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Our ref: ST04/58586.1/TILLING

Your ref: EPR-ZP3933NJ

11 September 2020

When telephoning please ask for: Simon Tilling

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 write further to your letters dated 27 August 2020 and 9 September 2020. As indicated in our letter of 2 September 2020, our client has prepared a detailed response to the substantive matters raised in your letter of 27 August, contained within the annex to this letter.

Your 9 September 2020 letter responds to our letter of 2 September 2020 in which we sought to ensure there was no difference between the parties in the interpretation of the legal test for the service of a suspension notice. We interpret your letter as agreement. On that basis, the points in dispute between the parties narrow to the following two issues:

- (a) is NRW's analysis of the risk to the environment from our client's contravention of its permit correct (requiring a reasonable likelihood of impact, not just a theoretical risk); and
- (b) did that risk justify, on an objective basis, the exercise of discretion to serve the Notice?

In your 9 September letter you have set out NRW's analysis of the risk to the environment from our client's contravention of its permit in succinct terms:

"In order to be clear, The Treatment Hub's permit was suspended because there is a breach of condition namely the amount of waste on site is in excess of that allowed under the permit. Due to this breach the waste on site is not being controlled, treated or segregated as required and therefore the waste leaving the site poses a risk to the recipient sites. NRW considers waste leaving the site is an absolute hazardous waste and only a hazardous landfill would have the appropriate infrastructure to deal with this waste so that it poses no risk to the environment."

This is helpful as it allows us to set out our client's position in equally clear terms:

It is accepted that there is a breach of the permit condition limiting the amount of waste on site.

It is denied that the waste on site is not being controlled, treated or segregated as required, and it is denied that this is due to the exceedance of the tonnage limits in the permit. It is accepted that the management of waste on site in practice is different from that envisaged when the permit application was made. However, it is our client's case that the waste is being controlled in a manner that is suitable for the waste streams that the site is receiving. Importantly, the amount of waste on site is not the cause of the difference in management approach adopted: the processes adopted are those suitable for the nature of the wastes, noting that a
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significant proportion of the waste received on site does not require treatment. The site has been operating in this manner since 2014 regardless of the amount of waste on site because our client believes that this is the correct way to manage these wastes.

It is denied that the waste leaving site poses a risk to the recipient sites: NRW does not put forward evidence for this, but submits that this must follow from the fact that the management processes on site are different to those set out in the permit. Our client's case is simple: the waste is processed according to its particular properties and is subject to robust WM3 classification before leaving site. No hazardous wastes have left the facility for receiving sites.

It is denied that the waste leaving the site is absolute hazardous waste: the materials are not hazardous wastes at all, let alone absolute hazardous wastes.

NRW will see from our client's detailed comments in the annex that there is a fundamental misunderstanding by NRW of our client's operations. For the avoidance of doubt, our client accepts that exceeding the limit of 5,250 tonnes for wastes requiring treatment might give rise to a degree of risk given the limitations of space on site. The important factor here is that the majority of the wastes received on site do not require treatment. The space available for treatment is adequate for those wastes that require treatment.

At the heart of the dispute appears to be our client's process of WM3 classification of the wastes on receipt and processing the wastes in accordance with its WM3 classification. It appears to be NRW's case that the classification by the waste producer is definitive. That does not reflect either the legal position (our client has a duty as waste holder to ensure that the classification is correct) or the practical reality of waste soil management across England and Wales.

In its detailed response, our client has sought to demonstrate that (a) the majority of wastes received to site do not need treatment; (b) as such, the areas available for treatment, although smaller in area than envisaged in the permit, are adequate for the lower volume of wastes that are treated; (c) as such, there is effective control over the waste processes on site; (d) as such, there is full confidence in the classification of waste that is leaving the site for receiving sites, and none of those wastes are hazardous; and (e) as such, there is no risk at the receiving sites. Our client's case is that, although it accepts the amounts exceed the permit limit and that this is a breach of permit, it does not follow that the breach gives rise to a risk of pollution. The issue of the Notice does not meet the legal test – a breach of permit and a consequential risk of pollution – and is therefore not lawful.

We note the suggestion that it is within our client's gift to simply comply with the terms of the Notice. That somewhat misses the point. Our client's case is that the material that is ready to leave site is non-hazardous and can be deployed at one of the receiving sites. It is NRW's case that the material is all "absolute hazardous waste" and needs to be sent to a hazardous waste landfill. Until that fundamental point of dispute is resolved, the waste cannot leave site.

It is for this reason that our client repeats its plea to NRW to engage with the reality of the operations on site and to understand the processes for waste management that are carried out so that the business can return to operation. This is not a case that can be resolved simply through complying with the Notice. NRW must engage with our client to understand the process on site in order to agree the classification of the waste under the terms of the Notice, in order to consider the extant permit variation application and the new permit application, and in order to regulate the facility in an appropriate risk-based manner in the future. Until these fundamental points are resolved, our client's business is severely constrained.

It appears to us that the most pragmatic and proportionate route forward is for NRW to:

- (a) accept that it may have misunderstood the nature of the operations at our client's facility, and therefore misjudged the risk of pollution;
- (b) to withdraw the Notice; and

(c) to engage with our client.

If, as a result of that engagement, NRW concludes that there is a risk of pollution, it is within NRW's power to issue a new suspension notice.

If NRW is not prepared to withdraw the Notice and engage in dialogue, an appeal will be our client's sole option.

Yours faithfully

A handwritten signature in dark ink, reading "Burges Salmon LLP". The script is cursive and fluid, with the letters "B", "S", and "L" being particularly prominent.

BURGES SALMON LLP

Enc. Annex