



Penderfyniad ar yr Apêl

Gwrandawriad a gynhaliwyd ar 20/04/21

Ymweliad â safle a wnaed ar 21/04/21

gan J Burston, BSc MA MRTPI AIPROW

Arolygydd a benodir gan Weinidogion Cymru

Dyddiad: 11/6/21

Appeal Decision

Hearing Held on 20/04/21

Site visit made on 21/04/21

by J Burston, BSc MA MRTPI AIPROW

an Inspector appointed by the Welsh Ministers

Date: 11/6/21

Appeal Ref: ENV/3259669

The Treatment Hub, Building 2, Westfield Industrial Park, Swansea, SA5 4SF

The Welsh Ministers have transferred the authority to decide this appeal to me as the appointed Inspector.

- The appeal is made under section 37(1) and (5) of the Environmental Permitting (England and Wales) Regulations 2016.
- The appeal is made by The Treatment Hub Limited against a suspension notice issued by Natural Resources Wales relating to Environmental Permit No. EPR/ZP3933NJ.
- The notice was issued on the 17 July 2020.
- The risk of pollution alleged in the notice was that the following condition was being contravened:

Condition 2.3.1(a) "The activities shall, subject to the conditions of this permit, be operated using the techniques and in the manner described in the documentation specified in schedule 1, table S1.2 unless otherwise agreed in writing by Natural Resources Wales."

Summary of Decision: The appeal is dismissed, and the Suspension Notice dated 17 July 2020 is affirmed with modifications as set out in my formal decision below.

Preliminary Matters

1. Suspension Notices (SN) for the purposes of the Environmental Permitting Regulations 2016 (EPR), can be served if the regulator considers that the manner of operating the regulated facility contravenes an environmental permit condition, and that such contravention involves a risk of pollution.
2. To be valid, the EPR state at Part 4 37(7) that a number of criteria must be met. I have taken into account the comments made by the appellant, including the case law brought to my attention¹ and that reference should be made to the Duty of Care paperwork. However, I consider that the SN before me, subject to modifications,

¹ R (EMR Ltd) v. Environment Agency [2012] EWHC 2360

adequately meets all the legislative criteria and is therefore valid. Discussion relating to proposed modifications to the SN are set out in my reasoning below.

3. The appellant submitted a permit variation application to Natural Resources Wales (NRW) on the 29 January 2020. At the time of the hearing the application had yet to be determined. Accordingly, at the time of the Hearing, the permit Ref: EPR/ZP3933NJ is still extant at the appeal site.
4. The appellant requested that the evidence put forward on appeal by NRW should be disregarded. I disagree, the evidence put forward supported the reasons for serving the SN and highlighted the differences between the evidence supplied by the appellant and the arguments being put forward by NRW.
5. I carried out a site visit, accompanied by representatives of the appellant and NRW. At the end of the site visit comments were exchanged between the parties. Whilst I heard some of this discussion, it was not relevant to this appeal and played no part in my thought process when writing this decision.

Application for costs

6. An application for costs was made by The Treatment Hub Limited against NRW. This application is the subject of a separate Decision.
7. An application for costs was made by NRW against The Treatment Hub Limited. This application is the subject of a separate Decision

Main Issue

8. The main issue in this appeal is whether there has been contravention of the relevant condition of the permit, and if so, whether the steps set out in the Suspension Notice are reasonable, necessary and proportionate to address that contravention, in order to prevent risk of harm to the environment.

Background

9. The Treatment Hub Limited (the appellant) operates a waste management business at the appeal site, on the outskirts of Swansea, with a large number of residential properties and employment sites nearby. The EPR Permit allows the facility to accept wastes and treat them with 'Environmental-Clays' or 'E-Clays' to recover the wastes for use as raw materials for the manufacture of brick/block products, landscaping, or safe disposal.
10. The Environmental Permit was issued on the 20 September 2013. Conditions of the Permit require the appellant to operate certain waste activities within its permitted site boundary, which are set out in Table S1.1. Schedule 2 sets out the waste types, raw materials and fuels. Table S2.2 describes the permitted waste types and quantities and that the total throughput shall not exceed 40,000 tonnes per year. Further, that no more than 5,250 tonnes of material will be stored internally at any one time².
11. It is agreed between the parties that historically the site had stockpiles of waste materials and used operating techniques to treat this material that were in conflict with the approved plans and permit requirements. NRW identify a long history of non-compliance with the statutory environmental controls at the site, which led to the serving of a Regulation 37 partial SN.

