

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

APPEAL BY:

Eaden Homes Limited

SITE AT:

**Residential development of land at Morfa, Trearddur Bay,
Anglesey, LL65 2TY**

PINS REF: 3215988

**STATEMENT OF CASE OF
THE NATURAL RESOURCES BODY FOR WALES**

INTRODUCTION

1. This appeal relates to the refusal of an application for an environmental permit for Residential development of land at Morfa, Trearddur Bay, Anglesey, LL65 2TY made by Eaden Homes Limited ('the Appellant').
2. Natural Resources Wales ('NRW') received an application for a permit from the Appellant on 22 March 2017.
3. NRW issued a Refusal Notice to the Appellant on 11 May 2018 pursuant to paragraph 12, Schedule 5 of the Environmental Permitting Regulations 2016 ("EPR 2016") and this is attached at **Annex A, section B number 1**. The Refusal Notice was accompanied by a Decision Document which set out the detailed reasons for NRW's refusal and is attached at **Annex A, sections A.3 numbers 1 & 2 and A.4 number 1**.
4. On 08 November 2018, the Appellant submitted a written Notice of Appeal to the Planning Inspectorate Wales (PINS) against NRW's refusal to grant an environmental permit. This appeal was accepted by PINS as a valid appeal with a starting date for the appeal of 11 January 2019.

BACKGROUND TO THE APPLICATION

Application

5. On 22 March 2017, the Appellant submitted an application under the then EPRs 2010 for a tier 2 bespoke environmental permit, based on standard rule permit 2010 Number 7 – the use of waste for construction. The application is attached at **Annex A, section A.1, numbers 1 to 9**. The standard rule permit 2010 Number 7 is attached at **Annex A, section E, number 1**. Natural Resources Wales Permitting Support (as referred to as "NRW PS" in this document) carried out a duly made assessment, in accordance with Operational Instruction 203_08 – Environmental permitting: how we duly make and consult on applications for water discharge, groundwater activities, waste, mining waste and installations. This is an Environment Agency legacy guidance document that NRW adopted. This is attached at **Annex A, section C, number 1**.

Proposed site and activity

6. The proposed site is located in Morfa, off the coast of Trearddur Bay, Anglesey.

7. The proposed site is completely within Flood Zones 3 and 2. This is attached at **Annex A, section C, number 2**. The proposed site is also within Development Advice map zone C2 (as per Technical Advice Note 15: Development and Flood Risk). This is attached at **Annex A, section C, number 3**. This is related to tidal flood risk.
8. The definitions for the flood zones are:
9. Flood Zone 3:
 - the extent of a flood from rivers with a 1% (1 in 100) chance or greater of happening in any given year
 - the extent of a flood from the sea with a 0.5% (1 in 200) chance or greater of happening in any given year
10. Flood Zone 2:
 - the extent of a flood from rivers or from the sea with up to a 0.1% (1 in 1000) chance of happening in any given year
 - contains areas recorded to have flooded in the past
11. Flood zone 2 is important from a planning context as it forms the basis of Zone C in the Welsh Government Advice Map (DAM). The Development Advice Map (DAM) shows areas at risk of flooding for the purposes of land-use planning. The DAM should be used alongside Planning Policy Wales and Technical Advice Note (TAN) 15 to guide new development away from areas at risk of flooding wherever possible. Together they form a precautionary framework to guide planning decisions.
12. TAN 15 provides guidance which supplements the policy set out in Planning Policy Wales in relation to development and flooding. It provides advice on matters including the use of development advice maps to determine flood risk issues, how to assess the flooding consequences of proposed development and action that can be taken through development plans and development control (management) procedures to mitigate flood risk when planning for new developments. The Development Advice Map (DAM) which supplements TAN 15 is published by Natural Resources Wales. It should be noted that both the Flood Zone maps and the DAM's do not consider the impact of climate change on sea level raises/increases in fluvial flows.

13. TAN15 is a document that supports Planning Policy Wales and is the guidance document which we use in assessing Flood Risk Management in development proposals and consultations such as this waste permit application. Therefore, for this proposal the principal risk that raised a concern was in relation to the increased risk of flooding in the surrounding area.
14. The site is within 1km of the Special Area of Conservation – North Anglesey Marine/ Gogledd Mon Forol which lies to the west of the site, Special Protection Areas Anglesey Terns / Morwenoliaid Ynys Môn which lies to the East and the West of the site, part of the site is within an Area of outstanding natural beauty – Ynys Mon/ Anglesey and Site of Special Scientific Interest Beddmanarch-Cymyran lies within 50m to the east of the site.
15. There is an un-named watercourse flowing through the site in a north to south direction.
16. The proposed activity was for the use of waste for construction, using 20,000m³ of waste material. The proposed activity was to enable a housing development to be built on the proposed site. The waste recovery plan stated that the proposed activity was required to *“raise the land levels to above 3.4m above ordnance datum (AOD) in order to mitigate the risk posed by flooding to the consented development. To facilitate the raising of land levels at the site it is necessary to import approximately 20,000m³ of material.”*

Background on waste recovery

17. The definition of recovery can be found in Article 3 (15) of the Waste Framework Directive. This is attached at **Annex A, section B, number 2**. The Waste Framework Directive replaced an earlier Directive on the treatment of waste, Council Directive 75/442/EEC of 15 July 1975 as amended. The definitions of recovery and disposal were modified in order that there is a clear distinction between the two concepts. It was envisaged that the Waste Framework Directive should move the EU closer to a “recycling society” seeking to avoid waste generation and to use waste as a resource.
18. Article 3(15) defines “recovery” as follows;

“recovery” means an operation the principle result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil

a particular function, or waste being prepared to fulfil that function, in the plant or wider economy. Annex II sets out a non-exhaustive list of recovery operations”

19. Waste recovery is when your main aim is replacing a non-waste material you would have used in your operation with a waste material that performs the same function.
20. Applicants need to demonstrate that they are replacing non-waste materials by submitting a waste recovery plan (WRP) to Natural Resources Wales. The WRP must cover all the points in the guidance “Waste recovery plans and permits –How to apply for a waste recovery environmental permit to permanently deposit waste on land”. This is attached at **Annex A, section C, number 5**. Although this guidance was produced by the Environment Agency, we have adopted this guidance in Wales.
21. The WRP guidance clarifies the regulators position on what constitutes a recovery operation for these types of activities and to support implementation of the standard rules set that was brought in in 2010 (as a result of a waste exemption review). The guidance is designed to be a standardised way of applying the test for recovery versus disposal activities and to create a level playing field for customers.
22. WRPs are assessed by us using the above guidance, to decide if a customer’s activity is for the recovery or disposal of waste. The waste recovery plan is a way of demonstrating that the proposed activity meets the definition of recovery in Article 3 (15) of the Waste Framework Directive. This is attached at **Annex A, section B, number 2**. If the activity is assessed as disposal, customers cannot apply for a waste recovery permit. The appropriate permit type that should be applied for is a landfill permit. If the activity is assessed as recovery, the customer can apply for either a standard rule permit or a full Tier 3 bespoke permit for the recovery of waste.
23. The permit application process is broken down into three distinct stages; pre-application, duly making and determination. NRW offer to assess WRPs in advance of an application being made (the pre-application stage), or, as part of a permit application (the determination stage). Most customers choose to have their WRP assessed at the pre-application stage.
24. If a waste recovery plan is submitted as part of an application, as the Regulator we need to assess whether the waste recovery plan meets the legal test and demonstrates the work proposed is for recovery purposes. Following an assessment, if we deem that the waste recovery plan does not demonstrate recovery we must refuse the permit.

