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DOLMANS SOLICITORS

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Alex Bowder
Regulating Officer
Natural Resources Wales
Rivers House
St Mellons Business Park
Cardiff
CF3 0EY

OUR REF: PHEB.CT.ATL016-014

YOUR REF: Permit EPR/PP3993VS (Alex Bowder – Regulating Officer

DATE: 24th September 2019

EMAIL: clairet@dolmans.co.uk

Hand delivery

Dear Sirs

Our client : Atlantic Recycling Ltd
Permit Number : EPR/PP3993VS
Regulation 37 Notice dated 25 July 2019

We attach by way of service:

1. Environmental Permitting Appeal Form;
2. Grounds of Appeal

We confirm that this was e-filed at The Planning Inspectorate yesterday.

Yours faithfully

DOLMANS

The Planning Inspectorate
Yr Arolygiaeth Gynllunio

For official use only
Date received:

Twitter: @PINSgov

Further information about us is available on the Welsh Government website at http://gov.wales/topics/planning/appeals/?lang=en

The Environmental Permitting (England and Wales) Regulations 2016

ENVIRONMENTAL PERMITTING APPEAL FORM

If you need this document in large print, on audio tape, in Braille or in another language please contact our helpline on 0303 444 5940.

WARNING: Your appeal must reach The Planning Inspectorate within the statutory time limits for making an appeal as set-out in Schedule 6 of the above mentioned regulations.

PLEASE PRINT CLEARLY IN CAPITAL USING BLACK INK

A. APPELLANT - The name of the person(s) making the appeal **must** appear as an applicant on the application form. **If this is not the case the appeal cannot be registered.**

Name	ATLANTIC RECYCLING LIMITED
Organisation Name (if applicable)	

B. AGENT (if any) FOR THE APPEAL

Name	CLAIRE THOMAS
Organisation Name (if applicable)	DOLMANS SOLICITORS
Reference	PHEB.CT.ATL16-14

C. REGULATOR DETAILS

Name of Regulator	NATURAL RESOURCES WALES -
Regulators reference number	Permit No : EPR/PP3993VS ALEX BOWDER (REGULATING OFFICER)/ or GARETH DAVIES (TEAM LEADER SOUTH CENTRAL)
Application form dated	n/a
Date of Decision Notice (if issued)	25.7.19 – REGULATION 37 NOTICE

D. APPEAL SITE ADDRESS

Address	ATLANTIC ECO PARK NEWTON ROAD RUMNEY CARDIFF
Postcode	CF3 2EJ

	YES*	NO
Could the Inspector see the relevant parts of the appeal site sufficiently to judge the proposal from public land?		√
Is it essential for the Inspector to enter the site to check measurements or other relevant facts? * ***If the answer is 'YES' please explain below***		√

NOTE: The Inspector will usually visit the site unaccompanied by either party. But, if the relevant part of the site cannot be seen from a road or other public land, or it is essential for the Inspector to enter the site to check measurements or other relevant facts, we will contact you to arrange access for the Inspector.

	YES*	NO
Are there any health and safety issues at, or near the site which the Inspector would need to take into account when visiting the site? ****If yes, please explain in your grounds of appeal (section F)***	√	

Due to the nature of operations being conducted all visitors are required to sign in and be accompanied. The wider site is uneven although the area in question is on even ground. Full PPI is required and this can be provided at the address. There is a good mobile phone reception. There are numerous pieces of dangerous machinery/equipment on site. There are no dangerous substances. A ladder is not anticipated to be required, but should the inspector require a higher view point a cherry picker can be made available.

E. DESCRIPTION OF WORKS

E. DESCRIPTION OF WORKS

Please enter details of the proposed permit or license. This should normally be taken from the application form, but if the application was revised while it was with the Regulator for consideration, you may enter a description of the revised scheme. Please enclose a copy of the Regulators agreement to the change.

n/a

	YES	NO
Has the description of the development changed from that entered on the application form?		
Is the appeal site within an Area of Outstanding Natural Beauty?		
Does the site lie within a SSSI?		
Does the site lie within a conservation area?		
Does the site lie within a green belt/green wedge?		

