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**IN THE MATTER OF THE ENVIRONMENTAL PERMITTING (ENGLAND
AND WALES) REGULATIONS 2016 (“EPR”)**

APPEAL BY:

THE TREATMENT HUB LIMITED (TTH)

SITE AT:

**BUILDING 2, WESTFIELD INDUSTRIAL PARK, WAUNARLWYDD,
SWANSEA, SA5 4SF**

PINS REF: 3299669

**NRW’S RESPONSE TO APPELLANT’S
STATEMENT OF CASE**

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Introduction

This document contains NRW's response to the statement of case presented by the Appellant, The Treatment Hub Limited. Unfortunately, the Appellant did not present the points of their case in a paginated manner. To aid our response and assist the parties involved in the appeal NRW has added numbers/letters to the Appellant's statement of case in our response.

The black text below represents the Appellant's statement of case. The blue text is NRW's response.

TTH Summary Statement – 08.12.20

- A. The Treatment Hub Limited [TTH] is currently unable to function due to the need to comply with a suspension notice issued by NRW. The suspension notice was issued as NRW considered TTH operations presented an environmental risk from sending hazardous waste to unsuitable sites. It is our firm contention that the notice is fundamentally flawed on both procedural and technical levels.

NRW Response to point A

As repeatedly highlighted throughout the statement of case, NRW has only partially suspended the Appellants permit by restricting their authorisation to accept waste; NRW has not suspended their authorisation to treat or remove waste in accordance with the permitted process. If the Appellant reduces the volume of waste on site to the permitted limit, the notice will be withdrawn. The reduction of waste has been within the gift of the Appellant throughout the life of the permit. The Notice requires that testing is undertaken before waste is removed which is submitted to NRW together with information as to where the waste was being sent. Nothing has been received from the Appellant and no waste has been removed since the service of the Notice.

- B. TTH has been unable to function since the issuing of the first Suspension Notice on the 15th July 2020. There has been extensive correspondence with NRW from the date of the first notice through to the issuing of an appeal notice on the 16th September 2020. Copies of the relevant correspondence is provided in the folder 'Relevant Correspondence Prior to 16.09.20
- Excluding Substantive Response 11.09.20'.
- C. TTH has engaged Burges Salmon [BS] to act on our behalf. BS has submitted letters and other correspondence and has engaged with Jane Chapman of NRW in discussions relating to the notice. Copies of this correspondence is provided in the folder 'Correspondence with Jane Chapman'.
- D. TTH has provided a comprehensive response on the 11th September 2020 to the points raised in NRW's letter dated 27th August 2020. This response is provided in the folder 'Substantive Response to NRW letter 11.09.20'.
- E. Relevant correspondence subsequent to the issuing of the appeal notice is provided in

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the folder 'Relevant Recent Correspondence'.

- F. TTH has produced a summary statement in 'bullet point' format for ease of reference. This is provided below.

NRW Response to points B – F

Despite numerous correspondence the Appellant has not constructively engaged with NRW. As highlighted in paragraph 11 of the statement of case the correspondence received from the Appellant contained a number of generalised statements that were neither supported with technical or evidential documentation. NRW cannot take these statements on face value, as they must be reinforced with information that provides appropriate and sufficient evidence to support the claim.

To enable NRW to review and assess the Appellant's statements, an EPR Reg 61 Information Notice was served on the 16th November 2020 requiring the Appellant to submit documentation that would support and evidence their September correspondence. It was also hoped that this information would help narrow the areas of dispute prior to the Planning Inspectorate Appeal. Information was received on 21st December 2020 but NRW has not yet had the opportunity to review the documentation.

The Appellant has also not engaged with NRW to discuss the classification of the waste in the main stockpile or shown a commitment to reduce the volume of waste on site. The Appellant continues to remain non-compliant with their environmental permit.

Background and History:

1. TTH was incorporated in 2013 to provide a much-needed recycling capability for the South Wales market in particular. The decision to form the company followed site remediation works carried out by Envirotreat Technologies Limited [ETL] at a site in Llanelli, where it was realised that there was no facility of this nature in South Wales and therefore such a facility was badly needed to service the Welsh market. At the time the only option for any soils requiring off-site disposal was to ship to landfill sites in England involving significant costs which rendered projects non-viable in most cases. This particularly applied to sites in Swansea for example, where there was (and still is) a requirement for materials to be removed from site as a legacy of South Wales industrial heritage, necessitating off-site disposal of surplus soils generated.
2. It was decided that ETL employees would manage the TTH operations with intention of imparting their specialist knowledge gained over 20 years in contaminated land remediation. This specialist knowledge and experience has ensured that TTH has operated professionally and with due cognisance to the necessary protection of the environment.

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3. In this respect it should be noted that ETL has carried out over 150 on-site remediation projects to date with the full support of the regulators (including several projects regulated by NRW).
4. These projects have included both on-site treatment and effective management of soils on site. In a number of cases we have also controlled the offsite disposal of waste soils through effective and professional waste classification processes in accordance with WM3 requirements.
5. It is clearly evident therefore that TTH senior staff have the necessary qualifications and experience to effectively manage TTH and to protect the environment. All senior staff are qualified chemists which is essential to manage such a facility and to effectively understand and implement the requirements of WM3.

NRW response to points 1 to 5

NRW acknowledges the Appellants qualifications and experience in contaminated land remediation and appreciate they are regarded as specialists in their field. However, a distinction must be made between having the knowledge and experience of on-site soil remediation and the knowledge and understanding on the management and treatment of off-site **waste**. Article 3(1) of the Waste Framework Directive 2008/98/EC defines waste as "...any substance or object which the holder discards or intends or is required to discard..." Once a material is discarded or intended to be discarded by the producer, it is considered waste, and its subsequent control and management is captured by waste legislation. The relevant legislation is listed in Annex R of NRW's statement of case.

The Appellant is the operator of a Hazardous Waste Treatment facility and it is their responsibility to understand the limitations of the permit and to be fully aware of how to comply with all relevant legislation. The extent of non-compliance at the facility would indicate that the Appellant does not understand the requirements of the environmental permitting regulations or have a clear grasp on what is required to comply with other relevant waste legislation.

ETL is a completely different legal entity. It is not a subject of this Suspension Notice and therefore the expertise of that Company is irrelevant to this Appeal.

6. At the time of the TTH's incorporation in 2013, ETL was in discussions with Tata Trostre regarding the acceptance and processing of filter cake from their Llanelli facility. Tata Trostre was very keen to promote recycling as it was necessary for the Trostre operation to ensure that they were seen to be promoting recycling from a group perspective (this was essentially to demonstrate long term viability of the plant against competing European facilities in this respect and it was seen as a very important exercise). Accordingly, Trostre wished to progress a recycling option (at that time material was sent for disposal at landfill in Shropshire) for the filter cake with ourselves, which prompted a need for a local facility for this purpose. The recycling approach would have involved the use of ETL's proprietary E-Clay Stabilisation technology to convert the filter cake material into a recycled material for use in bricks etc (producing a product). The

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initial permit ZP3393NJ was primarily designed for this purpose with the capability to also process and/or treat soils if required. In reality the Trostre waste stream did not materialise and the emphasis of TTH, as a natural course of events, became focused primarily on the processing and recycling of soils.

NRW response to point 6

Much of this point is irrelevant as ETL is a separate company and not the operator of the permit. The Appellant refers to the 'initial permit ZP3393NJ'. For clarity, this is the current, and only permit held by the Appellant at the site.

As previously stated, it is the responsibility of the Appellant to maintain compliance with their permit and to ensure the permit, operating techniques and environmental management system are reflective of activities on site. When the Trostre waste stream did not materialise and operations moved away from the original permit, the Appellant should have applied to vary their permit if they were no longer going to accept this type of waste.