25. As the Regulator, if we deem that the work proposed is for recovery purposes, we will then continue to assess the rest of the application. This includes assessing the risks from carrying out the activity and depositing the waste, as this could generate emissions including dust and noise.
26. The WRP is a way of demonstrating that the operator meets the definition of recovery in Article 3 (15) of the Waste Framework Directive. This is attached at **Annex A, section B, number 2**. The WRP is a legal test so that it is clear what level of environmental protection needs to be in place i.e. measures to protect the environment will be different for a disposal activity than for a recovery activity.
27. For this application, we do not consider that the WRP demonstrates recovery. (See sections 5.1, 5.2, 5.3, 5.3.1, 5.3.2, 5.3.3, 5.3.4 and 5.3.5 of the Refusal Decision Document at **Annex A, section A.4, number 1**).

Consultation on the permit application

28. We placed a copy of the application and all other documents relevant to our determination on our electronic Document Management System which acts as our Public Register. Anyone wishing to see these documents could do so on request and arrange for copies to be provided.

Requests for further information

Request for Information at Duty Making Assessment Stage

29. In order for us to be able to consider the application duly made, we needed more information. On 03 April 2017, NRW PS advised the Appellant that we had not assessed a WRP for the proposal or confirmed the activity as waste recovery. This is attached at **Annex A, section A.2, number 1**.
30. NRW PS advised the Appellant that in accordance with the application form guidance (Part B4), that they should confirm the activity is recovery with us before they apply for a permit. Application form guidance (Part B4) is attached at **Annex A, section C, number 6**. This is because if we have not assessed a WRP for the proposal prior to an application being made, we must assess it as part of the determination of the application. If we do this and assess the activity as disposal, we must refuse the application and keep the application fee.

31. NRW PS advised the Appellant that alternatively they could withdraw the application and we could assess their WRP as part of our pre-application advice and guidance service. NRW PS would then confirm if the activity was recovery or disposal. NRW PS advised that: If we considered that the activity was recovery, the Appellant could resubmit an application for a permit for the permanent deposit of waste for recovery. If NRW PS considered that the activity was disposal the Appellant could submit further information to us to demonstrate that the activity was for recovery purposes.
32. Based on the information above, NRW PS asked the Appellant to confirm how they wanted to proceed – by either withdrawing the application and fee and having the WRP assessed as part of pre-application, OR, continue with the application as submitted.
33. NRW PS advised the Appellant that if they wanted to continue with the application as submitted, that the following information needed to be submitted:
- i. A revised site-specific risk assessment which acknowledged sensitive receptors and the measures that will put in place to protect them.
 - ii. Confirmation if the relevant, formal qualifications to manage the activity were already held.
34. Further to NRW PS email to the Appellant sent 03 April 2017, the Appellant responded on 07 April 2017 and confirmed that they wished to proceed with the determination of the application as submitted and confirmed that they did not wish to withdraw the application. The Appellant provided a revised site-specific risk assessment and evidence of formal qualification. This is attached at **Annex A, section D, number 1**.
35. Upon receipt of this information, the application was accepted as duly made on 07 April 2017. This is attached at **Annex A, section D, number 2**. When an application is “Duly made” it means that we consider that the application is in the correct form, contains sufficient information for us to begin our determination and that the applicant has paid the correct fee. It does not necessarily mean that an application contains all the information we would need to complete the determination. Further information was requested during the determination, which is detailed further below.
36. During the application determination process under the Environmental Permitting Regulations, we can request further information that we require to complete our determination. We can do this formally or informally.

37. In accordance with the Regulations and DEFRA core guidance we requested further information from the Appellant. This is attached at **Annex A, section C, number 7**.

38. DEFRA core guidance states:

Requests for more information

39. 6.17 There may be circumstances where the regulator needs to serve a notice asking for more information it needs to determine the duly-made application (Schedule 5, Part 1, paragraph 4).

40. 6.18 The regulator should only require further information where that information is essential to allow the application to be determined. Any request for further information should meet at least one of the following criteria. The information must be necessary to:

41. assess whether the proposal meets any directive or other requirements, or determine the appropriate permit conditions to impose.

42. 6.19 this information might, for example, comprise: information to understand sufficiently the environmental impact or risk posed, or information to understand sufficiently the proposed operations.

43. When we request information formally we do this by serving a 'Schedule 5 Notice' on the applicant. A Schedule 5 Notice is a legal notice that clearly specifies what information we require to determine the application, why we need that information and by when the applicant must submit the information. The applicant must provide all the information specified in the notice.

Informal Request for Information (dated 07 June 2017)

44. An informal request for information was sent to the Appellant via email on 07 June 2017. This is attached at **Annex A, section A.2, number 2**. The information request advised of the following:

45. NRW PS had assessed the waste recovery plan in accordance with the guidance "Waste recovery plans and permits – How to apply for a waste recovery environmental permit to permanently deposit waste on land". This is attached at **Annex A, section C, number 5**. Further to our assessment, the information provided

within the WRP did not justify that this was a recovery operation. Primarily, the WRP stated that the benefit of the proposed works was to raise the land, as required in order to fulfil the requirements of the extant planning consent (as detailed in Section 3.1.1 of the WRP). The WRP is attached at **Annex A, section A.1, number 10**. However, the information provided did not provide evidence of this. Planning permission is integral to demonstrating why the land needs to be raised and why the work needs to be done.

46. It is also important to point out that the site is completely within flood zones 3 and 2 (This is attached at **Annex A, section C, number 2**) and also within Development Advice map zone C2 (as per TAN15: Development and Flood Risk). This is attached at **Annex A, section C, number 3**. This is related to tidal flood risk. In accordance with the guidance, waste recovery plans must include how the work carried out will meet quality standards. This includes demonstrating that the finished scheme does not result in any environmental problems including the increased risk of flooding in the surrounding area. This was not considered or addressed in the WRP.
47. We attached our assessment of the WRP that included this and other relevant information in our email sent to the Appellant on 07 June 2017. This is attached at **Annex A, section E, number 2**.
48. As the Appellant submitted the waste recovery plan with their application we advised them of the following choices that were available:
49. NRW PS issue a formal request for information (Schedule 5 Notice) for suitable evidence to demonstrate that this was a recovery operation. We advised that this would include, but would not be limited to: suitable planning permission and the requirement for the appellant to direct us to the relevant conditions within their planning permission; provide confirmation from the local planning authority that they would enforce against the requirement should it not be completed, and, whether the local planning authority would be likely to agree anything significantly different to the requirements of the permission.
50. The requests for the above follows the case of The Queen on the application of Tarmac Aggregates Limited (formerly Lafarge Aggregates Limited) and The

Secretary of State For Environment, Food and Rural Affairs [2015] EWCA Civ 1149.
This is attached at Annex A, Section 5, number 7. Discussed further below.

51. NRW PS advised the appellant that if we determined that the evidence did not demonstrate that was a recovery activity, that we would refuse the application and that the appellant would lose their application fee.

Or;

52. The appellant withdrew the application and re-apply when they had a waste recovery plan that demonstrated the activity was for recovery purposes.

53. NRW PS advised the appellant that they would lose their application fee if they chose to do this.

54. NRW PS advised the appellant that they could then obtain pre-application advice to help them with their waste recovery plan before they re-submitted it.

55. NRW PS advised the appellant that if they chose to do this, that they should do this sooner rather than later in case any changes were made to our process for assessing waste recovery plans.

56. NRW PS asked the appellant to confirm how they wished to proceed within 5 working days (by 15/06/17).

57. On 08 June 2017 the Appellant responded to our assessment of the waste recovery plan and provided a copy of the original site plan showing the proposed contours of the land. This is attached at **Annex A, section D, number 3 and section E, number 3.**

58. We assessed the further information and concluded that it did not demonstrate that there was an obligation to carry out the work.