F. REASONS FOR THE APPEAL

This appeal is against:

	Please tick
1. Refusal to grant an Environmental Permit	
2. Refusal to grant a variation of the conditions of an existing environmental permit.	
3. Conditions attached to an environmental permit following an application for a permit or variation.	
4. Conditions imposed on an environmental permit as a result of a regulator-initiated variation.	
5. Conditions imposed to take account of the partial transfer, partial revocation or partial surrender of the environmental permit.	
6. An Enforcement Notice, a Revocation Notice, Suspension Notice, Prohibition Notice, Landfill Closure or Mining Waste Facility Closure Notice.	√
7. 'Deemed withdrawal' of a duly-made application.	
8. Refusal of approval to initiate closure procedures or served with closure notice.	
9. Failure by regulator to give notice of determination of application for an environmental permit, variation, transfer or surrender within statutory time-period ('deemed refusal').	
10. Decision by the regulator to place information on the Public Register which the appellant consider to be commercially confidential.	

G. GROUNDS OF APPEAL

Please enter your grounds of appeal below. This is your opportunity to make your case in connection with the reason for the appeal as indicated in section F. To do this, you need to go through the reasons for the decision/notice, and explain why you disagree. Only the reasons within the Regulators decision/notice and the reasons put forward by you at application stage should be included on your appeal form. You should not introduce any new reasons for the appeal.

Please continue on a separate sheet if necessary

Please see attached separate document being Grounds of Appeal

H. COMMERCIAL CONFIDENTIALITY

	Yes	No
Do you consider that matters of confidentiality will arise during the appeal?		√

If any of the information enclosed with the appeal has been the subject of a successful application for commercial confidentiality under regulation 48 of the EPR please provide relevant details below. Unless such information is provided, all documents submitted will be in the public domain and will be open to inspection.

I. CHOICE OF PROCEDURE

Please note that we must also take the Regulators preference into account when we decide how the appeal will proceed.

*Please tick **ONE** box only* ✓

1. Written Representations

W ☐

This procedure involves an exchange of the parties' written statements, followed by a visit to the appeal site by the Inspector who is responsible for determining the appeal.

You and a representative for the Regulator will be given an opportunity to accompany the Inspector during the site visit.

2. Hearing

H ☐

A hearing is a discussion, held under the direction of the Inspector. It lets parties exchange their views in a less formal atmosphere than at a public inquiry. Hearings are open to the public and third parties may be heard at the discretion of the Inspector. Hearings are generally conducted in the spirit of the Town and Country Planning (Hearings Procedure) (Wales) Rules 2003, SI 2003 No. 1271. Hearings are not usually suitable for appeals that:

- are complicated or controversial and have created a lot of local interest; or
- require cross-examination of witnesses.

Please note that although you may prefer a hearing, the Inspectorate will also consider whether your appeal would be best dealt with at a more formal inquiry or on the basis of written representations.

3. Inquiry

I √

This is the most formal of procedures. Although it is not a court of law the proceedings will often seem to be quite similar as the parties to the appeal will usually be legally represented and expert witnesses will be called to give evidence; inquiries are open to the public and third parties may be heard at the discretion of the Inspector. In general, an inquiry is the best way to deal with a case that:

- involves complex legal issues;
- have caused a lot of local interest; or
- involve the need to question evidence through formal cross-examination.

An inquiry will be held if you, or the regulator, decide that you do not want to use the written representations procedure and we decide that a hearing is unsuitable. Sometimes, even if both parties have opted for the written representations procedure or an informal hearing, we may decide to hold an inquiry. If we do, we will tell you why.

If you want us to hold an inquiry, please set out your reasons below:

Please see attached Grounds of Appeal – paragraph 8 refers.

3. ESSENTIAL SUPPORTING DOCUMENTS

The documents listed in 1 – 6 below MUST be sent with your appeal form. If we do not receive all your appeal documents within the statutory appeal period, we may not be able to accept it.

Please tick the boxes to show which documents you are enclosing.

1	A copy of the **application form** which was sent to the Regulator	
2	A copy of any relevant **environmental permit**	√
3	A copy of the **decision** or **notice** (the subject of the appeal)	√
4	Any relevant correspondence with the Regulator	
5	If the appeal is against the Regulators failure to decide an application please supply a copy of the Regulators letter registering your application.	
6	A list (stating drawing numbers) and copies of all **plans, drawings and documents** sent to the regulator as part of the application. The plans and drawings should show all boundaries and coloured markings given on those sent to the regulator	
7	Additional plans, drawings or documents relating to the application but not previously seen by the Regulator. Please number them clearly and provide a list	