However, whilst it is noted that the primary focus of TTH has become soils, the Appellant also has contracts to accept other non-soil waste, both hazardous and non-hazardous, including filter cakes, albeit from a different source to originally intended. The types and quantities of these wastes are summarised in paragraph 5.4.1 of the statement of case and, in addition to filter cakes, include sludges, bottom ash and fly ash. It is noted that the Appellant makes no reference to the receipt of any other types of waste, other than soils, within their statement of case. This is not a true reflection of their business and therefore the risk posed by the wastes received and removed from site.

The table in section 6.2 of the statement of case summarises the waste accepted at the site from the Appellant's submitted hazardous waste consignee returns. These were included as Annex J in the statement of case. It should be noted that Annex J as supplied, was an incomplete document (due to filters applied within the spreadsheet). A complete version of the Annex is attached to this response. For clarity, the Annex and table in 6.2 relate to hazardous waste accepted at the site from January 2018 until June 2020 (inclusive); Q1 2018 – Q2 2020.

7. The first contract that TTH entered into was for the processing of soils from the Hitachi Rail Facility in Swansea. These soils were fully processed and recycled for a number of applications utilising the appropriate regulatory protocols. The processing and recycling of these soils won an award from the waste management industry (Chartered Institute of Waste Management - CIWM).

NRW response to point 7

NRW has no response to this point as it is not relevant to this appeal.

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8. Since TTH's inception in 2014, TTH has processed and recycled significant quantities of soils for the full benefit of the South Wales market. As stated repeatedly in our comprehensive response to NRW's letter dated 27th August 2020, we have carried out minimal, if any, treatment of these soils as there has been no requirement to do so – in this respect treatment has only previously been carried out where there has been a demonstrable need and/or for a specific purpose i.e. recycling. This is for the reasons stated in the response that on receipt the soils are assessed utilising a range of on-site testing and analysis by an accredited laboratory to provide confirmation as non-hazardous by WM3.

Operational:

9. The operation of TTH over the last 5 years has fundamentally not changed in relation to the assessment and recycling of soils. It is therefore not understood why NRW cannot recognise or seemingly acknowledge the obvious premise that we do not treat soils that do not require treatment.

NRW response to point 8 and 9

As shown in paragraph 5.4.1 of the statement of case, the duty of care information shows that 35,813.64 tonne (t) of waste was **ACCEPTED** on site between April 2018 to March 2020. This includes the acceptance of 20,824.74 (t) of soil classified as 17 05 03* (Soil and stones containing hazardous substances (MH)) 6,037.53 (t) of 17 05 04 (soil and stones other than those mentioned in 17 05 03* (MN)) and 8,951.37 (t) of other non-soil waste, 5,212.79 (t) of which is listed as hazardous.

Paragraph 5.4.2 highlights that between March 2018 to March 2020, 35,984 tonne of waste was removed from site, 13,129.64 tonne of which was exported as 19 12 09 (Minerals (for example sand, stones) (AN)) and 963.6 (t) as 17 05 04 (Soil and stones other than those mentioned in 17 05 03* (MN)) and 16, 329.11 (t) with no description or code.

As noted in paragraph 10.7 of the statement of case, for a hazardous waste to be considered non-hazardous, the hazardous substances must either be removed (not diluted) to below threshold levels or transformed into non-hazardous substances.

It is understood that the Appellant has been re-assessing and reclassifying hazardous soils as non-hazardous. NRW has concerns with this approach and it has neither been assessed or approved by NRW as a legally acceptable option for hazardous soils. There are questions on how 20,824.74 (t) can be misclassified as hazardous and there seems to be no accounting for the 5,212.79 (t) of other **non-soil hazardous waste** by the Appellant in their statement of case.

It is evident from the Hazardous Waste returns (Annex J(i)) that as recently as January to June 2020 the Appellant has received non-soil hazardous waste including 11 01 09* (Sludges and filter cakes containing hazardous substances), 19 01 11* (bottom ash and

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slag containing hazardous substances), 19 01 13* (Fly ash containing hazardous substances) and 19 02 05* (sludges from physical/chemical treatment containing hazardous substances).

10. The original permit and associated EMS focused primarily on the treatment of filter cakes as summarised above; the EMS was not sufficiently detailed to deal with the requirements of recycling contaminated soils and did not reference the inherent filter by Paul Gibson (a more experienced officer who attended the facility Dec 2019) at the time of his visit and by previous NRW officers reviewing our operation over the past 5 years however it appears not to have been taken forward since that time.

NRW response to point 10

As explained in paragraph 2.3 of the statement of case, the EMS is a live document and the Appellant is required, under the permit, to continually review and update it. The Appellant must ensure that the EMS accurately reflects the site operation and identifies and implements any necessary control and mitigation measures to minimise the risk of the activities. This further highlights the Appellant's lack of understanding of what is required to comply with their environmental permit.

11. To illustrate the point, even as recent as the visit on 2nd July 2020, one of the attending officers asked our Site Manager 'where is your treatment area?' The Site Manager was not given the opportunity to either discuss the matter or explain why a treatment area was not required at the time of the visit. This was further compounded by the reluctance of the attending officer(s) to enter into any dialogue with our Site Manager relating to operational activities, notwithstanding the fact that the Site Manager wanted to discuss the matter with the attending officer(s)
12. This included the need to confirm that only one week prior to the visit there was substantially less soil on site. Photographs were taken on Friday 25th June by the Site Manager showing the site at this time. Subsequent to taking the photographs, TTH received circa 1,600 tonnes of soils during the intervening period – these additional soils were present on site at the time of the NRW visit on Friday 2nd July. These soils had been assessed as being suitable for sending out without treatment (classified as non-hazardous) and circa 1,500 tonnes were sent out between 2nd July and 15th July prior to receipt of the suspension notice. It is therefore fairly evident, that prior to and subsequent to the 2nd July, there were considerably smaller quantities of soils on site.
13. On the date of the visit on the 2nd July, our Site Manager intended to demonstrate this fact by showing the attending officer(s) photographs taken on 25th June. This was intended to also illustrate the operational dynamics of the facility. The Site Manager was fully prepared to discuss this however the attending officer(s) showed no willingness to view the photographs nor to engage or acknowledge this fact. This is referenced in the comprehensive response and was clearly very poor governance, particularly as a suspension notice was issued shortly afterwards with no further discussions on the

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subject. The suspension notice was issued without any forewarning, neither verbally on the day of the visit or prior to issuing the notice. In fact NRW made it very clear that the Site Manager and COTC were not required onsite on the day of the visit.

NRW response to point 11, 12 and 13

During the inspection on the 2nd July 2020, if the NRW officers had enquired about the available treatment area it was as a result of noting that the area within the building visually seemed to have been further filled with waste reducing the available space to store, segregate, quarantine and treat waste. In point 11 the Appellant implies that at the time of the visit in July 2020 no treatment area was required at the site. This may suggest that the Appellant had already determined that yet to be received wastes would not require treatment. Although the Appellant states that waste soils often do not require treatment, other incoming waste types would and it could not be certain that the soils received in the future would not be hazardous and not require treatment.

The example the Appellant has provided above further highlights NRW's concern that the more recently received waste is the first to be exported. The volume of the main stockpile restricts access to the waste in the lower section of the building that has been on site the longest period of time.

NRW officers are both regulatory and enforcement officers and are therefore required to comply with the Police and Criminal Evidence (PACE) Act 1984. Under PACE code C, if an officer suspects an offence the person must be formally cautioned prior to any questions or discussions. The purpose of the visit on 2 July 2020 was purely to assess the volume of waste on site and did not require the Appellant to be there. Due to the complexities of the issue and the operation, an on-site formal interview was not considered appropriate or fair to the Appellant.

The Appellant has previously been advised (through their Solicitor) that NRW is investigating the permit breaches from a criminal angle in addition to acting to effect a protective response.