59. On 09 June 2017 the Appellant provided further information in relation to planning permission. This information was in relation to enforcement action taken for the illegal deposit of material at the proposed site. This is attached at **Annex A, section D, number 4.**

60. The enforcement action required the deposited material to be removed. **Annex A, section D, number 4.**
61. The enforcement action was appealed. This is attached at **Annex A, section D, number 4.**
62. The appeal was successful and planning permission for the proposed site was granted. This is attached at **Annex A, section D, number 4.**
63. We assessed the further information and concluded that it did not demonstrate that there was an obligation to carry out the work.
64. Following the appeal, the Planning Inspectorate may have granted planning permission, however this permission did not include a specific condition requiring the Appellant to raise the land and the Appellant was under no obligation to use the planning permission.
65. On 12 June 2017 the Appellant confirmed that they wished to proceed with the application and requested to be served with a formal notice for further information and requested details of the relevant officer in NRW Flood Risk team. This is attached at **Annex A, section D, number 5.**

Schedule 5 Notice 1 (dated 27 June 2017)

66. As the Appellant requested to be served with a formal notice requesting further information, a Schedule 5 Notice was issued to them on 27 June 2017. This is attached at **Annex A, section A.2, numbers 3, 4 and 5.**
67. The Schedule 5 Notice requested information to clarify aspects associated with the following:
- Function of the work*
68. The waste recovery plan (WRP) stated that “the importation of suitable materials to raise the development platform to a formation level of 3.4mAOD is required in order to fulfil the requirements of the extant planning consent for the site in preparation for the construction of the dwellings”.
69. We reviewed the planning permission submitted as part of the WRP. The planning permission was for “the layout and detailed plans for the erection of 45 dwellings and

layout for a further 38 plots on the land”. This is attached to the WRP attached at **Annex A, section A.1, number 10.**

70. The planning permission (dated 1983) did not include any conditions requiring the appellant to raise the land in order to carry out the work. This is attached to the WRP attached at **Annex A, section A.1, number 10.**

71. Furthermore, it did not mention the risk of flooding or include any conditions relating to mitigating this risk. Evidence of why the work was needed and how the work met that need had not been provided.

72. The planning permission included (Drawing Ref: 801G/13) which showed the proposed contours that the land would be raised to. This is attached to the WRP attached at **Annex A, section A.1, number 10.** The WRP did not include evidence of why these contours had been used and how raising the land to this level would prevent flooding.

73. The Schedule 5 Notice requested written evidence from Anglesey Council Development Control which confirmed that the proposed contours in Drawing Ref: 801G/13 had been specifically designed to raise the land out of flooding levels. This is attached at **Annex A, section A.2, number 5.**

74. We advised the Appellant that we required this information to support the proposed function/need for the proposed work: ‘as part of the consented residential development it will be necessary to raise the land levels above 3.4AOD in order to mitigate the risk posed by flooding to the consented development’.

75. We advised the appellant that if they could not provide this confirmation, we could not accept the function/benefit section of the waste recovery plan as recovery.

Appropriate standards

76. Our guidance includes a section on meeting quality standards that applicants must include in their WRP. These standards include providing evidence to show how the work will be designed and constructed and fit for purpose. The guidance also states that the finished scheme must not result in any environmental problems such as the increased risk of flooding in the surrounding area. This is attached at **Annex A, section C, number 5.**

77. The WRP stated that “Suitable materials, placement and compaction suitable materials, should meet the requirements of the following fill materials classified in the Specification for Highway Works (2005)”. However, the WRP did not include detailed information on the specific standards that the work would be carried out to.
78. The WRP stated that “As part of the consented residential development it will be necessary to raise the land levels to above 3.4m AOD in order to mitigate the risk posed by flooding to the consented development”. However, the risk of flooding to the surrounding areas from carrying out the work was not considered or addressed in the WRP.
79. The Schedule 5 Notice requested an assessment which investigated the impact of the works on flood and drainage risks to the site and possible impacts on third party interests. We requested that the assessment include the following:
- All sources of flooding be investigated and addressed including tidal and pluvial risks for a range of events. Pluvial risks relate to a period marked by increased rainfall.
80. Extreme sea levels with appropriate climate change allowances (suggest CL-03-16) be considered along with wave overtopping volumes. The open channel through the site conveys flood waters from overtopping/tidal events along Lon Isallt during current day events as will for future events. “CL-03-16” relates to climate change allowances for planning. This is attached at **Annex A, section C, number 8**. This document accompanies Welsh Government guidance document “Flood Consequence Assessments: Climate change allowance”. This is attached at **Annex A, section C, number 9**.
- Due consideration should also be given to tidal flood risk from the east/Inland Sea should a failure/breach of the B545 Four Mile Bridge structure (assuming a breach of 20m) occur.
 - Agreement should be sought from our Flood Risk and Development team on overtopping rates/volumes to be used in any linked 1D-2D hydraulic modelling for the site/area prior to constructing the model. The base model should use ground levels prior to any infilling occurring and the suitability and dates of any LiDAR (Light Detection and Ranging) flows should be justified in any assessment.
 - We would expect that the results of the hydraulic modelling work/flood assessment to show no detriment elsewhere due to the land raising.

Physical characteristics of waste

81. The WRP did not include confirmation or evidence from an appropriately qualified person that the waste materials being used were suitable for their intended use and were comparable to the non-waste material they were replacing i.e. confirmation of what non-waste materials would be used and whether the proposed wastes were physically comparable to those non-wastes. The Schedule 5 Notice requested evidence of this to be provided. This is attached at **Annex A, section A.2, number 5**.

Chemical characteristics of waste

82. The WRP included details that waste analyses (if available) including leachability tests would be provided, however the WRP did not include information on what testing will be carried out to ensure that only chemically comparable waste was accepted. The Schedule 5 Notice requested detailed information of the testing that would be carried out. This is attached at **Annex A, section A.2, number 5**.

Substitution test

83. The WRP must show that if an applicant couldn't use a waste material that they would do work to get the same outcome using non-waste materials. Applicants must include evidence of this in the WRP. The Appellant felt there was a planning permission requirement for them to complete the work, however no evidence had been submitted to demonstrate this.
84. The Schedule 5 Notice requested evidence of this and asked the Appellant to direct us to the relevant conditions within their planning permission; to provide confirmation from the local planning authority that they would enforce against the requirement should it not be completed, and, whether the local planning authority would be likely to agree anything significantly different to the requirements of the permission.

Financial gain by using non-waste materials

85. The WRP included some information on the revenue from completion of the works as evidence that the proposal would go ahead using non-waste.

In order to demonstrate this fully, the Schedule 5 Notice requested:

- Confirmation if the groundworks are being carried out by Eaden Homes Ltd, or if a subcontractor will be employed to do this.

- If a subcontractor will carry out this work, the value of land after the groundworks have been completed, non-waste costs and the cost of carrying out this work must be included in the WRP. The resulting value will show if a profit will be made from the activity and would demonstrate that the proposal would go ahead using non-waste.

The Schedule 5 Notice also stated that in accordance with the guidance, there are 3 main ways applicants can show evidence that they are using waste in place of non-waste. These are:

- Financial gain by using non-waste materials,
- Funding to use non-waste and;
- Obligations to do the work

To demonstrate that the activity is recovery, you only need to pursue one line of evidence:

1. Obligations to do the work

Or;

2. Financial gain by using non-waste materials

86. We advised the Appellant that if they decided to pursue the line of financial gain by using non-waste materials, that they would still need to provide planning permission to demonstrate the function of the work and why the work needed to be done.