Personal Details

Personal Details on this page will not be publicly available

1. APPELLANT PERSONAL DETAILS

Address	ATLANTIC ECO PARK NEWTON ROAD RUMNEY CARDIFF
Postcode	CF3 2EJ
Daytime Telephone	02920 363888
E-mail	Phil@atlanticrecycling.co.uk

	English	Welsh
Language Preference	√	

	E-mail	Post
I prefer to be contacted by	√	

2. AGENT PERSONAL DETAILS (if any)

Address	DOLMANS CAPITAL TOWER CARDIFF
Postcode	CF10 3AG
Daytime Telephone	02920 345531
E-mail	clairet@dolmans.co.uk

	English	Welsh
Language Preference	√	

	E-mail	Post
I prefer to be contacted by	√	

The gathering and subsequent processing of the personal data supplied by you in this form, is in accordance with the terms of our registration under the Data Protection Act 1998. Further information about our Data Protection Policy can be found on our website under "Privacy Policy" (http://planninginspectorate.wales.gov.uk/privacy_policy)

PLEASE SIGN BELOW

I confirm that I have sent a copy of this appeal form and all relevant documents to the Regulator (if you do not your Appeal will not normally be accepted).

I confirm that all sections have been fully completed to the best of my knowledge.

I understand that you may use the information I have given for official purposes in connection with the Town and Country Planning Act 1990 and details including my name, the site description and my statement of case will appear in the public domain. By submitting this form I am agreeing to the use of the information I provide in this way.

Signature:	

Name (in capitals)	CLAIRE THOMAS	Date	23.9.19

On behalf of (if applicable)	ATLANTIC RECYCLING LTD

SEND

1 COPY to us at:	**1 COPY to the Regulator**	**1 COPY for you to keep**
The Planning Inspectorate Crown Buildings Cathays Park CARDIFF CF10 3NQ E-mail: wales@planninginspectorate.gov.uk	Send a copy of the appeal form to the address from which the decision notice was sent (or to the address shown on any letters received from the Regulator). There is no need to send them all the supporting documents again, send them any supporting documents not previously sent as part of the application.	

WHEN WE RECEIVE YOUR APPEAL

When we receive your appeal form, we will:

1. Tell you if it is valid and who is dealing with it.
2. If everything is in order, we will give you an appeal **start date** and **timetable**.
3. Inform the regulator of the start date of the appeal (if applicable).

If you submit information or representations late we may be unable to consider them, the Inspector may not see them and that may be returned to you.

At the end of the appeal process, you will receive the Inspector's decision in writing, which will include details of the Inspector's reasoning.

IN THE MATTER OF AN APPEAL BY ATLANTIC RECYCLING LIMITED

A SUSPENSION NOTICE DATED 25 JULY 2019

UNDER THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) REGULATIONS 2016, REGULATION 37(1) AND (5)

GROUNDS OF APPEAL

INTRODUCTION

Background

1. Atlantic Recycling Limited ("the Company") is the holder of Environmental Permit Reference EPR/PP3993VS ("the Permit") in respect of waste operations at the site at the Atlantic Eco Park, Newton Road, Rumney CF3 2EJ.

2. By way of document dated 25 July 2019, Natural Resources Wales ("NRW") served a Notice of Suspension and Requirement to take Steps on the Company under Regulation 37(1) and (5) of the Environmental Permitting (England and Wales) Regulations 2016 ("the Notice").

3. Regulation 37 of the Environmental Permitting (England and Wales) Regulations 2016 ("EPRs") provides, in part, that:

   > **37.— Suspension notices**
   > (1) The regulator may suspend an environmental permit by serving a notice (a "suspension notice") on the operator under this regulation.
   > ....
   > (5) If the regulator considers that the manner of operating a regulated facility contravenes an environmental permit condition, and that such contravention involves a risk of pollution or, in the case of a flood risk activity, a risk specified in paragraph (6), it may serve a suspension notice on the operator.

(6) The following are risks specified for the purposes of paragraph (5)—
(a) risk of flooding;
(b) risk of detrimental impact on drainage;
(c) risk of harm to the environment.

(7) A suspension notice served for the purpose of paragraph (2) or (5) must—
(a) specify—
(i) the risk mentioned in paragraph (2) or (5),
(ii) the steps that must be taken to remove that risk,
(iii) in a case where paragraph (5) applies, the matters constituting the contravention mentioned in that paragraph,
(iv) in a case where paragraph (5) applies, the steps that must be taken to remedy that contravention, and
(v) the period within which the steps mentioned in paragraph (ii) or (iv) must be taken,
(b) state that the environmental permit ceases to have effect to the extent specified in the notice until the notice is withdrawn, and
(c) if the environmental permit continues to authorise the operation of a regulated facility, state any steps (in addition to those already required to be taken by the environmental permit conditions) that are to be taken when operating that regulated facility.