Paragraph 1.7 of the statement of case details actions requested of the Appellant following the site inspection in October 2019 and agreed in December 2019. As outlined in paragraph 1.8 these actions, including submission of a plan explaining how waste volumes would be reduced on site were concluded insufficient. NRW considers that its concerns over the volumes of waste onsite prior to serving of the suspension notice were evident.

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14. There appears to be a fundamental misunderstanding as to the accepted heterogeneous properties of soils and equally the fact that the waste classification attributed at source, can change by virtue of unintentional mixing of the soils through excavation on site, loading on to lorries and transporting to TTH. This is reflected in the fact that soils and stones are regarded as 'mirror entries' for EWC classification purposes (i.e. they are classified as either 17.05.03 or 17.05.04). On receipt of soils at TTH, the necessary pre-acceptance procedures are implemented and the soils are predominantly shown to be non-hazardous at this point. This is reflected in the subsequent processing of the soils (where required) in order to comply with the requirements of the subsequent receiver site for the material. *NRW have not entered into any dialogue with TTH where this is discussed.*

NRW Response to point 14

There are a number of points that need to be considered and clarified.

- It is the responsibility of the waste producer to assess and accurately classify waste **prior to it being removed** from the site where it was generated. This means the waste should be accurately assessed and classified before entering TTH. The guidance document WM3 provides an example of waste soil in chapter 3, subparagraph 3 (Page 20). The assessment of waste soils will involve multiple samples with often subpopulations (hotspots) requiring separate assessment for hazardous waste purposes. There is a duty on the producer to ensure that only the minimal amount of incidental less contaminated material is removed, and it should not be considered in the assessment. It is for the producer to determine which loads are mirrored hazardous (above threshold) and mirrored non-hazardous (below threshold). In addition to their legal duty, exporting hazardous waste soil is significantly more costly for the producer and would seem illogical to do this if it is non-hazardous.
- The process of re-classification of a hazardous soil has not been assessed or approved by NRW. The assessment of waste soil requires multiple samples, Annex D of WM3 provides further information (WM3 included in Annex D of statement of case). The Appellant has not submitted any information regarding the sampling methodology used to re-classify hazardous soils from (17 05 03*) to non-hazardous soils (17 05 04). There will inevitably be differences in the chemical composition of soil loads and a robust sampling methodology is required to ensure a good representation of the waste.
- Waste that is below hazardous thresholds can still be contaminated and pose a risk to the environment if not appropriately managed.
- The Appellant is confusing **pre-acceptance** procedures and **acceptance** procedures. Chapters 2.1.1 and 2.1.2 of the S5:06 sector guidance provides guidance on the difference between these two process controls.

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Pre-acceptance is completed prior to waste being received on site. This stage:

“...an initial stage, a screening step or pre-acceptance procedure, involving the provision of information and representative samples of the waste. This will allow Operators to determine the suitability of the waste for the activity before arrangements are in place to accept the waste. The second stage, acceptance procedures when the waste arrives at the site, should serve to confirm the characteristics of the waste, without the time pressure and potential hazard of checking a waste at the gate.

The Operator must obtain the following information:

- *the nature of the process producing the waste, including the variability of this process;*
- *the composition of the waste (chemicals present and individual concentrations)*

and ensure that:

- *a representative sample(s) of the waste should be taken from the production process and analysed*
- *for each new waste enquiry, a comprehensive characterisation of the waste and identification of a suitable treatment method is undertaken.*

When waste is delivered to site, it is at the acceptance stage and in the guidance, it states:

“For waste treatment or transfer, the bulk of the characterisation work should have taken place at the pre-acceptance stage. This means that acceptance procedures when the waste arrives at the site should serve to confirm the characteristics of the waste”.

It further states:

“Wastes should not be accepted at the installation without a clear defined method of recovery or disposal being determined and costed and ensuring there is sufficient capacity being available. These checks should be performed before the waste acceptance stage is reached”.

To summarise the above, there is a legal duty on the producer of the waste to accurately assess and classify the waste prior to it being removed and exported from site. The classification and chemical composition of the waste should be confirmed by the Appellant during the pre-acceptance stage and prior to the waste being delivered to site. When waste is accepted on site, the acceptance procedure should confirm that the waste is as expected and described. For large quantities of soil waste to be accepted as hazardous but to be re-tested as non-hazardous would imply that:

- The producer is failing in their responsibility to accurately assess the waste and to minimise the amount of hazardous waste produced; **OR**
- The Appellant is not completing appropriate pre-acceptance checks and identifying issues with the waste classification prior to it being delivered to site.

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NRW accepts that on occasion unintentional mixing during excavation of hazardous soils may result in a changing of characteristics. NRW does not however agree that this would likely happen on the frequency suggested by the Appellant. It would not be in the interest of the waste producer to excavate and export as hazardous waste more waste than necessary. The nature of this waste is more costly to deal with.

15. There is absolutely no point in treating soils that do not require treatment, simply because the existing permit refers to treatment – to reiterate the emphasis on treatment in the EMS relates to the original requirement for the treatment of filter cake as previously explained.

NRW response to point 15

NRW is not stating the Appellant must treat soils that do not require treatment. The Appellant is required to comply with the conditions of their permit. Once again the Appellant is not being altogether transparent as they are solely talking about soils rather than the other waste types that they receive. However even within “soils” the Appellant accepts soils that have been assessed and classified as hazardous **waste**.

As previously noted the EMS is the Appellant’s document and it is a requirement of the permit that it is regularly reviewed and updated to reflect operations.

It should be noted, that from the hazardous waste returns submitted by the Appellant for the period Q1 2018 – Q2 2020 (Annex J), TTH received 95,094.78 tonne of waste which they classified as having hazardous properties including HP3, HP4, HP5, HP6, HP7, HP8, HP9, HP10, HP11, HP12, HP13 and HP14. The Appellant lists the disposal / recovery treatment as either R05:04 (Chemical-physical treatment e.g. soil washing) or R07 (Recovery of components used for pollution abatement). This contradicts their assertion that they don’t treat waste. Receiving waste, where the only operation is holding it before onward transfer for disposal or recovery, should be listed in the returns using either D15 (disposal) or R13 (Recovery) codes. In either of these instances the EWC waste codes would not change and the waste would be exported under the same code as it was received.

There are significant discrepancies with the tonnages recorded in the hazardous waste returns, waste returns and duty of care paperwork which causes NRW further concern about actual activities on site and the management of these.

16. As stated in the response, we cannot understand why NRW cannot accept this point as it is custom and practice within the industry. This is further compounded by a statement to the effect that we should reject and return the (hazardous) soils to the point of origin if they are non-hazardous on receipt (i.e. not as described by the waste consignment note). This is clearly illogical and non-sensical.

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NRW response to point 16

Waste classification should be determined at source by the producer and this is confirmed during pre-acceptance checks and prior to the waste being accepted.

If during acceptance checks the waste is sampled and assessed to be different, the operator should “reject” the load and notify the producer. If the site is permitted to accept the waste, they do not need to physically reject the load, just request the producer amends and supplies accurate duty of care that lists the correct EWC code and description. This completes the duty of care audit trail that is required for waste shipments.

If the waste received by the Appellant is consistently of a different classification than what is determined by the producer, then TTH should inform the producer of the misclassification. The apparent frequency of waste re-classification would suggest that this is not occurring. The disposal and treatment of hazardous waste and soils is significantly more costly than non-hazardous therefore it would be in the producer’s interest to ensure accurate and correct coding.

There are procedures set out in the Hazardous Waste Regulations (Regs 42-44) for rejection of hazardous waste including informing the relevant environmental body (NRW). To the best of our knowledge NRW has never received this notification from the Appellant.