87. The Schedule 5 Notice was sent on 27 June 2017 with a deadline of 26 July 2017. This is attached at **Annex A, section A.2, number 5.**

88. The Appellant responded to the Schedule 5 Notice on 26 July 2017 and provided a revised version of the waste recovery plan. This is attached at **Annex A.1, number 11 and section D, numbers 6, 7 and 8.**

89. The additional information supplied by the Appellant did not satisfy the requirements of the Schedule 5 Notice, issued on 27 June 2017.

90. The outstanding information from the Schedule 5 Notice included the following:

- flood risk modelling.

91. Although some of the additional information supplied by the Appellant satisfied the requirements of the Schedule 5 Notice, the revised version of the waste recovery plan did not demonstrate that the activity was for recovery purposes and our concerns to flood risk had not been suitably addressed.
92. On 11 August 2017 NRW PS informed the Appellant of our conclusions to the information provided in response to the Schedule 5 Notice. NRW PS advised the Appellant that the Schedule 5 response did not address our concerns with relation to flood risk and did not demonstrate an obligation to carry out the work. This is attached at **Annex A, section D, number 9**.
93. NRW PS gave the Appellant the opportunity to provide further information to address our concerns and requested that this information be submitted by 29 August 2017. This is attached at **Annex A, section D, number 9**.
94. The Appellant provided clarification in regard to the information previously submitted in relation to flood risk on 29 August 2017. This is attached at **Annex A, section D, number 10**.
95. NRW PS afforded the Appellant ample opportunity to provide further information to demonstrate that the activity was for recovery purposes and to provide evidence that the activity would not pose a risk of flooding to the surrounding area, in accordance with guidance. There has to be a cut-off point at which NRW PS proceeds to determine the application on the information / evidence submitted. NRW PS should not go beyond a reasonable amount of time assessing further information that is submitted.
96. In this case, NRW PS gave the Appellant several opportunities to revise their WRP to demonstrate the standards laid out in the relevant guidance.

RELEVANT POLICY AND GUIDANCE

97. As the Regulator, under the EPRs, NRW has a duty to make decisions that protect the environment. To ensure that we make decisions consistently and fairly we follow legislation, regulatory guidance – DEFRA core guidance and internal operational guidance notes and instructions.
98. The EPRs provide the legislative direction for what NRW PS needs to do for environmental permits and DEFRA core guidance and other guidance documents

instruct NRW PS as to how to carry out this work. This is attached at **Annex A, section B, number 1.**

99. The Statement of Case sets out below how NRW PS determined the application in accordance with EPRs and relevant guidance.

100. NRW PS decide whether to grant or refuse a permit application based on the information submitted by applicants. Whilst NRW PS consult with others, both internally and externally, the permitting decision is ultimately made by NRW PS. This is in accordance with adopted Operational Instruction 233_08 - Environmental permitting: how we determine an application for a permit or carry out an Environment Agency led variation to a permit, for water discharges, groundwater activities, waste, mining waste and installations. This is attached at **Annex A, section C, number 10.**

Waste recovery plan guidance - 'How to apply for a waste recovery environmental permit to permanently deposit waste on land'

101. Applicants proposing to permanently deposit waste to land for recovery purposes must submit a waste recovery plan (WRP) to Natural Resources Wales.

102. Through their waste recovery plan, applicants need to demonstrate that they are replacing non-waste materials.

103. The WRP must cover all the points in the guidance on waste recovery plans and permits – the Environment Agency's 'How to apply for a waste recovery environmental permit to permanently deposit waste on land'. This is attached at **Annex A, section C, number 5.**

104. This WRP did not cover all points in the guidance and did not demonstrate that the activity was for recovery purposes.

Flood risk guidance - Technical Advice Note 15: Development and Flood Risk

105. Technical Advice Note 15 is a document that supports Planning Policy Wales and is the guidance document which we use in assessing Flood Risk Management in development proposals and consultations such as this Waste permit application. Technical Advice Note 15 is attached at **Annex A, section C, number 3.**

106. In accordance with the guidance 'How to apply for a waste recovery environmental permit to permanently deposit waste on land', waste recovery plans

must include how the work carried out will meet quality standards. This is attached at **Annex A, section C, number 5.**

107. This includes demonstrating that the finished scheme does not result in any environmental problems including the increased risk of flooding in the surrounding area.

108. This was not suitably considered or addressed in the WRP.

THE DECISION

109. The Appellant was notified of the decision on 11 May 2018. NRW PS prepared a Decision Document. This is attached at **Annex A, section A.4, number 1.**

110. The Decision Document forms the basis of the Respondent's decision to refuse the application.

111. The Decision Document states inter alia

Key issues of the decision

Our decision

Based on the information currently available to us we are refusing the permit application. We carefully considered the application and all other relevant information before we reached a decision. Having considered the information submitted with the application and further information submitted during the determination, we are not satisfied that the applicant has demonstrated that the proposed activity is for "recovery" purposes. In addition to this we are not satisfied that the applicant has adequately considered and addressed the risk of flooding to the surrounding area from proposed activity.

Our decision has been influenced by the following principles:

In accordance with the relevant guidance – 'How to apply for a waste recovery environmental permit to permanently deposit waste on land' the submitted waste recovery plan does not demonstrate that the activity is for recovery purposes.

The waste recovery plan fails to demonstrate that there is an obligation to do the work.

Therefore, a landfill permit is required as the proposed activity is for disposal and not recovery.

The risk of flooding to the surrounding area from the proposed activity, given the sensitivity of location and that the proposed site is completely within Flood Zones 3 and 2 and also within Development Advice map zone C2 (as per TAN15: Development and Flood Risk).

This aspect of the waste recovery plan contravenes the guidance ‘How to apply for a waste recovery environmental permit to permanently deposit waste on land’ which states that the finished scheme must not result in environmental problems such as flooding. This aspect forms part of the “recovery test”.

We are therefore unable to grant a permit for this activity, given that the waste recovery plan does not demonstrate an obligation, that the activity is for recovery purposes and the risk of flooding to the surrounding area.

RESPONSES TO GROUNDS OF APPEAL

112. Based on the information available to us at the time of determination, the Respondent refused the permit application.
113. It is important to note that during the determination period, whilst the Respondent gave the Appellant the opportunity to provide further information to demonstrate that there was an obligation to complete the activity and to demonstrate that the activity would not increase the risk of flooding to the surrounding area, there must be a cut-off point where the Respondent must make the decision based on the information that is submitted.
114. The grounds of the Appeal submitted by the Appellant are attached at **Annex A, section E, number 4** and include the following:
- Ground 1 - Recovery
115. “The Appellant proposed the use of locally sourced waste to prepare the appeal site for development in accordance with the extant planning consent for

housing development and to avoid the need to use natural resources such as quarried stone. The development could satisfactorily proceed without the use of waste but would increase the carbon footprint of the development which has planning consent.”

116. “The quantity of waste proposed was a genuine need and only the amount needed to meet the levels required by the planning consent (the obligation). Alternative proposals would involve the use of additional quarried stone.”

117. “The waste recovery plan was revised during the course of the application process and submitted to NRW to address their questions. The decision document does not properly clarify why NRW consider the application to be for disposal rather than recovery.”

Ground 2 – Flood risk

118. “NRW are not satisfied that the waste recovery plan has adequately considered or addressed the risk of flooding to the surrounding area from the proposed activity. The appellant has engaged in correspondence with NRW throughout the application process. Despite the length of time involved in determining the application the potential for the proposal to impact adversely by increasing the risk of flooding is a matter upon which NRW and the appellant cannot agree. The appellant considers the detail submitted with the application satisfactorily addresses the flooding issue. The parties to the appeal cannot agree on the merits of use modelling software to provide further information or clarity with respect to the flooding risk.”