....
(12) The regulator—
(a) may withdraw a suspension notice at any time by further notice served on the operator, and
(b) must withdraw a notice when satisfied that the steps specified in it have been taken.

The Suspension Notice

4. The Notice suspends the input of wastes onto Field 1. Field 1 receives and processes Refuse Derived Fuel waste. The Notice therefore precludes the Company from carrying on an important part of its business.

5. The Notice is based on an alleged contravention of permit condition 3.7.1. Condition 3.7.1 relates to "incident management – accidents, emergency and incident planning". It states that:

> "The operator shall manage and operate the activities in accordance with a written fire prevention plan using the current, relevant fire prevention plan guidance".

6. The Notice states the following:

"The reason for this decision is that, Natural Resources Wales consider that the operation of the regulated facility involves a risk of pollution, namely: Condition 3.7.1 of the environmental permit EPR/PP3993VS requires the operator to manage and operate activities in accordance with a written Fire Prevention and Mitigation Plan.

Waste storage of loose Refuse Derived Fuel Stockpiles on Field 1 is not compliant with this condition. This has resulted in a risk of pollution as there is a fire risk due to excessive quantities of loose Refuse Derived Fuel waste material being stored. The storage of this waste does not comply with the height restriction or separation distance requirements of your Fire Prevention and Mitigation Plan. Due to the volume of material stored across the permitted area, there is limited room available to enable emergency services to deal with a fire, if an incident were to occur.

The potential risk of pollution is the material catching on fire. As the stored waste contains elements of plastic, if it were to catch fire, the smoke would contain toxins. There are residents and businesses in the vicinity of the site, who would potentially have their health and work impacted by the smoke. The site is also surrounded by a series of drainage ditches/reens and lies within a Site of Special Scientific Interest, therefore any fire water run off entering these watercourses has the potential to cause a water pollution and damage to the environment."

7. The Notice also sets out "steps to be taken" in Schedules 2 and 3 of the Notice. Contrary to the statutory requirement in Regulation 37(7) of the EPRs, the Notice fails to specify the steps that are required to be taken to remedy the permit contravention. Schedule 2 is said to set out the "steps to be taken to remove risk of serious pollution". Schedule 3 deals with "Additional steps for non-suspended operations".

Mode of disposal of appeal

8. The Company appeals against the Notice and requests that the Appeal is determined by public inquiry. It proposes to call expert evidence and it is submitted that representatives of NRW will need to be cross examined.

Summary of appeal

9. The Company's grounds of appeal may be summarised as follows:

   (1) First, the Notice is invalid.

(2) Secondly, the statutory criteria for the service of the Notice were not satisfied.

(3) Thirdly, the decision to serve the Notice was unreasonable and disproportionate.

GROUND 1 - THE NOTICE IS INVALID

10. It can be seen from Regulation 37(7) of the EPRs that for the Notice to be a valid Suspension Notice for the purposes of the EPRs, it must *specify*:

    (1) First, the matters constituting the contravention of the environmental permit condition which is said to involve a risk of pollution and the steps that must be taken to remedy that contravention; and

    (2) Secondly, the risk of pollution said to be involved in the alleged contravention of that environmental permit condition and the steps that must be taken to remove that risk of pollution.

11. The statutory term "specify" means "state explicitly" (*European Metal Recycling Ltd v Environment Agency* [2012] EWHC 2361). A statutory notice which fails to comply with the statutory requirements of the legislative enactment under which it was served is not formally valid and is not a notice for the purpose of those provisions.

12. Moreover, a recipient of a statutory notice must be able to find out from the "four corners of the document" exactly what they are doing wrong and exactly what they are required to do (*Miller-Mead v Minister of Housing and Local Government and Another* [1963] 2 Q.B. 196). A notice must "properly enable the recipient to know what was wrong, why it was wrong and how the giver of the notice intended that what was wrong should be put right" (*BT Fleet Limited v McKenna* [2005] EWHC 387 (Admin)).