17. The recurring point that NRW keep making is that we are required to treat all soils which bears no relation to what occurs in practice. If the soils have been assessed and classified as non-hazardous by TTH on receipt, what logic presupposes that we would endeavour to make them hazardous as implied by the officer in question (as this would appear to the fundamental ‘justification’ for issuing the suspension notice). The officer takes this a stage further by implying that the soils should be classified under EWC as an absolute hazardous waste and shipped as such irrespective of contamination concentrations. *This is fundamentally incorrect.*

NRW response to point 17

This is not what NRW have been stating. See NRW responses to points 14, 15 and 16.

As highlighted in section 10 of the statement of case, the Appellant has accepted both hazardous and non-hazardous soils and **other non-soil waste**. The volume of waste on site, exceeds permitted limits and has restricted the Appellant’s ability to store and treat waste separately and in accordance with their permit conditions.

It is clearly evident on site that waste from different sources have been mixed (photographs in Annex G & M). Whilst the Appellant consistently refers to soil, there is little reference to the fate of other non-soil waste (hazardous and non-hazardous) accepted and stored on site. Once soil is mixed with non-soil, it can no longer be considered soil. When a hazardous waste is mixed with other wastes (including soil) the resultant waste is considered “pre-mixed waste” 19 02 04* and this classified as an

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absolute hazardous waste regardless of threshold criteria. This is explained in the guidance document HWR06 (Annex D of Statement of Case) and in section 2.8 of the statement of case.

18. *TTH was issued with a suspension notice on 15th July 2020. TTH immediately questioned the validity of this notice and it was subsequently withdrawn. A second suspension notice was issued on 17th July which provided no further justification apart from clarifying that the risk to pollution appertained to hazardous waste being sent out from the facility in NRW's opinion. TTH reiterated that the notice was equally invalid. This remains TTH's position and has been the case for the last five – six months. NRW has provided no justification for the notice and it is clearly based on supposition and false premises.*
19. TTH has repeatedly refuted the arguments put forward by NRW for the suspension notice and have addressed all the points raised by NRW in our comprehensive response of the 11th September 2020.
20. *The suspension notice should have by definition included a detailed explanation of the perceived risk of pollution. It was therefore incumbent on NRW to provide same. In this respect a source-pathway-receptor model should have been provided for both the donor site (TTH) and the receptor sites. This has not been provided for either the donor or receptor sites.*
21. The model promulgated by NRW is completely flawed, as it bears no relation to the potential risk of pollution at either the donor or the receptor sites. These are the sources in the model and there is a requirement therefore to identify the respective pathway and receptors at the respective sites. This is the accepted practice which ETL commonly uses and employs for on-site remediation projects, with the full knowledge of the regulators.
22. *The pathway is clearly not the transporting of materials from the donor site to the receptor sites as implied by the officer.*
23. Furthermore, TTH does not understand how NRW can correlate a risk of pollution based on an assumed EWC absolute waste code as opposed to the actual risk of pollution associated with the nature of the material being shipped out from TTH. As stated, in all correspondence, TTH does not export hazardous materials from its site. Furthermore, it does not export any absolute hazardous waste materials. However, this point is constantly ignored by NRW based on an assumption that materials have been treated and not further processed which would mean the material would be assigned a hazardous/absolute hazardous waste code. *This lack of understanding is the root cause of the problem.* To reiterate, soils are assessed to be predominantly non-hazardous on receipt at TTH and are equally assessed prior to leaving our site to confirm their non-hazardous status. Processing / treatment is undertaken as and when required.

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NRW response to points 18 to 23

No further response, see section 10 of the statement of case.

24. *It is also the firm contention of TTH that NRW has not acted in accordance with their stated procedures and that the requisite due diligence was NOT undertaken before issuing the Suspension Notice. It can not be carried out after the issuing of the notice.*
25. Regulation Guidance Notes No 11 [RGN 11] provides guidance on enforcement powers. It is described in the summary as ‘high level guidance to our staff on how to use enforcement powers at regulated facilities’. NRW further states that ‘we [NRW] are publishing it so everyone can see our approach’ and that ‘it will help staff and operators identify issues we need to consider before deciding on the appropriate action’. The series of guidance notes are available for review / download on NRW’s website.
26. NRW has argued that these guidance notes are ‘out of date’ and refer to the Environmental Permitting Regulations [EPR] 2010 as opposed to the Environmental Permitting Regulations [EPR] 2016. These guidance notes are nevertheless still in the public domain / referenced specifically on NRW’s website. BS commented as follows in their letter of the 2nd September 2020.
27. ‘First, you [NRW] state that RGN 11 is “*out of date*”. It is important to be precise. It is our understanding that RGN 11 is still the extant Regulatory Guidance Note on Enforcement Powers and, as published guidance (not withdrawn), there is a legitimate expectation that NRW will not deviate from it without good reason. We acknowledged in our 14 August 2020 letter that RGN 11 did not expressly address the EPR 2016 and we asked if NRW would “*readily accept*” that the guidance in paragraph 3.45 about “*justification of the judgement, demonstration of a reasonably likelihood of impact, based on clear evidence, within the area of expertise of the person making the judgement*” applied as much to a judgement about the ‘risk of pollution’ as it would to a judgement about ‘risk of serious pollution’. Your answer evades that straight-forward question. It is obvious (and, for the avoidance of doubt, fully accepted) that the threshold for a risk of serious pollution is a different threshold than for a risk of pollution, but in exercising its judgement, the same requirement for “*justification of the judgement, demonstration of a reasonably likelihood of impact, based on clear evidence, within the area of expertise of the person making the judgement*” must apply’.
28. Paragraph 3.36 of RGN11 states the following:
‘There can be a risk of serious pollution even if the permit conditions are complied with. Compliance with the permit conditions is not a factor to be considered in deciding whether or not to issue a suspension notice’.
29. This statement is self-evident and equally applies to a risk of pollution. The key point being that the issuing of a suspension notice can not follow from a permit breach – the risk to pollution and the justification for a suspension notice risk has to be assessed / demonstrated as a stand-alone matter.
30. Paragraph 3.37 of RGN 11 incorporates the following statement:

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'We need to be satisfied there is a risk of serious pollution to exercise these powers' as the serving of a suspension notice 'will have serious implications for the operator's business and therefore should not be taken lightly'.

31. This is another self-evident statement. It was therefore incumbent on NRW to carry out the necessary due diligence BEFORE taking any decisions in this respect. TTH has seen no evidence to support NRW's assertions and we have repeatedly stated that the suspension notices are invalid.
32. Paragraph 3.39 of RGN 11 states *inter alia* that NRW must *'say what that risk of serious pollution is'*. NRW has implied that the TTH are sending out hazardous wastes which has been totally refuted by the TTH – NRW has NOT demonstrated the risk of pollution – see points above in relation to *inter alia* source-pathway-receptor modelling etc.
33. Paragraph 3.43 of RGN 11 further emphasises this key requirement and states the following:
'You [NRW] must be satisfied that there is a risk of serious pollution – that means that you will have to identify what the serious pollution is and why there is a risk of it occurring or continuing'. NRW has NOT identified what the risk of pollution is and why there is a risk of it occurring / continuing.
34. Paragraph 3.45 has been cited by BS in correspondence with NRW (see above) but needs reiterating:
'Whether there is a risk of pollution / serious risk of pollution is a matter of judgement. You [NRW] will have to justify the judgement in relation to the seriousness and risk by showing the effects on the environment and health and demonstrate that there is some reasonable likelihood that these could have a long-term negative impact or a significant immediate environmental impact. You [NRW] will have to have clear evidence from which you make this assessment and be able to justify forming that view'.
35. TTH has not seen any justification to support the issuing of the suspension notice. BS has formally requested NRW *'to disclose the paperwork for the 'reviews and checks' carried out so that it [TTH] can understand the technical expertise of those involved and the degree of scrutiny and challenge that this decision was subjected to'*. This was requested on the 11th September and TTH has subsequently further requested this key information. To date TTH has not received any response to these requests.
36. The letter from BS to NRW dated 2nd September 2020 makes further statements in relation to Regulation 37 of the EPR 2016 as follows – these points are highly relevant:
37. *'Second, we appear to agree (and the EPR 2016 is clear) that there are two limbs to Regulation 37(5): first, there must be a contravention of an environmental permit condition and second, that contravention must involve a risk of pollution. Both limbs must be satisfied. Our client does not dispute that the first limb is satisfied (our client's substantive response will address the factors behind this in more detail). Our client's challenge to the Notice concerns whether there is, in fact, any genuine reason to believe that there is a risk of pollution. We understand from your letter that NRW accepts that there are two limbs and that both limbs need to be satisfied.'*