RESPONSE TO GROUND 1

119. In response to Ground 1, the waste recovery plan did not demonstrate that there was an obligation to complete the activity. The planning permission (dated 1983) did not include any conditions requiring the appellant to raise the land in order to carry out the work. This is attached at **Annex A, section A.1, number 10.**

120. The waste recovery plan submitted with the application included information on the revenue from completion of the works as evidence that the proposal would go ahead using non-waste. However, this information did not demonstrate this fully and further information was requested in the Schedule 5 Notice sent 27 June 2018. This is attached at **Annex A, section A.2, number 5.** Whilst NRW PS requested further

information to demonstrate financial gain by using non-waste materials, in the Schedule 5 Notice sent 27 June 2018, NRW PS advised the Appellant that if they pursued the line of financial gain by using non-waste materials, that they must also provide planning permission to demonstrate the function of the work and why the work needs to be done.

121. Demonstrating financial gain by using non-waste materials is one of the three main ways to demonstrate that waste is being used in place of non-waste. However, waste recovery plans must also demonstrate that there is a specific obligation to do the work proposed and why you would meet that obligation by carrying out the work proposed. It must also show how your proposed work meets your obligation. This is attached at **Annex A, section C, number 5**.
122. The increase of the carbon footprint is not relevant to the Waste recovery plan guidance or the EPRs.
123. The WRP did not include a specific obligation to do the work proposed, therefore did not demonstrate that this was a recovery activity. Therefore, the amount of waste required was not relevant.
124. Alternative proposals were submitted 27 February 2018, some 10 months after the application was duly made and 8 months after the Schedule 5 Notice requesting further information to demonstrate a recovery activity.
125. The refusal document clearly stated why the activity did not demonstrate recovery and therefore was a disposal activity. See sections 5.1, 5.2, 5.3, 5.3.1, 5.3.2, 5.3.3, 5.3.4 and 5.3.5 of the Refusal Decision Document at **Annex A, section A.4, number 1**). This is in accordance with the guidance 'How to apply for a waste recovery environmental permit to permanently deposit waste on land'. This is attached at **Annex A, section C, number 5**.

Obligations to do the work

126. The guidance 'How to apply for a waste recovery environmental permit to permanently deposit waste on land' states:
127. "You could provide evidence that you're obliged to carry out the work. This could be because a regulator has imposed a requirement on you. For example, you operate a quarry and are required by planning conditions to restore it according to an approved plan. This isn't the same as planning permission, which allows you to do

certain work without setting obligations. If there's an existing planning condition or obligation the Environment Agency will look at all the available information. This may include:

- the extent to which the local planning authority was directly involved in the design of the scheme when planning was granted and the condition imposed
- whether the local planning authority would be likely to agree anything significantly different".

This is attached at **Annex A, section C, number 5.**

128. The case of The Queen on the application of Tarmac Aggregates Limited (formerly Lafarge Aggregates Limited) and The Secretary of State for Environment Food and Rural Affairs and the Environment Agency [2015] EWCA Civ 1149 can be differentiated from this Appeal in a number of ways.

129. Firstly in the above case planning permission was granted in late 2007 subject to conditions which included a condition that the Quarry site should be restored in accordance with Tarmac's proposals as approved by the Council ("the restoration condition"). A date was given by which time the restoration work needed to be completed. The Appellant's planning permission did not contain a condition to raise the land.

130. Secondly the planning authority in the Tarmac case would have taken enforcement action if they had failed to restore the quarry this was whether waste or non waste was used. In the Appellant's case the planning permission was granted in 1983. No enforcement action has been taken to force the Appellant to build the houses for which they had planning permission.

131. In the first waste recovery plan the Appellant submitted planning permission as evidence to demonstrate their obligation to carry out the work. This is attached at **Annex A, section A.1, number 10.**

132. No evidence to demonstrate an obligation to do the work was submitted in the response to the Schedule 5 Notice or in the revised waste recovery plan. The Appellant submitted the following information (points 1.1 to 1.12 below - inter alia) on 26 July 2017 in relation to this point in their response to the Schedule 5 Notice. This is attached at **Annex A, section D, number 7.** The revised waste recovery plan is attached at **Annex A.1, number 11.** We assessed this information (points 1.1 to 1.12 below - inter

alia) and provided comments in the Refusal Decision Document where necessary (in bold text). This is attached at **Annex A, section A.4, number 1**.

133. We have provided additional comments below where required.

134. *“1.1 The planning permission is for development as quoted in the Schedule 5 Notice. It also correctly states that there is no condition requiring the applicant to raise land levels in order to carry out the work. However, it fails to refer to the appeal decision issued in 1988 when an appeal was upheld against the service of an enforcement notice for alleged unauthorised tipping of material to raise land levels on part of the site. The appeal succeeded on Ground A, that is, that planning permission should be granted for the development against which the enforcement action was initiated.”*

135. *“1.2 In terms of the extent of the enforcement notice, the plan covers the whole of the site and reflects the area which was the subject of the 1983 planning permission. There is no specific area outlined within the red line plan in the enforcement notice which indicates the part of the site where tipping was alleged to have taken place. Given this, it would appear that the notice was effective in respect of the whole site and, as such, the appeal decision, which granted permission for the tipping, should also cover the whole of the site.”*

136. The permission for the deposit of material (tipping) is not an obligation that the work must be carried out. No enforcement action has been taken by the Local Authority since 1983 to make the Appellant raise the land and build the dwellings which is the subject of the planning permission. The Appeal was against an enforcement notice to remove waste that they had deposited. It did not add a condition to the planning permission to raise the land and planning does not deal with the permission to deposit the waste that is NRW's remit.

137. *“1.3 In allowing the appeal, the Inspector commented that: “Bearing in mind the nature of the ground, I see no reason to question that the land on which the materials are placed must be raised in order to make it suitable for building on. Notwithstanding the lack of any detailed approval, it still enjoys the benefit of planning permission for residential development. In these circumstances there is, to my mind, no justification in requiring the removal of the deposited materials if they can be levelled and drained satisfactorily, thus overcoming what I see as the basic*

planning objections to the works undertaken. This course is not beyond the bounds of practical possibility, and indeed technical agreement seems well under way.”

138. Whilst the Appellant may have planning permission to build a housing development, they do not have a specific obligation that they must build said development.

139. *“1.4 With regard to the action required by the Schedule 5 Notice, that is, to provide written evidence from the LPA that the proposed contours in Drawing Ref: 801G/13 have been specifically designed to raise the land out of flooding levels, it is not as simple as that. In order to establish what is allowed to be undertaken on the land in terms of development, it is also necessary to consider other decisions relating to development. As such, the appeal decision is critical to the development permitted to be undertaken on the land.”*

140. *“1.5 Having established that there is consent for the raising of land levels, it is then necessary to establish the reasoning for increasing land levels to the 3.4m AOD in order to mitigate flood risk. The quality of the drawings and application information available on the LPA’s files is sub-standard and it is difficult to make out the detail contained in the drawings, this includes the land level details provided. As such, the landowner commissioned an appropriately qualified surveyor/engineer to interpret level data contained in the drawings with a view to establishing these in relation to Ordnance Datum as opposed to a local datum that the engineer surmised had been used when drafting the original plans.”*

141. *“1.6 In an email dated 26 August 2016, the engineer in question (Adam Caldwell of the Datrys consultancy) stated as follows:*