13. The Notice fails to achieve those requirements and is therefore invalid.

14. First, the Notice does not *specify* the matters constituting the contravention of the environmental permit condition. The Notice fails to provide any specific details as to how condition 3.7.1 is contravened and merely makes vague references to quantities,

and height restriction or separation distance requirements of the Fire Prevention and Mitigation Plan. In order to try and understand the Notice, the Company has had to look outside the "four corners of the document" to a Compliance Assessment Report ("CAR") of an inspection which preceded the Notice on 10 and 15 July 2019. The Notice itself does not properly enable the Company to know what was wrong and why it was wrong. This is in breach of the legal requirements referred to above.

15. Secondly, the Notice does not *specify* the steps that must be taken to remedy the alleged contravention of the environmental permit condition. Nowhere in the Notice is this addressed. In fact, there is no box in the Notice which deals with it.

16. Thirdly, the Notice does not *specify* the risk of pollution involved in the contravention of the permit condition. The Notice makes unparticularised reference to fire without any proper explanation as to how the matters alleged to be a contravention of the permit condition involved a risk of pollution from fire. Moreover, as explained below, the Notice fails to properly consider the issue and adopts an apparently confused approach as to the risk of pollution involved in the contravention of the permit condition.

17. Fourthly, the Notice does not *specify* the steps that must be taken to remove the risk of pollution said to be involved with the alleged contravention of condition 3.7.1. The requirement to specify such matters is not satisfied by stating, as in this case, matters such as, for example, that the operator shall remove the risk of pollution, namely risk of fire, by complying with the Fire Prevention and Mitigation Plan or that the operator shall take all steps as are necessary to prevent the risk of fire. This does not *specify* the steps that must be taken to remove the risk of pollution involved in a contravention of condition 3.7.1. The Notice is vague, imprecise and lacking in any suitable specific details. It is submitted that, as a matter of law, a Suspension Notice is required to set out with clarity and precision the means which NRW considers must be employed by the Company (see, for example, *European Metal Recycling Ltd v Environment Agency* [2012] EWHC 2361 and *Canterbury City Council v Bern* (1982) 44 P & CR 178).

18. Fifthly, the flaw in the drafting of the Suspension Notice is also demonstrated by reference to the fact that there is a mandatory obligation on NRW to withdraw the

Notice when the steps specified in the Notice are taken. Completion of the steps must therefore be capable of being objectively measured. A statutory notice must be predictable in its effect; compliance cannot merely depend on the discretionary judgment of NRW. Such an approach conflicts with the principle of legal certainty. In this Notice, however, for example, completion of the steps depends on when NRW is satisfied that the operator has taken all steps as are necessary to prevent risk of fire. It follows that the Notice is not predictable in its effect; it depends on the discretionary judgment of NRW as to what is necessary. This undermines legal certainty and it is why the EPRs requires NRW to specify the steps, i.e., NRW was required to set out those specific steps which it considered were necessary for the Company to take.

GROUND 2 – THE STATUTORY CRTIERIA FOR THE SERVICE OF THE SUSPENSION NOTICE WERE NOT SATISFIED

19. It can be seen from Regulation 37(5) of the EPRs that, before the power to serve a Suspension Notice is engaged, it must be the case that there has been a contravention of an environmental permit condition and that such contravention involved a risk of pollution. The Company disputes that the statutory criteria were satisfied.

20. As explained above, the Notice fails to provide any proper details of the matters alleged to constitute the contravention of permit condition 3.7.1 and how that contravention involved a risk of pollution. It merely makes unparticularised references to "a fire risk due to excessive quantities of loose Refuse Derived Fuel waste material being stored". It also makes unparticularised reference to "height restriction or separation distance requirements of your Fire Prevention and Mitigation Plan". In order to try and understand the Notice, the Company has therefore had to look outside the four corners of the document. The CAR which was issued following inspections on 10 and 15 July 2019 and which, therefore, preceded the service of the Notice stated the following in relation to an alleged contravention of permit condition 3.7.1:

> "**Section 3.3.3 – Storage pile sizes and Separation Distances**
> At the time of inspection, the storage dimensions of stockpiles across the permitted area were deemed to be non-compliant with your FPMP. It was

estimated that numerous stockpiles were exceeding the four-metre height restriction and that some fire breaks between loose RDF stacks were less than 12 metres.

Section 4.3 Quarantine Area
The proposed Quarantine area was not sufficient to effectively deal with a fire incident. The Fire and Rescue Service feel that the designated zone would be inadequate to manage the amount of waste stored on Field 1, given the space available. Section 4.3 of your FPMP states "the Quarantine Area should have a separation distance of at least 6m around its perimeter from adjacent buildings and waste piles". The proposed area did not satisfy this requirement.".