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38. *Third, a two-limb test would only be necessary if it is possible to have to satisfy one limb without satisfying the other. Therefore, a risk of pollution without a contravention of an environmental permit condition is not sufficient to serve a notice under Regulation 37(5) (noting of course that Regulation 37(1) remains open in such circumstances if the risk is serious). It must also be true that a contravention of an environmental permit condition without a risk of pollution is insufficient to invoke the powers under Regulation 37(5). However, the whole purpose of the environmental permitting regime is to authorise and control otherwise proscribed activities that inherently pose a risk to the environment. Therefore, one might argue that any contravention of an environmental permit condition poses a risk to the environment. Your letter comes close to arguing this point in the following passage: “When an operator fails to comply with the conditions of their Environmental Permit or fails to operate their facility in manner as authorised by those conditions, it presents a risk of that operation negatively impacting the environment through the absence of appropriate controls”. If such an argument is being advanced, it is flawed. Such an argument would make the second limb of Regulation 37(5) superfluous and redundant, and that cannot have been the intention of the legislature.*
39. *It is our case that the second limb, the requirement for establishing the existence of a risk of pollution, must require identification a real, specific and quantifiable risk. There are of course other enforcement options for a contravention of environmental permit conditions: suspension notices are reserved only for those cases where there is a specific risk of pollution arising from that contravention, of sufficient magnitude to justify intervention. Reading your letter in its totality, we anticipate that we are in agreement on this point.*
40. *Fourth, Regulation 37(5) requires an exercise of discretion. If (and only if) the two limbs are satisfied, Regulation 37(5) provides that NRW “may” serve a notice: it is not mandatory. The exercise of such discretion should be carried out in accordance with published guidance (if any) unless there is good reason to deviate. As you correctly note, RGN 11 does not expressly provide guidance on the exercise of Regulation 37(5) because it was last edited before the EPR 2016, but our client nevertheless has a right to receive the reasons for the decision, including the elements set out in paragraph 3.45 (justification of the judgement, demonstration of a reasonably likelihood of impact, based on clear evidence, within the area of expertise of the person making the judgement). Again, we hope this legal point is not in dispute.*
41. *If we are in agreement on these four points of law, then the issues between NRW and our client are reduced to a narrow set of points that remain in dispute: is there, in fact, a risk of pollution from the contravention of the permit (requiring a reasonable likelihood of impact, not just a theoretical risk); and did that risk justify, on an objective basis, the exercise of discretion to serve the Notice?*
42. *Please note that, in its substantive response, our client will argue that there is no genuine risk of pollution. Without prejudice to the arguments that our client may wish to present in its detailed submissions in due course, our client asks us to point out that it has been operating in the same manner for over 5 years, with the full knowledge of a number of NRW officers over the period, none of whom had expressed any concern*

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that the operation posed the risk of pollution that is now relied upon in justification for the service of the Notice. Our client acknowledges that the site is operated in a different manner to that set out in its permit application (something which is being addressed through the permit variation) because the nature of site operations changed to provide for soil management from remediation projects alongside treatment operations. Our client acknowledges that it has a responsibility to keep its permit up to date (and is now doing so). However, previous NRW officers have understood the evolution of the business operations and the valuable role that this site serves in providing South Wales with a centre for soil management and processing alongside its original treatment operations, and in doing so promoting a circular economy. Therefore, although the overall maximum tonnage limit has been exceeded throughout this period, it is the nature of the material on the site that is important when considering the risk posed. As such, our client will argue that the suggestion that “the quantity of waste is a fundamental factor” is simply not correct and ignores what is actually happening on site. It is our client’s case that it has at all times retained effective control of the materials within the facility.

43. *As such, our client’s argument is that, once its process is properly understood, it will become clear to NRW that there is no genuine risk of hazardous wastes leaving the facility for receiving sites, which is the one and only justification given for the service of the Notice (the risk of pollution put forward by NRW being a risk at receiving sites) also our client’s case that previous NRW officers responsible for the site have understood this: it is noteworthy that following Paul Gibson’s site inspection in December 2019 when volumes on site were greater than those at the time of the Notice, the conversation focused on varying the permit to ensure that the permit reflected activities on site, rather than talk of suspension notices arising from concerns about a risk of pollution. It is notable that there is nothing in NRW’s explanation to date that explains why the operation is considered to be a risk now when it has been operating in this manner for many years.*
44. *Our client’s substantive response will elaborate on these submissions but our client wanted us to provide this summary in advance to maximise the opportunity for NRW to consider its position in good time before the deadline for the issue of appeal proceedings’.*
45. It appears to TTH that NRW has issued this notice without fully understanding these key points. Alarminglly NRW has made no effort to discuss these points at all with representatives of TTH (or to equally understand) prior to issuing a suspension notice. The rational for issuing the notice is fundamentally flawed for the reasons stated in this summary and in all previous correspondence with NRW.

[NRW response to points 24 to 45](#)

[The above points are addressed in section 14.1 of the statement of case.](#)

46. As should be fully appreciated, the issuing of a suspension notice has severely impacted our business and inevitably damaged our reputation within the industry. TTH take issue with the glib comment ‘we do not take this lightly’ as the ramifications for our business

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are significant. The reluctance of NRW to enter into meaningful dialogue prior to issuing the suspension notice further supports this notion. TTH does not see how this is consistent with the stated intent of the Welsh Government to promote zero waste where practical to do so and equally how this is viewed as consistent with waste hierarchy principles. NRW should be supporting responsible recycling businesses such as TTH.

NRW Response to point 46

As noted in paragraph 16.10 of the statement of case, NRW have issued a proportionate, considered Suspension Notice. Service of any such Notice is deliberated at length and the impact on the Appellant/recipient is always considered together with whether there is any other alternative. It is believed that the Notice was necessary and proportionate and although alternatives were explored they would not have offered the same protection to the environment.

The Notice only suspends the Appellant's authorisation to accept waste and it is within their gift to reduce the amount of waste on site following confirmation on its classification with NRW. This has not been done. If the amount of waste had been reduced to permitted limits the partial suspension notice would be withdrawn.

There has been no reluctance on the part of NRW to enter into meaningful dialogue. However, the correspondence received from the Appellant was generalised with sweeping statements, and little information provided to support the claims. Evidence was requested so that the dialogue could be meaningful but this was not received until after the deadline for NRW's Statement of Case.

The Appellant is required to comply with their environmental permit and other relevant legislation and they have failed to do so.

47. Prior to issuing of the suspension notice, TTH was highly regarded within the industry and provided an essential service. Many of TTH's clients have used external experienced environmental consultants to attend site and undertake audits prior to and during acceptance of their waste.

NRW response to point 47

No comment, this point is not relevant to the appeal of the suspension notice.

48. We are also concerned with the actual/potential damage that was caused to our business by placing what we consider to be sensitive documents on the public portal. These were placed without context and did not include appropriate responses. It was only when we formally raised the matter in our e-mail of the 22nd October 2020 that this matter was addressed resulting in our responses being uploaded to the NRW portal. NRW has a duty to place *all* documentation appertaining to the suspension notice on the portal in accordance with Regulation 46 of the EPR 2016 – NRW was clearly in breach of this regulation until late October 2020 – over three months since the suspension notice was issued.