142. *We are working our way through numerous flood modelling criteria and we wish to model the flood impact on the development that received planning permission in 1983. In order to do so we wish to agree the Finished Floor level of the dwellings associated with that application. Having looked through all the records in the office a few months back when we met, I concluded that the planning permission was granted on the basis that the drawings showed a level relative to a local datum rather than ordnance datum.*

143. *I have since been converting the local datum back to ordnance datum using levels that would be deemed to have remained unchanged since the 1980’s. Effectively the invert of the ditch on the site is my comparison value and it cannot*

have been raised otherwise would not function. The 750mm culvert in the planning application of 1983 was proposed to be laid at 1 in 600 and its invert would align with the ditch invert at the time. SW6 on the planning drawings appears to be at the boundary and states a value of 28.430. A comparison of position of this level in the ditch at this boundary indicates that the level to ordnance datum is approx 1.78m A.O.D. If $1.78 = 28.430$ then the FFL of 30.050 equates to 3.4m A.O.D. As of last year following the topographic survey being undertaken, the levels of the site east of the ditch lie at approximately 2.8 – 3.2mA.O.D whilst the levels of the site west of the ditch lie at approximately 2.0 – 3.0mA.O.D. Can we please come to an agreement of this level of 3.4mA.O.D so we can undertake our flood modelling as required by Natural Resources Wales.”

144. “1.7 On 8 September 2016, the Council’s planning enforcement officer, Iwan Jones, forwarded the email to Kevin Dogan, a senior assistant engineer within the Council’s Highways’ Department, with a view to obtaining Mr. Dogan’s “professional thought” with regard to Mr. Caldwell’s findings. Mr. Jones’ email read as follows:

145. “I refer to the above site and email below sent by the agent acting on behalf of the developer. A planning application was approved at the site for residential development in 1983. Over a period of time inert material has been deposited on the land. The developer are (sic) of the opinion that the work are (sic) done in accordance with the approved level of land, under the original planning consent. The plans approved under the original planning permission is relatively old and unclear. Nevertheless, the engineer acting on behalf of the developer has provided his findings below. I propose to respond to him by stating something similar as ‘Based on your methodology the Local Planning Authority has no reason to contradict your findings’. However, prior to formally responding I would be grateful for your professional thought regarding his findings. Do they seem logical to you?”

146. “1.8 Mr Dogan responded on 6 October as follows:

Further to your e-mail correspondence relating to the above matter, I have now had the opportunity to clarify some of the details with the consulting engineers. As a consequence, I can confirm that the methodology employed to convert the site/finished floor levels, as shown on the original approved drawings, so that they are now relative to ordnance datum, appears to be reasonable. I trust these observations are of assistance and apologise for the delay in responding.”

147. *“1.9 Given the absence of clear plans/drawings on the planning application file to indicate the land levels to be worked towards, the above correspondence summarises the LPA’s position on the matter, that is, that land levels should be at 3.4m AOD in order to mitigate risks from flooding.”*
148. **The plan suggests culverting the watercourse with a 750mm diameter culvert. The IoACC (as the Lead Local Flood Authority) would be the consenting body for such culverting on an ordinary watercourse. It is understood that they have adopted a no culverting policy (apart from access purposes) and may not consent such culverting works under the Land Drainage Act 1991.**
149. *“1.10 In terms of the validity of the planning permission, it should be noted that a claim against Dwr Cymru by the landowner was dealt with by the Lands Tribunal in May 2012. Whilst considering the claim, the compensating authority (Dwr Cymru) conceded one of the preliminary issues under consideration as part of the claims process, this being whether planning permission 1/20/V/131N was in force at the date when the pipelaying works were carried out on the subject land by Dwr Cymru. If the permission was in force in 2004, it was as a result of its implementation within the relevant timescales laid out in the 1983 permission. This being the case, it follows that the permission has been secured in perpetuity.”*
150. *“1.11 Discussions with the LPA and the outcome of legal proceedings have proven that:*
151. *• the planning permission relative to the site has been implemented and therefore safeguarded in perpetuity, but there are no specific planning conditions that dictate the height that the land should be raised to;*
152. *• the principle of tipping to raise land levels has been established by virtue of the appeal decision in relation to the enforcement appeal lodged by an earlier site owner. The enforcement notice related to the whole of the application site, therefore, unless the area of tipping was precisely indicated within the red line boundary of the enforcement notice plan, it is presumed that the permission granted under the Ground A appeal applies to the whole of the land captured by the red line;*
153. *• all conditions requiring discharge appear to have been discharged therefore allowing work to continue without the consents being invalidated and this is*

confirmed in correspondence from the LPA, not least the one dated 31 March 2011 which confirms that the planning permission granted in 1983 is safeguarded; and

154. • *Given the lack of authoritative data on the LPA's file with regard to land levels, an appropriately qualified professional has established the relevant ordnance datum as opposed to the local datum used in drafting the approved plans. These calculations conclude that finished floor levels should achieve a level of 3.4m AOD and consultation with the LPA have resulted in an agreed position with regard to the methodology used by the engineer to establish level values relative to AOD as opposed to a local datum. 1.12 Taking all the above into consideration, planning permission exists for the residential development of the land and the permission has been safeguarded in perpetuity. This has been recognised by several agencies and been subject to legal scrutiny in proceedings relating to the land in question. The site's preparation, in anticipation of the proposed development, includes raising land levels to an appropriate height. The use of construction and demolition waste to do this benefits from the decision of the Welsh Office Planning Inspector on 22 August 1988 which grants planning permission for the tipping of material on the land subject to the appeal which is that of the Morfa site in its totality. The LPA has agreed that the methodology applied by the engineer relating levels to Ordnance Datum values are reasonable and therefore acceptable. The approach in question calculates expected finished floor levels to be at 3.4m AOD."*

155. We reviewed this information submitted by the Appellant and concluded that:

156. It had been put forward that there was an obligation to do work because there was planning permission in place. Planning permission is not however a legal obligation to do work in and of itself. Planning permission is applied for and granted in respect of a certain activity such as housing development. However, there is no legal obligation once the planning permission is in place to start the activity it permits. Even if the planning permission contained a specific condition within it such as to raise the land, there would still not be legal obligation to start the works. In looking at the legal obligation to do work consideration is also given as to whether the Local Planning Authority would enforce the obligation. The Planning Authority in this case seemed unsure as to whether there was planning permission in existence. The planning permission was granted in 1983 and the Local Authority have taken no enforcement action to date.

157. Furthermore, the previous appeal referred to by the Appellant (in paragraphs 130, 133, 133 and 135 above) is irrelevant. The previous appeal was in respect to the deposit of waste and subsequent removal as an exempt activity. The refusal of the permit application is on the grounds that there is no obligation to carry out the work and the risk of flooding to the surrounding area.

158. Therefore, whether the planning permission has been preserved in perpetuity or not, in and of itself the planning permission does not provide a legal obligation to do the work.

159. The Appellant's response failed to demonstrate that there was an obligation to do the work.

160. On 17 October 2017, we informally advised the Appellant that we were intending to refuse the permit application as the waste recovery plan did not meet the definition of recovery based on;

- no evidence to demonstrate that there was an obligation to do the work and;
- consideration of flood risk to the surrounding areas.