21. Please note that, although the Notice also imposes a requirement on the Company to create a Quarantine Area with a capacity to store 50% of the volume of the largest waste pile, nowhere in the Notice does NRW allege that there was a contravention of the permit conditions in relation to the Quarantine Area and/or that such a contravention involved a risk of pollution. In the absence of that, section 37 of EPRs does not empower NRW to impose a requirement in relation to a Quarantine Area. As a matter of statutory construction of Regulation 37 of the EPRs, only those steps which correlate with the contravention of the permit condition and the risk of pollution involved in that contravention of the permit condition can be imposed. Nonetheless, the issue of the Quarantine Area is addressed towards the conclusion of this section on Ground 2.

Storage pile sizes and separation distances

Separation distances

22. In the CAR which followed the inspections on 10 and 15 July 2019, it stated that:

> "…The separation distances between loose RDF Stockpiles 1, 3, 6 and 7 in Field 1 were complaint with Graph 1 of the FPMP guidance at the time of inspection. However, the fire breaks between Stockpiles 2 and 4 were non-compliant due to the volume of material present..".
>
> "…..Table 3 of your FPMP states: "the separation distance of 12m is maintained across site between loose waste piles regardless of the size and meets the minimum required separation distances detailed in the NRW FPMP guidance document". At the time of the inspection, there was machinery working on Field 1 processing material within the fire breaks. This not only compromised the separation distances, but blocked vehicle access to parts of Stockpiles 2, 4 and 5….".

23. Photograph 5 of the CAR is said to show a small pile of mixed waste deposited on Field 1 within the fire breaks between RDF stockpiles.

24. It can be seen, therefore, that, even on NRW's position, there had been substantial compliance across Field 1 in relation to separation distances. The area where it was said that the separation distance was inadequate is significantly small.

25. Moreover, in response to the comments in the CAR, the Company avers that:

    (1) It is acknowledged that a small waste pile was processed in an area between piles 2 and 4. However, the area referred to between piles 2 and 4 was not the entire length of the two piles. It was a very limited area at the end of these two piles. The area where it was said that the separation distance was inadequate is therefore very small in comparison to the total area.

    (2) In relation to the machinery said to be working on Field 1 processing material within the fire breaks, neither the guidance nor the site specific FPMP suggests that mobile machinery is not allowed to operate within fire breaks. Further, machinery is needed for processing material and can be moved instantly if a fire incident occurs. This machinery is part of the fire management plan and would likely be used if a fire incident occurred.

    (3) Moreover, a 360-degree access around all stockpiles is not a requirement of the guidance nor the site specific FPMP. WISH[1] guidance suggests that access be provided from both sides for a 20 metres wide stack, or from one side for a 10 metres wide stack. Such access was in place at the site.

26. It can be seen, therefore, that any contravention of the requirement in relation to separation distances was very limited in extent. Moreover, for the reasons developed in more detail below, this position must also be considered in the context of the wider fire prevention and mitigation measures which were in place at the Company's site.

[1] Waste Industry Safety and Health Forum

Storage pile sizes

27. In the CAR which followed the inspections on 10 and 15 July 2019, it stated that:

> "Table 3 of ARL's FPMP states that waste within all stockpiles shall be stored at a height of 4 metres. During the inspection, waste was being stored within stockpiles in excess of 4 metres and as a result, is not being stored in accordance with ARL's FPMP. Exceeding stockpile heights goes against fire mitigation and has contributed to a breach of condition 3.7.1 as a result. The storage of waste in excess of 4 metres is a direct consequence of storing too much waste on site and having to stack waste high in order to try and maintain compliant separation distances between piles".

28. The Company acknowledges that some of the piles were higher than 4 metres. It is important to note, however, that the parts of a FPMP – such as requirements within a FPMP in relation to stockpile heights - cannot be considered in isolation. The measures must be considered collectively. They are a package of measures which collectively are designed to achieve the aim of appropriately controlling risk of pollution from fire. It follows that, whether there has been a breach of the FPMP, depends on whether the factual position on the site undermines the objective of that FPMP. This can only be assessed by considering the overall measures which have been taken to achieve the aim of ensuring that the risk of pollution from fire is appropriately controlled.