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49. TTH took further issue with the subsequent failure of NRW to upload the correspondence dated 22nd October to the portal. This was only uploaded after repeated requests from TTH. It transpired that the e-mail from TTH to NRW was not included as part of the e-mail trail (the full e-mail trail included the e-mail from TTH as the most recent e-mail) – this was later explained as an ‘administrative error’ by NRW. The whole e-mail trail was subsequently uploaded.
50. This was poor governance and has only compounded the current situation with TTH in terms of reputation and related matters.

NRW Response to points 48 – 50

These points do not relate to the notice appeal. The Appellant has the option to raise their concerns through NRW’s formal complaints procedure.

51. On a similar note, TTH takes significant exception to the issuing of a letter to our landlord which not only involves the landlord in this matter by implication but could seriously jeopardise the continuity of the business should the landlord not be willing to renew our lease or grant a new lease as a consequence. TTH are currently in discussions with our landlord regarding relocating our operations in a larger building on the same site, which is subject to the granting of a new permit application submitted in June 2019.

NRW Response to points 51

There is a duty on NRW to notify landlords where they consider permit breaches could present significant ramifications for the landlord if abandoned. It was appropriate to notify the landlord considering the extent of the permit breaches and the quantity and nature of the waste on site.

52. It should be reiterated that the problems caused to TTH by the quite frankly, ridiculous amount of time that NRW has taken to process a permit variation which was required *at the specific instruction of NRW* to address the divergences between the historical permit and the activities undertaken at TTH in practice. This required permit variation was required to update the permit to reflect current activities at TTH (in other words to bring the permit in alignment with current activities).
53. TTH has been formally advised on the 8th December 2020 that our permit variation is now duly made – Revision 4 of the Supporting document is provided in the folder ‘Permit Variation – Revision 4 – Supporting Document’.
54. This equally applies to our NEW permit application, which is equally at the duly made stage notwithstanding the original submission was made in June 2019.
55. Under the circumstances and bearing in mind that TTH has been operating under significant constraints since December 2019 (as stipulated by NRW), TTH does not understand why the officer in question simply did not wait for the variation to be issued. The officer in question knows full well that a variation had been submitted in February 2020 and her actions were clearly precipitous under the circumstances. Furthermore,

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TTH has not caused any risk of pollution since inception and was clearly not considered to be causing a risk of pollution in late 2019 (or at any time previously) so why now, particularly as the volumes of materials at TTH are considerably lower than those identified in the latter part of 2019. The permit variation would have clearly negated the point made regarding the volumes, which incidentally has nothing to do with the nature and classification of the materials leaving the hub (which are fully assessed prior to exiting the site). To reiterate, TTH does not send out any hazardous/absolute hazardous materials based on WM3 assessment – the assertion that we are sending out hazardous/absolute hazardous soils based on an assumed EWC coding is fundamentally incorrect.

NRW Response to 52 to 55

The permit variation received in February 2020 followed the request to submit an application as documented in the Compliance Assessment Report (CAR) from the inspection on 29 October 2019. However, this was not the first time the need for a permit variation had been recorded on a CAR form. It is also documented on Report ID: 150707/ZP3933NJ (date of assessment 7 July 2015) and Report ID: CAR_NRW0032158 (date of assessment 8 August 2017) - both CAR forms contained within Annex F of NRW's Statement of Case. In both CAR forms the focus for varying the permit centred around increasing storage capacity for wastes onsite, the same root cause for serving the partial suspension notice in July 2020.

NRW received the (first) permit variation application (PAN009143) on 12 February 2020. Emails from the Permitting Team Leader explaining the work queue were sent to the Appellant on 27 May 2020 and 15 June 2020. The application was allocated to a determining officer on 16 July 2020.

After assessment the variation application was deemed **not duly made** and additional information was requested on the 5th August 2020. This was received on the 1st September 2020 but was insufficient and the application was returned **not duly made** on 18 September 2020.

On the 6th October the NRW permitting team had a video meeting with the Appellant to discuss the details required for the variation.

The re-application for the variation was received on 28 October 2020 (PAN-011960). This was again assessed and deemed **not duly made** with more information requested on 18 November 2020. More information was received on 19 November 2020 and the application has now been duly made. The application is currently in the **determination** stage.

With regards to the New bespoke application (PAN-009640), the application was received on the 5th March 2020. As with the other application this was **not duly made** and a request for more information was sent on the 7 August 2020. Following an online meeting with the permitting team, the application was withdrawn by the Appellant on 7 October 2020.

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Contrary to point 54, the re-application for a new bespoke permit has not been received by NRW and therefore has **not been duly made**.

All permit variation applications go through a determination process where the application and the supporting information is assessed by the allocated permitting officer. This process may lead to the application being approved in full, approved in part and refused in part or refused in full. There is also the potential for placing the application or elements of the application into abeyance.

It is not possible to pre-determine the outcome of the determination stage therefore the compliance officer and the operator cannot assume that all aspects of the requested variation will be approved, and the existing permit remains the effective permit at this time.

NRW have only supplied the above information as it has been raised by the Appellant and in order to assist the Planning Inspector. Once again this is irrelevant to the Appeal and any grievance should be dealt with through our formal complaint procedure.

56. *This is the fundamental flaw in NRW's position. Contaminated soils are NOT absolute entries in the EWC list. Therefore, how can they then assume an absolute hazardous waste code, which is what the officer is inferring, if they have been assessed as being non-hazardous on receipt at TTH (and not requiring treatment as a result).*

NRW response to point 56

NRW has not stated that contaminated soils are considered absolute hazardous wastes. The waste code for contaminated soil is either 17 05 03* or 17 05 04 depending if hazardous thresholds are exceeded. However, if contaminated soils or other wastes are mixed with another hazardous waste, the resultant waste is considered 19 02 04* (premixed wastes composed of at least one hazardous waste) which is considered an absolute hazardous waste regardless of thresholds. Further information is provided in the guidance document HWR06 and paragraph 2.8.3 of the statement of case.

In addition to this, within guidance document HWR06, it states that waste treated using stabilisation or solidification is classified as either 19 03 04* (wastes marked as hazardous, partly stabilised) or 19 03 06* (wastes marked as hazardous, solidified). Both codes are absolute hazardous wastes.

It is clear from the duty of care paperwork and hazardous waste returns that the Appellant does not just accept hazardous soils but accepts hazardous wastes from other sources. During the inspections on the 29th October 2019 and 2nd July 2020 it was evident that the main stockpile is a mixture of these various wastes and the volume of waste on site has caused other waste stockpiles to merge (see photographs provided in annex G & M).

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NRW considers the main stockpile within the building to be classified as 19 02 04*(pre-mixed waste composed of at least one hazardous waste). Schedule 3 of the suspension notice states:

STEP 3: Classify stored waste and submit to NRW prior to commencing removal.

The Operator must classify the waste stored on site in accordance with Guidance on the classification and assessment of waste (1st Edition v1.1) Technical Guidance WM3 and HWR06 Classifying and coding wastes from physio-chemical treatment facilities version 5.

Prior to the removal of any waste from site, the Operator must submit to Natural Resources Wales for agreement, the determined waste classification and details on the intended destination of the waste.

Schedule 3 of the notice provides the Appellant the opportunity to challenge this classification and to submit to NRW an evidence backed classification of the waste in the main stockpile.

57. The issuing of the notice could and should have been avoided by what most people would consider to be good governance i.e. an implicit requirement of the regulator to fully understand the activities undertaken at TTH and to engage appropriately before taking any action of this nature. NRW has an obvious duty of care to carry out the appropriate due diligence in relation to the actual activities being carried out at TTH prior to issuing a suspension notice, which has significant ramifications on a business.