² EPR Permit Application supporting document SOL0113EPS01: Operating Techniques document

12. The SN suspended the input of waste within the boundary of the permit and set out the following steps to be addressed:

STEP	Steps to be taken	By Date
1	Cease the acceptance of waste onto site	With immediate effect
2	Reduce the quantity of waste stored on site to 5,250 tonnes as authorised by the Environmental Permit The quantity of waste must be reduced on site to enable wastes to be treated in the manner authorised by the permit.	31 January 2021
3	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.	With immediate effect all waste must be assessed and classified prior to removal.

13. The appellant has stated that there is no real, specific, quantifiable and material risk of pollution and as such the SN is flawed. Moreover, NRW has relied on a number of assumptions and the SN should be quashed.

Reasons

14. It was accepted by the appellant that historically the storage and quantities of waste on the site exceeded the requirements set out in the relevant documents and consequently represented a breach of the permit. The appellant set out that waste levels can vary week to week given market demands and the inspections carried out by NRW were only a snapshot in time.
15. Further, after applying for the permit the contracts for treating filter cake material were not of the volumes expected. Accordingly, more construction and industrial waste had been treated on site and that some of these materials were treated using methods not set out in the permit. The appellant stated that all material was tested before it left The Treatment Hub to ensure that the material was safe to be used at the receiving sites.
16. Nonetheless, it was agreed at the hearing that if an operator wished to change or amend any activities or processes in a permit, they must first apply to vary the permit to enable the appropriate assessments to be undertaken. An operator must not commence an activity until it has been assessed and authorised.

17. NRW provided a number of Compliance Assessment Reports (CARs)³ dating from 2015 to 2019. The majority of the CARs highlight the breaches set out above. The CARs also note a number of actions required by the operator, which included: updating the 'Written Management System', reducing the quantities of waste material and applying for a permit variation. No application to vary the permit was submitted until January 2020.
18. It is clear that there has been a breach of permit condition 2.3.1(a), but this is not the end of the matter. The EPR 2016 sets out a second limb, that such a contravention involves a risk of pollution.
19. NRW state that due to the volume of waste on site the operator is unable to store or treat the material according to the permit. In this respect the Operating Techniques document establishes that upon arrival the material will be stockpiled, each stockpile will represent a single batch of material and subsequently be allocated a unique batch reference for the identification of the material throughout the entire treatment operation. NRW Officers, during their inspections, found that stockpiles were being merged or were being mixed on arrival. This included both hazardous and non-hazardous wastes. Moreover, the material could not be managed in accordance with the Internal Site Layout⁴ and thus treated and untreated material were forming single stockpiles. Indeed the appellant stated that wastes are stockpiled according to their HP codes and contamination profile rather than in accordance with the Operating Techniques Document.
20. Given this, NRW were concerned that material exported from the site could contain hazardous material and such hazardous material could be deposited at a site not equipped to deal with it, thus causing a risk to pollution. In any event the Hazardous Waste (Wales) Regulations 2005 (as amended) generally prohibit the mixing of hazardous with non-hazardous waste, with a different category of hazardous waste or with any other substance or material.
21. To support these suppositions NRW served two EPR Regulation 61 Notices⁵ relating to duty of care paperwork for incoming and exported waste and sampling and validation results for the exported materials.
22. The duty of care information was received by NRW on the 29 May 2020. This paperwork included waste transfer notes and hazardous waste consignment notes, for the period 1 March 2018 to 1 March 2020. This drew attention to a number of issues that confirm NRW's position including:
 - The acceptance of non-permitted waste, including hazardous waste.
 - The most common hazardous waste property codes for wastes received on the site were HP5 (Harmful), HP7 (Carcinogenic), HP8 (Corrosive), HP10 (Toxic for reproduction), HP11 (Mutagenic) and HP14 (Ecotoxic).
 - Export of waste with no description or code or an incorrect code.
 - Waste leaving The Treatment Hub under one code and being accepted at the receiver site under a different code.

³ NRW Statement of Case Appeal bundle Annex F.

⁴ Operating Techniques document Figure 1.2

⁵ Dated 13 March 2020 and 10 June 2020.