This is attached at **Annex A, section D, number 12.**

161. On 06 November 2017 NRW PS advised the Appellant that our request was for evidence that there was an obligation to carry out the work. NRW PS advised that this isn't the same as planning permission, which allows you to do certain work i.e. build houses, without necessarily setting any obligations. NRW PS advised that the waste recovery plan should have set out exactly how they would meet the planning obligations imposed, and why waste recovery is the most appropriate solution for meeting the obligation. This is attached at **Annex A, section D, number 14.**

162. On 27 November 2017 the Appellant requested that the determination date be extended until 31 January 2018 to allow them the opportunity to provide flood modelling information to demonstrate that the activity would not increase the risk of flooding to the surrounding area. This is attached at **Annex A, section D, number 16.**

163. On 28 November 2017 NRW PS agreed to the Appellant's request to extend the determination date in order for them to revisit their answers to the Schedule 5 Notice for further information in relation to our concerns to flood risk from the activity. This is attached at **Annex A, section D, number 16.**

164. We advised the Appellant that before they continued with any further assessment (in relation to flood risk) that we were still of the opinion that evidence for a legal obligation to raise the land had not been provided and as such activity did not meet the definition of recovery. We reminded the Appellant that planning permission per se is not a legal obligation to do the work. This is attached at **Annex A, section D, number 16.**

165. To conclude, the information submitted by the Appellant failed to demonstrate that there was an obligation to do the work.

RESPONSE TO GROUND 2

166. In response to Ground 2, the site is completely within flood zones 3 and 2. This is attached at **Annex A, section C, number 2.** It is also within Development Advice map zone C2 (as per Technical Advice Note 15: Development and Flood Risk). This is attached at **Annex A, section C, number 3.** TAN15 is a document that supports Planning Policy Wales and is the guidance document which NRW use in assessing Flood Risk Management in development proposals and consultations such as this Waste permit applications. In accordance with the guidance 'How to apply for a waste recovery environmental permit to permanently deposit waste on land', waste recovery plans must include how the work carried out will meet quality standards. This includes demonstrating that the finished scheme does not result in any environmental problems including such as the increased risk of flooding in the surrounding area. This was not considered or addressed in the WRP. This is attached at **Annex A, section C, number 5.**

167. Given the sensitivity of location and the risk of flooding to the surrounding area from the proposed activity, NRW PS requested the Appellant to submit hydraulic modelling work/flood assessment as evidence to demonstrate that the activity would not increase the risk of flooding to the surrounding area. This information was requested in Schedule 5 Notice 1 (dated 27 June 2017). This is attached at **Annex A, A.2, number 5.**

168. On 26 July 2017, the Appellant responded to the Schedule 5 Notice and provided a revised version of the waste recovery plan. This is attached at **Annex A, section A.1, number 11 and Annex A, section D, number 8.** Although some of the additional information supplied by the Appellant satisfied the requirements of the

Schedule 5 Notice, the information was speculative and not substantiated by evidence.

169. On 11 August 2017 NRW PS informed the Appellant of our conclusions to the information provided in response to the Schedule 5 Notice. This is attached at **Annex A, section D, number 9**. NRW PS gave the Appellant the opportunity to provide further information to address the concerns and requested that this information be submitted by 29 August 2017. This is attached at **Annex A, section D, number 9**.

170. In response to the further information submitted on 26 July 2017 by the Appellant on flood risk, NRW PS informed the Appellant that the information provided was speculative and not substantiated by evidence. NRW PS respectfully reminded the Appellant that evidence (flood modelling work/Flood Consequence Assessment) should be provided to support the further information. This is attached at **Annex A, section D, number 9**.

171. On 29 August 2017 the Appellant provided clarification regarding the information previously submitted in relation to flood risk. This is attached at **Annex A, section D, number 10**.

172. On 13 September 2017 in order to allow us sufficient time to assess the Schedule 5 response, NRW PS emailed the Appellant and requested that the statutory determination date be extended until 16 October 2017. This is attached at **Annex A, section D, number 11**.

173. On 14 September 2017 the Appellant agreed to extending the determination date until 16 October 2017. This is attached at **Annex A, section D, number 11**.

174. On 17 October 2017 NRW PS informally advised the Appellant that we were intending to refuse the permit application as the waste recovery plan did not meet the definition of recovery based on;

- no evidence to demonstrate that there was an obligation to do the work and;
- consideration of flood risk to the surrounding areas.

This is attached at **Annex A, section D, number 12**.

175. On 31 October 2017 the Appellant agreed to the determination date being extended until 30 November and requested the following information:

176. “Project Appraisal Report by Faber Maunsell Ltd in respect of coastal defence improvements carried out during 2008 along with pre and post scheme flooding scenarios. We would be grateful also to receive any other flood modelling information held by NRW pertaining to the Morfa site including where available modelled depths, extents and flows for the various return periods including any allowances for climate change and GIS outputs where available.” This is attached at **Annex A, section D, number 13.**

177. On 06 November 2017, NRW PS re-iterated to the Appellant that our request was for evidence that they were obliged to carry out the work. We advised that this isn’t the same as planning permission, which allows you to do certain work i.e. build houses, without necessarily setting any obligations. We advised that the waste recovery plan should have set out exactly how they would meet the planning obligations imposed, and why waste recovery is the most appropriate solution for meeting the obligation. This is attached at **Annex A, section D, number 14.**

178. On 07 November 2017, NRW PS advised the Appellant that:

“The Project Appraisal Report by Faber Maunsell Ltd was commissioned by the Isle of Anglesey County Council who were the promoters of the coastal improvement scheme. As such, please contact the IoACC (Highways department) to obtain. With regards to flood modelling information pertaining to the Morfa site, the flood zone mapping is based on projected extreme sea levels for the area. To obtain the sea levels a formal data request should be made for product 4 requesting nodes 988 & 996. NRW are aware of two previous studies carried out by Weetwoods in 2006 and Datrys in 2016, both commissioned Eden Homes. NRW’s predecessors (Environment Agency Wales) did not accept the work in 2006 whilst the 2016 was not completed and omitted suggested flood scenarios which are required for consideration in any FCA”.

This is attached at **Annex A, section D, number 15.**

179. On 27 November 2017, the Appellant requested that the determination date be extended until 31st January 2018 to allow them the opportunity to review the flood information that NRW PS suggested that they should obtain in order to complete flood modelling. Once the Appellant had obtained this information they confirmed that they would contact NRW PS in order to arrange a meeting with NRW hydrological

specialists to discuss the scope of their response. This is attached at **Annex A, section D, number 16.**

180. NRW PS agreed to the request to extend the determination date and confirmed that a meeting would be arranged with NRW flood risk specialist. This is attached at **Annex A, section D, number 16.**

181. On 28 November NRW PS advised the Appellant that before they continued with any further assessment (in relation to flood risk) that NRW PS were still of the opinion that evidence for a legal obligation to raise the land had not been provided and as such activity did not meet the definition of recovery. NRW PS respectfully reminded the Appellant that planning permission per se is not a legal obligation to do the work. This is attached at **Annex A, section D, number 16.**

182. On 18 January 2018, the Appellant met with NRW flood risk specialists to agree the information to be used in flood modelling.

183. On 29 January 2018, the Appellant requested an extension to the determination deadline until 30 April 2018, in order to agree the parameters of the modelling and to provide this to NRW PS. This is attached at **Annex A, section D, number 17.**

184. On 29 January 2018, further to the Appellants meeting with NRW flood risk specialists NRW PS advised them of the following:

- "The baseline model should be run using 2006 topography for the site."
- "Please find attached our guidance "Flood Risk Management: Modelling blockage and breach scenarios".
- "We have also been advised that following the meeting it is noted that the road levels along Lon Islalt may be below the Extreme Sea levels (year 2118) and thus still water level overtopping volumes will also need to be assessed along with the volumes associated with wave action."