29. This point appears, to some extent, to be acknowledged by the regulatory officers in the CAR which followed the inspections on 10 and 15 July 2019. The regulatory officers preparing that CAR did not consider that the exceeding of the stockpile heights set out in the Company's FPMP *in and of itself* constituted a contravention of condition 3.7.1; simply that it contributed to a contravention of that permit condition.

30. The wider measures which are in place to control risk of pollution from fire must also be taken into account so as to make a holistic assessment of whether condition 3.7.1 has been contravened and whether such a contravention involves a risk of pollution. Indeed, it is important to emphasise that, in relation to the Company's site, all the storage and processing in Field 1 is carried out on a concrete infrastructure with a sealed drainage system. Therefore, the only potential impact on the environment which could occur is if a significant and uncontrollable fire incident took place.

31. The comment in the CAR to the effect that "exceeding stockpile heights goes against fire mitigation and has contributed to a breach of condition 3.7.1 as a result" fails to weigh into the balance wider mitigation measures which were relevant to the assessment of whether there was a contravention of permit condition 3.7.1 and whether that contravention of permit condition 3.7.1 involved a risk of pollution.

Wider fire management measures

32. Neither the Notice nor the CAR issued following the inspections on 10 and 15 July 2019 have regard to the advanced fire prevention measures at the site. These include:

    (1) Temperature (thermal) monitoring within the waste.

    (2) Twice daily visual inspections of the waste.

    (3) Regular (daily) water spraying which damps down the outer layer of the waste to a depth of 300mm. This reduces the risk of surface fire spread but also acts as a barrier reducing oxygen ingress into the stockpile.

    (4) The site is manned 24/7 by means of workers on site (typically 6am to 6pm Monday to Friday) or, when workers are not on site, security staff. When on duty the security staff carry out regular full site inspection patrols.

33. Further, neither the Notice nor the CAR issued following the inspections on 10 and 15 July 2019 have regard to the advanced fire-fighting measures at the site. These include:

    (1) 4 x 13000 litres water bowsers equipped with water cannons capable of 2000 l/min; automatic refill with 5-minute turnaround and more than 30 metres height reach "throw".

    (2) Over 1 million litres of water available for fire-fighting. This is excluding use of fire hydrants which would be in addition plus the ability to recycle/reuse water already laid down.

    (3) Trained staff on call to respond to the site. Full access to all onsite equipment, i.e., excavators and loading shovels.

    (4) Availability of additional space to move uninvolved stock to adjacent field in the event of an incident.

34. These are matters which must be taken into account in determining whether there was a contravention of permit condition 3.7.1 and whether that contravention of permit condition 3.7.1 involved a risk of pollution.

Risk of pollution

35. The Notice demonstrates an apparently confused approach to the issue of risk of pollution. Indeed, it is to be noted from that the Notice that:

    (1) First, when setting out the "reason for this decision", the Notice states that the "risk of pollution" is "condition 3.7.1 of the environmental permit EPR/PP3993VS requires the operator to manage and operate activities in accordance with a written Fire Prevention and Mitigation Plan". This says nothing about the 'risk of pollution", still less does it specify the risk of pollution. Instead, it simply sets out the permit condition.

    (2) Secondly, subsequently in the Notice, there is a reference to "fire risk" which is alleged to be "due to excessive quantities of loose Refuse Derived Fuel waste material being stored". However, the details provided in the CAR, and which are alleged to be a contravention of the permit condition, are not to do with "quantities of waste". Rather, the matters in the CAR focus on separation distances between piles and the height of the piles.

    (3) Thirdly, later in the Notice, the Notice talks in terms of "potential risk of pollution" as opposed to "risk of pollution". The statutory criteria require there to be a risk of pollution, not merely a potential risk of pollution. The power to serve a Suspension Notice only arises where a contravention of an environmental permit condition involves a risk of pollution.

    (4) Fourthly, Schedule 2 of the Notice then states that steps are to be taken to remove the risk of "serious pollution". However, nowhere within the Notice does NRW provide any details to support the suggestion that there is a risk of "serious pollution". No such particulars are provided by NRW at all.

36. It can also be seen from the above that NRW failed to assess matters holistically – having regard to the wider fire prevention and mitigation measures at the site – when deciding whether the alleged contravention of condition 3.7.1 involved a risk of pollution. For the reasons already summarised above, including the wider fire

prevention and mitigation measures which were in place, it is disputed that there was a contravention of permit condition 3.7.1 which involved a risk of pollution.