23. The laboratory analysis, chemical and physical validation results for all waste removed from the site between the dates of 1st March 2018 to 1st March 2020 was received by NRW on 6 July 2020. Again, this drew attention to a number of issues that confirm NRW's position including:
- The testing and sampling paperwork submitted did not demonstrate or evidence that adequate testing was being completed on waste exported from site.
 - Validation samples do not fully cover environmental criteria/contaminants as set out in the Operating Techniques document.
 - It was not possible to directly link the analytical reports to specific shipments of imported waste.
 - Waste tonnages did not correlate with the quantities submitted or the volume calculated from the duty of care paperwork review.
24. These points build a picture where the appellant has received both hazardous and non-hazardous wastes, above permitted levels, which it does not have the capacity to treat in accordance with the Operating Techniques document. As such, separate batch stockpiles cannot be maintained and there is restricted access to the stockpiles across the site, leading to a reduced area for wastes to be treated and stored prior to export. Waste piles have been allowed to spread into and potentially cross contaminate each other. Given that the export sampling/testing was not adequate, hazardous waste could have been inadvertently deposited at receiver sites leading to a risk of pollution. Therefore, a 'Source – Pathway - Risk of pollution' has been identified.
25. The appellant contends that such a risk is only theoretical and NRW has no evidence or justification that hazardous waste was exported to sites that could not deal with it. They suggest NRW's argument is solely based on too much waste being present on the site, but such a loss of control does not equate to a pollution risk. They further state that errors found on the waste returns were mistakes, human error, and whilst hazardous wastes were accepted that were not listed on the permit, the appellant's own analyses showed that the material was in fact inert non-hazardous material.
26. Similarly, the appellant states, the material was tested before it left 'The Treatment Hub' and it was found to be non-hazardous. Receiver sites were happy with the procedures used by 'The Treatment Hub' and a letter of support was received from The Royal Mint. In any event they state that, NRW failed to analyse returns correctly so the evidence put forward at appeal is flawed.
27. Nonetheless, on the evidence before me, reclassification of hazardous waste received by 'The Treatment Hub' is not appropriate due to 'hot spots' that could be present in the material. It is the responsibility of the producer to classify material and if material is consistently found to be non-hazardous then a discussion should be held between the producer and NRW. I have no evidence that such discussions were held. Overall, it is clear that waste should not be accepted if it is not as described by the producer and thus would not be suitable for the treatment process at the appeal site.
28. Following a review of the evidence submitted by the appellant, testing on material leaving the site was not adequate and did not follow nationally accepted guidance. For example, not all samples were leachate tested and there was no consistency between the volume of waste and the number of tests conducted. Due to the potential cross contamination of waste and that it was being treated by methods not on the permit, it was essential that robust testing was conducted to ensure that the materials were suitable for a receiving site and would not cause a pollution risk.

29. In this respect NRW brought to my attention evidence that highlighted that material from The Treatment Hub had been transported to Pembrey Racing Circuit for use in the construction of a bund. The material used contravened the site's permit in terms of the composition of the waste material. This presents a risk not just to the receiving site, but the wider environment due to potential hazardous substances not having been removed, immobilised or assessed with regard to their impact on the environment hereabouts.
30. I have considered the appellant's argument that it is up to the receiver sites to do their own tests to determine if the material is suitable and complies with their permit. Thus, the appellant cannot be penalised for another operator's actions. However, if you carry out a waste operation that changes the composition of the waste, you are regarded as a producer of the waste. Waste producers play a key role under the duty of care requirements to identify the nature and characteristics of the waste. Particularly as the misclassification of waste as a non-waste or a waste that does not fit the written description is illegal. Furthermore, a waste holders' duty of care extends to disposal i.e. to prevent unauthorised or harmful deposit, treatment or disposal.
31. I have noted the appellant's concerns regarding NRW's analysis of the waste return documentation. Nevertheless, except for errors relating to the volumes of waste on site⁶, no evidence of errors has been produced. This limits the weight I can attach to this matter.
32. Even a small amount of certain hazardous materials can cause a catastrophic impact on the environment and this is why the EPR are based on a precautionary approach. I agree with NRW that 'risk' is something that could cause a problem, rather than an actual pollution incident occurring. There are various matters that may influence the degree or likelihood of risk and to my mind the frequency of waste movements as set out in the evidence, the high potential for exposure, and the elevated severity of hazardous materials all lead to a high likelihood of a risk of pollution from material leaving the site and being deposited elsewhere. In reaching this opinion I have taken into account the Green Leaves III document brought to my attention by the appellant.
33. In these circumstances, I consider NRW were entitled to consider that permit condition 2.3.1(a) was contravened and that such a contravention involved a risk of pollution. NRW were entitled to therefore consider enforcement action. Accordingly, the question before me is whether NRW were reasonable to pursue such enforcement action, in light of the evidence before them.
34. The appellant states that historically NRW have consistently scored the permit breaches at the site as C3. It wasn't until a change in NRW Regulation Officer that the score increased to C2 and the SN was served. Moreover, by the time the SN was served, the volumes of waste on the site had reduced from previous levels and therefore an Enforcement Notice, rather than a SN, would have been adequate to address NRW's concerns.
35. I accept that consistency in approach by a statutory undertaker is important to provide certainty. Nonetheless the CAR forms highlighted the fluctuations in waste volumes so there would be no confidence that waste volumes would continue to reduce. Furthermore, the more recent investigations by NRW officers had found evidence of a risk of pollution, rather than just a breach in permit conditions.