NRW response to point 57

The issuing of the notice could have been avoided had the Appellant complied with the conditions of their environmental permit.

58. To reiterate, the officer(s) visiting the site on the 2nd July seemingly had no intention of discussing the situation with the Site Manager / COTC despite his request to do so (in fact he had been informed in a previous email that neither he or the COTC (Phil Rees) were required on site during the proposed visit). The Site Manager would have explained the activities being carried out on-site and the nature of the stockpiles had he been given the opportunity to do so. This is clearly very poor governance and is not how a regulator should conduct itself.

NRW response to point 58

No further response. See response to point 11,12 and 13 and the statement of case.

59. TTH also takes exception to the repeated misrepresentations of comments attributed to the Site Manager in NRW's letter of the 27th August.

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NRW response to point 59

NRW has not misrepresented comments made by the site manager Mr Simon Farr. Comments made during the 29th October 2019 site inspection, were recorded on the inspection report (CAR_NRW0036053) and were not challenged or appealed on issue of the CAR.

G. The facts are as follows:

- NRW has not followed their own stated procedures and guidelines
- NRW did not request TTH management presence at the inspection. We attended anyway
- NRW refused to discuss the findings of the inspection
- NRW had not collated full details on TTH operations until AFTER the issuing of the suspension notice
- NRW deem the operation to present a risk / significant risk to human health and the environment yet allow it to continue with their knowledge for over five years. The change in approach was triggered by a change in officer and thus is based on differing interpretations and not different evidence.

NRW response to point G

The above points are incorrect. NRW has followed all procedures and guidelines in the regulation of the facility and action has been taken as a result of the increased severity of permit breaches. NRW reviewed all the available information and evidence and considered the operation presented a risk to the environment. Following management and legal review a partial permit suspension was judged to be the most appropriate and proportion protective response. During the inspection on the 2nd July 2020, Officers were unable to engage in full discussion with the site manager or COTC as discussing complex issues informally on site is not appropriate or fair on the Appellant under PACE.

H. It has always been our opinion that NRW have acted prematurely / precipitously and without full knowledge of TTH operations. No evidence has ever been provided that the suspension notice was justified. Indeed, the first suspension notice was rescinded due to significant flaws identified to them by TTH. The reissued notice (current suspension notice) has not rectified these flaws and thus our view remains that it is invalid. We have raised this numerous times with NRW but have received no constructive responses. At no point has NRW sought to discuss their view of events that supports their decision. The suspension notice is based on assumptions and a nebulous, qualitative view of risk, which clearly does not meet the requirements of statutory guidance (CLR11/ LCRM) or their own internal guidance (RGN11).

NRW response to point H

NRW withdrew the original notice on the request of the Appellant as they considered that sufficient explanation had not been provided. The subsequent Notice provided changes to help clarify NRW's reasoning behind the Notice.

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As stated, NRW has been open to constructive dialogue but much of the justification provided by the Appellant has come in the form of generalised statements unsupported by technical or evidential documentation. In fact the Appellant has made little effort to address or counter NRW's concerns or to reduce the volume of waste on site.

The CLR11 is currently NRW's approved document for contaminated land remediation but this guidance only applies to historically contaminated sites and not remediation of soils at places other than the site of production. The LCRM is in the process of being adopted by NRW and some of the risk assessments produced by following the steps in LCRM may become relevant in demonstrating if any imported soils are suitable for use (if imported under CL:AIRE DoWCoP) but that's not their standalone purpose.

- I. It appears NRW have assumed soils at TTH MUST be treated because such treatment is allowed under our permit. However, just because treatment can be undertaken does not mean it is mandatory. Treatment is undertaken as and when required.

NRW Response to point I

No further response. See response to point 15 and statement of case.

- J. NRW have assumed that, due to the volumes of soil stored in TTH, we are unable to adequately treat soils. This overlooks the fact that treatment is rarely required.
- K. NRW have then referenced document HWR06. They argue that this document shows partially stabilised soils to be an absolute hazardous waste. They then argue that removal of hazardous waste to disposal sites has resulted in a potential pollution risk and that this risk can only be mitigated through suspension of TTH activities. There are several logical and technical issues with this argument:
- HWR06 does not apply to soils.
 - As stated above, TTH rarely undertakes stabilisation. As such this does NOT apply.
 - NRW has WRONGLY conflated waste classification with environmental risk.

NRW Response to J & K

NRW's position is that by not having sufficient space within the permitted area to effectively segregate batches of waste, batches of wastes with different contaminants have a potential to be mixed, so transferring hazardous substances to any outputs (albeit potentially at levels below the hazardous thresholds). However, the presence of these hazardous substances within any outputs could pose a risk of pollution to any receiving sites for the outputs.

With reference to the Appellants statement "HWR06 does not apply to soils" - NRW agree that there is specific exclusion relating to soil and groundwater remediation. HWR06 was not intended to apply to soil remediation in situ, as the EU Waste Framework Directive (presumably brought into UK legislation post Brexit with substantially the same words) has a specific exclusion for unexcavated contaminated soil so waste classification and the designation as hazardous or non-hazardous cannot apply to unexcavated soil. However once excavated the WFD does apply to the classifying of waste.

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The introduction to HWR06 contains the following text: *“This guidance will direct you to the correct choice of code for a treated waste in the following situations:*

- *pre-mixed waste;*
- *bulked waste;*
- *stabilisation and solidification;*
- *metal precipitation sludges, cyanide treatment sludges and chromic acid treatment sludges; and*
- *waste from oil / water separation.”*

Definitions of stabilisation and solidification are included from paragraph 2.8.5 of NRW’s statement of case.

The appellant contend that they do not remediate (treat) waste soils, however the text within HWR06 applies to “pre-mixed” and “bulked” waste. It is NRW’s position that failure to segregate wastes of different waste codes (e.g. soils and hazardous non-soils) will result in a pre-mixed waste. This will be designated with an absolute hazardous code, 19 02 04*.

As hazardous waste classification depends on the presence of hazardous constituents above threshold levels and not the source/pathway/receptor model, it is irrelevant if hazardous substances are “bound”, “immobilised” or otherwise stabilised if a waste treatment process only binds them to some substrate.

The result will be under UK classification the following codes:-

19 02 04* premixed wastes composed of at least one hazardous waste - this will be where a mixing of non-hazardous (hazardous) waste with a hazardous waste has taken place.

19 03 04* wastes marked as hazardous, partly stabilised other than 19 03 08 – where the partial stabilisation has not transformed the hazardous substances into non hazardous substances. None of the proposed treatments will do this.

And the same for solidified waste 19 03 06* wastes marked as hazardous, solidified but that is meant, generally for liquid hazardous liquid wastes that have been mixed with solids.

Further more HWR06 should apply to pre-mixed wastes – the definition in there is:-

Pre-mixing

If a hazardous waste is mixed with:

- a hazardous waste with a different EWC code;
- a hazardous waste with the same EWC but different hazardous properties or chemical composition;
- a non-hazardous waste; or
- a non-waste

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and a reaction does not take place, then this is considered pre-mixing. This waste is coded 19 02 04* premixed wastes composed of at least one hazardous waste. This is an absolute hazardous waste; threshold criteria do not apply to absolute hazardous wastes.

- L. By their actions, NRW have concluded that a risk of pollution has arisen due to volumes of soil at TTH. This is based upon a risk that hazardous waste leaves the site for an unsuitable destination.
- NRW has not presented any evidence that hazardous wastes have left the site
 - NRW has not presented any evidence that hazardous wastes are stored in a single stockpile
 - NRW has not presented any evidence that wastes have been treated, or partially treated
 - NRW has not presented any evidence that pollution has occurred. Their case is theoretical and based purely on false premises

NRW response to L

NRW's statement of case, and paragraph 10, provides evidence on why NRW consider the volume of waste on site and the operation poses a risk of pollution. Paragraph 10.11 summarises the risk of pollution using the source pathway receptor model.