Quarantine Area

37. The Notice also imposes a requirement on the Company to create a Quarantine Area that must have the capacity to store 50% of the volume of the largest waste pile on site. However, nowhere in the Notice does NRW allege that there was a contravention of the permit conditions in relation to the Quarantine Area and/or that such a contravention involved a risk of pollution. In the absence of that, section 37 of the EPRs does not empower NRW to impose a requirement in relation to such a Quarantine Area. As a matter of statutory construction of Regulation 37 of the EPRs, only those steps which correlate with the contravention of the permit condition and the risk of pollution involved in that contravention of the permit condition can be imposed.

38. In any event, a Quarantine Area is somewhere where (i) burning waste can be placed to extinguish it and (ii) waste can be isolated to prevent it catching fire. During the inspections in July 2019 there were areas on site available as a Quarantine Area. However, they were not to the size or at the location required by NRW. NRW have indicated during site visits that the Quarantine Area needs to be in the immediate vicinity of the stockpiles, i.e., within the boundaries of Field 1. The Company contends that the location of the Quarantine Area is not specified in the WISH guidance except that it should be within the boundaries of the permitted site. Fields 3 and 4 are within the boundaries of the permitted site as is the Transfer Station. It is right to note that the WISH guidance, NRW's current guidance and NRW's previous guidance does not provide any specific guidance on the size or location of the Quarantine Area.

39. The only document that sets out guidance on size is the Environment Agency's guidance. It recommends an area large enough to hold 50% of the volume of the largest pile. This recommendation was used when preparing the Company's FPMP. The 50% sized Quarantine Area is therefore a self-imposed condition; it is not one which is imposed by NRW's guidance. Both NRW and the Fire & Rescue Service have been asked to provide an explanation or a rationale for the size of the Quarantine Area being

an area which can hold 50% of the volume of the largest waste pile. They have not done so. Whilst the Company imposed on itself a condition for such a Quarantine Area, this was self-imposed condition. There is no bright line legal requirement for an area of such dimensions. An operator should not be penalised for imposing on itself a condition which is over and above that which is required as a matter of law. The question ought to be, what was legally required, i.e., what was necessary to ensure that risk of pollution from fire was appropriately controlled.

40. Indeed, the location and size of a Quarantine Area that is required must be considered having regard to the specific site of the Company, the wider measures in place at the site (such as the fire-fighting measures) and, for example, that the site has several excavators and shovels that can move, and generate gaps in, the piles of waste if required. Moreover, in terms of wider facilities at the Company's site, the site has two very large fields to the north of Field 1 (Fields 3 and 4) with Field 3 being directly north of Field 1 with easy and direct access. If material from an unaffected part of a burning pile needed to be removed then it could be temporarily managed in Field 3. Even if, for any reason, a burning part of a pile needed to be removed then temporary management of it in Field 3 would be appropriate in an emergency situation. The heavy clay geology of the site will prevent migration of water into the ground. Further, Field 3, like all other fields, has interceptor ditches that separates the field area from the designated SSSI field ditches and reens. Any run off from Field 3 area would run into these interceptor ditches and can be pumped and either removed off site or recycled.

41. To suggest, therefore, that the absence of a Quarantine Area, large enough to hold 50% of the volume of the largest waste pile, would constitute a contravention of the condition 3.7.1 involving a risk of pollution from fire would be overlook these wider measures and the wider facilities which were in place at the Company's site.

<u>Summary of position</u>

42. For the reasons explained, the provision of wider fire prevention and mitigation measures at the Company's site must be taken into account when assessing the risk of

pollution said to be involved with a contravention of a permit condition. The Company disputes that the statutory criteria for the service of the Notice was satisfied.

GROUND 3 – THE DECISION TO SERVE A SUSPENSION NOTICE WAS UNREASONABLE AND DISPOROPRTIONATE

43. In the light of the matters set out above, it is also contended that the decision to serve the Suspension Notice was unreasonable and disproportionate.

44. The decision to serve the Notice and suspend the input of wastes onto Field 1 was a draconian measure. The Notice precludes the Company from carrying on an important part of its business. The matters which were of concern to NRW could properly have been addressed by a less intrusive enforcement response.

45. On any analysis, the risk of pollution from fire, if any, was limited in extent. Any concerns which NRW had could have been dealt with by a less intrusive enforcement response such as a Regulation 36 enforcement notice.

CONCLUSION

46. For the reasons summarised above, the Company appeals against the Notice. It seeks the quashing of the Notice. It will also seek its costs of the appeal.