⁶ The appellant has confirmed that waste levels over the permit levels are present on the site.

36. It is acknowledged that 'The Treatment Hub' is investigating new premises and is constantly evolving its practices to respond to market conditions. As such it applied to NRW for a permit variation in January 2020 after an action note on a CAR form. At the hearing the appellant set out how the SN was a surprise and the NRW should have used its discretion to determine the variation before resorting to enforcement.
37. As set out in paragraph 16 above, an operator must not commence an activity until it has been assessed and authorised. Therefore, whilst the appellant may wish to take advantage of new business opportunities it must continue to abide by its permit until those activities are authorised, thus reducing the risk of costly remediation. In the case before me the appellant has been advised on numerous occasions⁷ that its permit should be varied. However, decided to wait until enforcement action was predictable. Whilst it may be good practice for NRW to determine the variation application prior to enforcement activities, where there is a risk of pollution it is vital that swift action is taken to prevent environmental harm. Moreover, it is up to the appellant to decide whether to apply for a variation, unless a permit is varied due to a change in legislation.
38. The appellant asserts that NRW had not followed its own guidance and practices, including those set out in Regulatory Guidance Note 11: Enforcement Powers, dated October 2014 (RGN 11). Nevertheless, this is a guidance document and somewhat out of date given that it was published prior to the EPR 2016 regulations. Furthermore, as required, NRW worked alongside its legal colleagues throughout the process and, whilst it did not provide a 'formal assessment report' at appeal, it is up to NRW to decide how it best wants to present its case.
39. Finally, the appellant asserts that the business could never comply with the SN given the costs involved in complying with Schedule 3, Step 3. This requires the appellant to classify stored waste and submit for agreement the determined waste classification details on the intended destination of the waste to NRW prior to commencing removal.
40. It is accepted that there would be costs involved in complying with the SN. Nonetheless, it would seem to me that this requirement is no more onerous than the existing Duty of Care controls and the requirements set out in the appellant's permit documentation. Furthermore, the SN is 'partial' so that it addresses the activities to the extent necessary to avoid a risk of pollution, rather than forcing the business to close completely.
41. I have also considered various amendments to Step 3 put forward at the Hearing. I agree with the appellant that the requirement 'for agreement' should be removed. It could be argued that the requirement to submit '*for agreement*' the appellant cannot know, on receipt of the SN, what NRW will approve and therefore what he has to do. Furthermore, there is no mechanism through which he can challenge NRW's failure to agree the proposed details. Nonetheless, I consider that the SN could be modified to repair this defect, particularly as the notice already sets out with clarity and certainty what steps need to be taken for non-suspended operations.
42. Overall, I consider that NRW were proportionate in seeking a partial SN to bring the site back into compliance. I also consider that the risk of pollution was sufficient to justify the steps to be taken.
43. However, I also accept that circumstances have now changed materially as regards to the ability of the appellant to remove the waste given the Covid-19 pandemic.

⁷ As shown on CAR forms

Consequently, I consider that it is necessary for the SN to be modified in accordance with regulation 31(4). At the Hearing a period of six months from the date of my decision was agreed by both parties.

44. I therefore affirm the notice but with the modifications set out in my formal decision below.

Formal Decision

45. That the appeal is dismissed and the Suspension Notice, dated 17 July 2020, in respect of Permit Ref: EPR/ZP3933NJ be affirmed with the modifications set out below, all other steps to remain the same:

Under Schedule 2 – Steps to be Taken:

STEP	Steps to be taken	By Date
2	Reduce the quantity of waste stored on site to 5,250 tonnes as authorised by the Environmental Permit The quantity of waste must be reduced on site to enable wastes to be treated in the manner authorised by the permit.	31 November 2021
3	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 the determined waste classification and details on the intended destination of the waste.	With immediate effect all waste must be assessed and classified prior to removal.

J Burston

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Mr G Wignall	Counsel, instructed by
Mr N McLeod	Technical Advisor (The Treatment Hub)
Mr S Farr	Director (The Treatment Hub)
Mr D Slater	Technical Advisor (The Treatment Hub)
Mr P Rees	WAMITAB Holder (for The Treatment Hub)

FOR NATURAL RESOURCES WALES:

Mr T Evans	Counsel, instructed by
Ms J Chapman	Solicitor (NRW)
Ms I Bacon-Weekes	Regulation Officer (NRW)
Mr T Morris	Hazardous Waste Officer (NRW)