This is attached at **Annex A, section D, number 18.**

185. NRW PS also reminded the Appellant that as per their request of 27 November 2017, the statutory determination date was extended until 31 January 2018. NRW PS advised that in accordance with previous email correspondence to

the Appellant that our intention was to refuse the application. This is attached at **Annex A, section D, number 18.**

186. On 31 January 2018, NRW PS sent a chronology of the application to date to the Appellant. This is attached at **Annex A, section D, number 19.**

187. NRW PS advised the Appellant that sufficient opportunity had been allowed for the Appellant to provide the outstanding information. Furthermore, that it had been seven months since the original request for flood modelling and evidence of an obligation to carry out the work (requested via Schedule 5 Notice dated 27 June). This is attached at **Annex A, section A.2, number 5.**

188. The Environmental Permitting (England and Wales) Regulations 2016 stipulate the statutory determination period allowed to determine a bespoke permit as 4 months. This is attached at **Annex A, section B, number 1.**

189. When a Schedule 5 notice requesting further information is issued, the determination clock is “stopped” and the amount of time that is taken for the Appellant to respond is then added to the determination time. This is in accordance with the Environmental Permitting (England and Wales) Regulations 2016. This is attached at **Annex A, section B, number 1.** Without the requests to extend the application, the determination date should have been 04 September 2017.

190. NRW PS agreed to the request to extend the determination date until 30 April 2018. This is attached at **Annex A, section D, number 19.**

191. NRW PS advised the Appellant that given the amount of time that we had already allowed the Appellant to provide the information, that the flood risk modelling must be submitted by 16 March 2018. This is attached at **Annex A, section D, number 19.**

192. NRW PS advised the Appellant that the application would be refused on the basis that the Appellant had not provided evidence that there was an obligation for the work to be carried out. Therefore, the waste recovery plan did not demonstrate that the activity was for recovery purposes. This is attached at **Annex A, section D, number 19.**

193. NRW PS advised the Appellant that if flood risk modelling was submitted by the required date (16 March 2018) and NRW flood risk specialists considered that the modelling supported the Appellants claim that the activity would not increase the risk

of flooding to the surrounding area, that NRW PS would not include this as a reason for refusal in the decision document. However, if NRW flood risk specialists did not consider that the modelling demonstrated that there would not be a risk from the activity, our decision document will include this as a reason to refuse the application. This is attached at **Annex A, section D, number 19.**

194. NRW PS respectfully reminded the Appellant that they had the option to withdraw the application and re-submitting a new application when the Appellant had all of the information required to support the waste recovery plan. This is attached at **Annex A, section D, number 19.**

195. On 31 January 2018 the Appellant confirmed that they wished to extend the deadline for the determination date to 30 April 2018 and acknowledged the requirement for the flood risk modelling to be submitted by 16 March 2018. This is attached at **Annex A, section D, number 20.**

196. On 27 February 2018, the Appellant advised NRW PS that flood modelling would not be submitted. This is attached at **Annex A, section D, number 21.**

197. The Appellant proposed to revise the waste recovery plan to include a reduced area of the site to deposit the waste, using a reduced amount of waste. This is attached at **Annex A, section D, number 21 and Annex A, section E, numbers 5 and 6.**

198. The Appellant made three separate proposals to NRW PS in order to complete the activity of raising the land. This is attached at **Annex A, section D, number 21 and Annex A, section E, numbers 5 and 6.**

199. The proposals included the following:

Proposal 1 - The Appellant continued and completed the consented development (83 plots) in accordance with the approved details (as shown on drawing referenced 801G/13) using non-waste materials without the need to obtain an Environmental Permit to import waste as a recovery activity.

Proposal 2 - The Appellant continued and completed the consented development using non-waste materials and submitted a revised waste recovery plan with a reduced waste deposition area and reduced waste volumes pertaining to the latter phases of the scheme (the additional 38 plots as shown on drawing referenced 801G/13).

Proposal 3 - NRW PS issue an Environmental Permit for the works based generally on the proposals in the WRP in accordance with which the Appellant continued the consented development, agreeing any minor changes to the consented scheme agreed as part of the Environmental Permit with the Local Authority as necessary.

200. On 8 March 2018 NRW PS advised the Appellant of the following in response to the Appellant's proposals:

Proposal 1 – NRW PS would provide comments if consulted by the Local Planning Authority, and these would include (but may not be limited to) comments in relation flood risk. This is attached at **Annex A, section D, number 22**.

Proposal 2 - The application (including waste recovery plan) was submitted in March 2017. NRW PS requested further information via a formal Schedule 5 Notice on 27th June. This is attached at **Annex A, section A.2, number 5**. Some of the requested information was still outstanding.

This information would still be required even if the waste recovery plan was revised. Due to the length of time of the determination thus far, it was not reasonable for a revised plan to be submitted. This is attached at **Annex A, section D, number 22**.

NRW PS had to make a decision on the information submitted. This is attached at **Annex A, section D, number 22**.

NRW PS had agreed to extend the determination deadline until 30 April 2018 to provide the Appellant with the opportunity of submitting flood risk modelling. This is attached at **Annex A, section D, number 22**.

In addition to this, there was still the concern of flood risk to the surrounding area. Without evidence presented in support of any land raising/infilling, NRW flood risk specialists could not determine if the proposal would be acceptable in not leading to an increased risk of flooding elsewhere. This is attached at **Annex A, section D, number 22**.

For this site, NRW flood risk specialists would expect any proposal presented to us to have considered a range of tidal events up to and including that of the 0.1% annual exceedance event (1 in 1000) with allowances for climate change impacts. Tidal flood risk is possible from two sources with differing times to peak (time of High water) and possibly peak heights would differ. It is suggested that the main flood risk concern which will need addressing is that of flood waters entering and flowing

across the site from west would be impeded by the raising of the levels; this is likely to increase flood risks elsewhere. This is attached at **Annex A, section D, number 22.**

Adopting the precautionary principles taken for flood risk, that only by modelling the site could NRW flood risk specialists accept that impact on flood risk that any raising of site levels could have. This is attached at **Annex A, section D, number 22.**

Proposal 3 –NRW PS respectfully reminded the Appellant that as previously advised we would not grant a permit for this activity as the waste recovery plan did not suitably demonstrate that the activity was recovery and evidence that the activity would not increase the risk of flooding to surrounding area had not been provided. This is attached at **Annex A, section D, number 22.**

As the Appellant had the option of completing the work using non-waste NRW PS asked the Appellant to confirm if they wished to proceed with the application or if they wished to withdraw the application. This is attached at **Annex A, section D, number 22.**

201. On 15 March 2018 the Appellant confirmed to NRW PS of the following:

- that the application would not be withdrawn.
- since the application was submitted the Appellant had commenced the land raising works the subject of the application using primary materials comprising quarried limestone.
- Adequate information has been provided in the waste recovery plan to demonstrate the activity is recovery.
- Referenced the Tarmac case pertaining to Methley Quarry.
- Waste recovery plan has demonstrated that undertaking the activity using non-waste materials would result in financial gain. Eaden Homes have demonstrated an obligation to do the work in providing the planning permission. Waste recovery plan demonstrates an obligation and financial gain.
- The cessation of the flood modelling work is a direct result of NRW advising that we would refuse the application on 31 January. If NRW had not advised Eaden Homes would have instructed flood modelling.

This is attached at **Annex A, section D, number 23.**

202. On 23 April 2018 NRW PS advised the Appellant that as they had not withdrawn the application, we had completed the determination and would be refusing the permit application. This is attached at **Annex A, section D, number 24.**

203. On 11 May 2018 NRW PS formally refused the application. This is attached at **Annex A, section A.3, numbers 1 and 2, section A.4, number 1 and section D, number 25.**

CONCLUSION

204. The Respondent respectfully invites the Inspector to dismiss the appeal and uphold the Respondent's decision to refuse the application.

205. For the reasons set out above, the Respondent determined the application in accordance with relevant and applicable legislation and guidance.