

FAO Liane Bacon-Weekes
Natural Resources Wales
Llys Afon
Haverfordwest
Pembrokeshire
SA61 2BQ

One Glass Wharf
Bristol BS2 0ZX
Tel: +44 (0)117 939 2000
Fax: +44 (0)117 902 4400
email@burgess-salmon.com
www.burgess-salmon.com
DX 7829 Bristol

Direct Line: +44 (0)117 307 6314
stephen.lavington@burgess-salmon.com

By First Class Post and Email to Liane.Bacon-Weekes@cyfoethnaturiolcymru.gov.uk

Our ref: SL07/ST04/58586.1/LAVIN

Your ref: EPR-ZP3933NJ

14 August 2020

When telephoning please ask for: Stephen Lavington

Dear Natural Resources Wales

Our client: The Treatment Hub Limited
Suspension Notice in respect of environmental permit number EPR/ZP3933NJ
Installation: The Treatment Hub, Swansea

We act for The Treatment Hub Limited. This letter concerns the service by Natural Resources Wales (“**NRW**”) of a suspension notice dated 17 July 2020 (the “**Notice**”) on our client.

We have concerns about the legal basis of the service of the Notice. At this stage, we are making enquiries, so that we can advise our client on its legal options. NRW has a legal duty to provide the reasons for the service of the Notice. To date, we do not consider that the information provided fulfils that duty, for the reasons given below. Once we are in receipt of the reasons for the service of the Notice, we can advise our client on the merits of NRW’s action. Until then, our client reserves all its rights.

From the information available to us, we have concerns that the service of the Notice is disproportionate, not justified and based on errors of fact, but we reserve our position pending further investigation. However, rather than spend time and resources on both sides examining the validity of the Notice, our client would much prefer to spend that time and resource working with NRW. We therefore submit that the most efficient and proportionate regulatory action is to withdraw the Notice and re-engage in dialogue to address any underlying concerns that NRW may have.

Request for further information

In the Notice your stated reason for suspension of our client’s permit is that you “*consider the operation of the regulated facility involves a risk of pollution*”. You add that:

“Storing waste in volumes that exceed the permitted limit restricts the capacity to treat waste in segregated batches and has resulted in mixing of hazardous wastes. Failing to store, treat and manage hazardous waste in breach of the permit, leads to a risk of pollution from these wastes leaving the facility and entering the environment at the receiving sites. These sites are not permitted to receive hazardous wastes and do not have the appropriate controls in place.”

For the reasons already set out in correspondence from our client, the allegation that there has been a mixing of hazardous wastes, and that our client’s processes result in an increased risk of hazardous wastes leaving site, is strongly denied. However, and more importantly for our purposes, NRW has offered no evidence whatsoever to substantiate this allegation. There must be an evidential basis for this allegation (otherwise it is pure speculation, WORK\37657495\v.4

and the Notice is *prima facie* invalid). Our client has a right to see that evidence so that it can assess the merits of NRW's actions.

As such, we ask NRW to provide all of the evidence upon which you have relied in reaching these conclusions.

In particular (and without limitation), please:

- (a) describe in detail the "risk of pollution" which you claim is sufficient to justify the suspension of our client's environmental permit and provide evidence, including all documentation (risk assessments, technical reports etc.), by which you have analysed and quantified this risk;
- (b) give specific details of the nature of the pollution that you claim to be involved and provide relevant evidence of such pollution or the risk of such pollution;
- (c) confirm that the source-pathway-receptor model formed part of your analysis and provide details of how it was applied (the explanation in the email dated 4 August 2020 from Liane Bacon-Weekes is wholly inadequate but if this is the only analysis upon which the decision was based then please say so in clear terms);
- (d) particularise the specific "hazardous wastes" that led to the decision to serve the Notice (and provide related evidence) and give detail as to how these "hazardous wastes" were factored into your risk assessment and analysis (including using the source-pathway-receptor model);
- (e) confirm that the officers involved in the decision-making process had relevant and specific technical expertise in relation to the specialist waste management operations carried out at our client's installation and provide details of this expertise;
- (f) advise if third-party consultants were instructed on this matter, or if not, whether this was considered and why it was rejected; and
- (g) confirm that legal advice was taken prior to service of the Notice, and in accordance with paragraph 3.53 of Natural Resource Wales' Regulatory Guidance Note 11 ("**RGN 11**"), or, if not, why not.

In responding to these requests NRW should have particular regard to paragraph 3.45 of RGN 11 which provides that:

"Whether there is a 'risk' of 'serious' pollution is a matter of judgement. You will have to justify the judgement in relation to the seriousness and risk by showing the effects on the environment or health and demonstrate that there is some reasonable likelihood that these could have a long term negative impact or a significant immediate detrimental impact. You will have to have clear evidence from which you make this assessment and be able to justify forming that view. If forming this judgement is not clearly within your area of expertise, you should seek the view of a person who is an expert."

We note that, in the email dated 4 August 2020 from Liane Bacon-Weekes to Rebecca Bomers, our client's consultant, it was stated that "*RGN 11 only refers to EPR 2010 and therefore only the Reg 37(1)(2) [sic] notice*".

We assume NRW will readily accept that paragraph 3.45 of RGN 11 provides equally to a judgement about the 'risk of pollution' as it does to a judgement about 'risk of serious pollution'. The paragraph is 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.

It is precisely this justification of the judgement that we are asking for in this letter.

A constructive way forward

As stated at the beginning of this letter, our preliminary view, pending receipt of the information requested in this letter, is that the Notice is wholly disproportionate.

Service of the Notice in the circumstances is not only disproportionate in relation to the alleged breaches of the permit (which can be readily addressed through other, more proportionate, means) but also unnecessary in the context of the generally cooperative and constructive approach that our client has taken to your investigations to date.

In particular you will be aware of our client's application for a variation of its permit in February 2020, an application which was made as a direct result of discussions between your officers and our client in December 2019 and specifically intended to address your officers' concerns. As of 24 July 2020 (almost six months later) this application had not even been assessed as duly made. Despite the severe ongoing delays to this variation, our client's position is that it has continued to work hard to constructively engage with the issues raised by your officers.

Suspension of our client's operations has caused considerable commercial disruption. Moreover, in preventing our client from taking in waste for remediation, NRW's actions will have caused waste to be diverted to landfill, rather than dealt with in proper accordance with the waste hierarchy.

We appreciate that a suspension notice is one of the many regulatory tools at NRW's disposal. It is, however, at the more serious end of sanctions available to it, and we submit that it is a disproportionate sanction in these circumstances. The choice of enforcement should be appropriate to the facts and circumstances of each case (proportionality being one of the key principles in your enforcement and prosecution policy). Where enforcement action takes a severe form (such as a suspension notice) there is a correspondingly high threshold for action which you are required to justify.

In the circumstances, we submit that the most efficient and proportionate regulatory action is to withdraw the Notice and re-engage in dialogue to address any underlying concerns that NRW may have.

Given the statutory timescales, your urgent attention to this matter is appreciated. Given that we are only asking for disclosure of evidence that was in your possession at the time of issuing the Notice we do not consider this to be an onerous request. As such, we ask that you either withdraw the Notice, or provide a substantive answer to this request, no later than **4pm on 21 August 2020**.

Yours faithfully

Burges Salmon LLP

BURGES SALMON LLP

CC. Erin Smyth-Evans, erin.smyth-evans@cyfoethnaturiolcymru.gov.uk
Gavin Brown, Gavin.Bown@cyfoethnaturiolcymru.gov.uk