- M. For clarity, TTH does not dispute that volumes are above the permitted level. This has been the case for several years and NRW has been fully aware of the situation. Several audits have taken place over this time-period and NRW has requested volumes be reduced to 5,250t. No deadline was ever set, and we were progressing towards this through consistent volume reduction. The current quantity on-site is within the stated tonnage within the permitted variation.

NRW response to M

During the inspection on the 2nd July 2020 despite the Appellant estimating there to be less waste on site than the previous inspection, the waste reception area had visually further filled with waste. This can be seen in photographs taken at the site [Annex M].

The current permit variation has not been determined and the Appellant cannot not assume that the current volume of waste would be authorised.

- N. However, NRW's own guidance is clear that breach of permit conditions is not equivocal to pollution risk.

NRW Response to N

NRW is unsure what the Appellant is saying in this point. NRW has demonstrated in the

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statement of case that not only permit condition breaches but also the risk to of pollution posed by the operation.

- O. Risk of pollution is defined as being harmful to human health or the quality of the environment. We have not been presented with evidence of this. In the event that hazardous soils were exported from TTH, which we deny, it is not self-evident that hazardous soils would present such a risk. The risk to human health and the environment is based on a source-pathway- receptor risk assessment process, as set out in CLR11 and LCRM (the guidance change since issue of the suspension notice but this element remains unchanged).

NRW Response to O

As explained in paragraph 14.1 of the statement of case, the RGN11 guidance provides provision for the Regulator to serve a suspension notice not only where it considers a risk of pollution has *happened*, but also where it considers a risk of pollution is *likely* to happen. Even in relation to a Regulation 37(2) Notice a pollution **does not have to occur** for the regulator to serve the notice.

As highlighted in 14.4.4 of the statement of case, amendment to regulation 37 of the 2010 Regulations. The amended legislation will expand the regulators' powers to issue a suspension notice where there has been a breach of a permit condition and a consequent risk of pollution. This amendment will apply to all activities regulated under the 2010 Regulations and not just waste operations.

The Collins English Dictionary definition of "risk" is "*the possibility of incurring misfortune or loss, hazard*". It is clear from the Dictionary Definition that it is not required to prove the result of a "risk". It is described as a possibility. NRW do not have to prove that there has been an environmental effect/ damage but just that there is a possibility of such because of the actions of the Appellant, a "risk". It is NRW's contention that this statement of case absolutely shows that there is a risk of pollution due to the breach of the permit condition in relation to the amount of waste on site

The CLR11 is currently NRW's approved document for contaminated land remediation but this guidance only applies to historically contaminated sites and not remediation of soils at places other than the site of production. This document does not apply in this instance.

- P. RGN11 and LCRM (CLR11) requires that judgement be made regarding the risk to human health / the environment. NRW must justify their decision by showing the effects on the receptors. This judgement must be made on clear evidence. NRW guidance stipulates that, where forming such a judgement is not within the officer's area of expertise, they should seek advice. BS has sought confirmation as to whether the officer is suitably qualified and whether due consultations were made. We were informed that no consultations were made.

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NRW Response to P

As previously stated, The CLR11 is currently NRW's approved document for contaminated land remediation but this guidance only applies to historically contaminated sites and not remediation of soils at places other than the site of production. This document does not apply in this instance.

- Q. Based on discussions with the officer, where she has openly stated that she has limited knowledge in this area and based on the source-pathway-receptor linkage provided in response to the withdrawn first suspension notice, it is clear the officer does not have the requisite expertise in this area. Such expertise is presumably available within NRW, but we were informed that no consultation took place. To this end, it is evident that no source- pathway-receptor model that conforms to national guidance has been produced and that no 'clear evidence' was available upon which to support this. Such clear evidence could take the form of a quantitative comparison of soil results for exported material (which NRW has held since July 2020) with risk-based screening values, or on-site monitoring to show ongoing pollution of the environment. To our knowledge neither has been undertaken and thus there is no technical basis for the judgement. It is purely assumption.

NRW Response to Q

As communicated to the Appellant in correspondence on the 27th August 2020 (Annex Q12) the officers involved in regulating TTH are experienced officers with expertise in regulating a range of complex waste management facilities. Whilst it is helpful for an officer to have specialist knowledge on a specific treatment process, it is not essential when assessing permit compliance.

The decision to serve a Notice is not down to one officer but a process of reviews and checks through several tiers of management and the NRW legal team.

- R. NRW reported on their review of validation testing and duty of care documentation in September 2020. The review does not present evidence of hazardous waste having left the site, despite this being their contention in the July 2020 suspension notice. It is also noteworthy that NRW were reviewing the evidence pertaining to the suspension notice two months after issue of the suspension notice. This is not in accordance with their own procedures. Therefore, despite reviewing data for two months after issuing the suspension notice, NRW have not been able to provide evidence to support their case.

NRW Response to R

NRW received and reviewed the duty of care and testing and validation paperwork **prior** to the issue of the Notice. Our findings of the review were communicated and reported to the appellant in September 2020 after the issue of the notice.

The Hub

- S. In summary, TTH maintains the position it has repeatedly stated from the initial issuing of the suspension notice in mid-July that the suspension notice was and is invalid (as there is no risk to pollution as the soils are demonstrated to be non-hazardous prior to leaving site). The rationale for NRW's assertion is fundamentally flawed for all the reasons stated in previous correspondence and within this summary. It is of great concern to TTH that this action was taken without due consideration or without carrying out the necessary due diligence and fully establishing the facts by engaging and discussing same with the site representatives. The issuing of the suspension notice was precipitous and unjustified and has severely impacted our business and reputation.

NRW Response to S

NRW's statement of case clearly explains the evidence and rationale used in concluding that serving of a partial suspension notice was necessary and proportionate. NRW has been open to dialogue with the Appellant, provided the assertions made regarding the true risk presented by the site was forthcoming. NRW has a legal duty to continually review the suitability and necessity of the suspension notice and is committed to doing so. NRW still believes the Notice to be necessary and proportionate.

The information provided by the Appellant has over time changed. In their statement of case they cite WM3 in relation to the testing of wastes. Paperwork submitted to NRW under a Reg 61 Information Notice shows the use of WAC (waste acceptance criteria) testing prior to issue of the partial suspension. WAC analysis is relevant to landfill and not to be used for waste classification or hazardous waste assessment. This was highlighted to the Appellant in a letter dated 11 September 2020 (Annex Q13). There is not mention of WAC in the Appellant's statement of case.

Shortly after issue of the suspension notice, and at the request of the Appellant's legal representative, NRW agreed to review additional information about the site on the basis that the Appellant claimed a lack of understanding of the process in operation. The Appellant advised that the supporting document to the permit variation application received in February 2020 described the activity at site and therefore the risks associated. Further to the application being returned to the Appellant as not duly made and then a re-submission, NRW was then informed that the revised (version 4) supporting document should be the reference for assessing activities at site (and their associated risks) prior to July 2020. The documents submitted in February and October 2020 contain differences which make it difficult for NRW to have a clear understanding of what the Appellant alleges was actually happening at site and how this posed no risk.

NRW accepts that the Appellant may use the permit variation process as an opportunity to legitimise operations going forward. However, it is not possible to retrospectively alter the permit conditions under which the Appellant should have been operating. As outlined above it is not possible for these past activities to be described by two documents which are different in nature and content. These ambiguities make it difficult for NRW to have clarity over what the Appellant alleges was occurring at site and how the risks were lower than NRW consider they are. NRW are satisfied that the Suspension was and continues to be necessary and proportionate.