****

**NOTE ON APPEALS TO THE PLANNING INSPECTORATE AGAINST THE REVOCATION OF A PERMIT BY THE ENVIRONMENT AGENCY- RANDOM JOTTINGS FROM THE SILK COAL FACE**

**By Richard Barraclough QC - Six Pump Court Chambers**
**Leading Counsel for a Waste Recycling Operator**

This note concerns an appeal against a revocation notice by the Environment Agency of a waste transfer permit in respect of which the Agency is regulator. It is not concerned with a determination of an appeal by written representations or inquiry.

PERMIT CONDITIONS

When granting the permit the Agency will impose such conditions as are” *necessary and enforceable*”.

The Environmental Permitting Guidance Core Guidance for the Environmental Permitting (England and Wales) Regulations 2010 deal with conditions in the following terms:

 “*”Necessary” means that the regulator should be able to justify at appeal if necessary the permit conditions it attaches. To be enforceable, conditions should clearly state the objective, standard or desired outcome of the condition so that the operator can understand what is required”.*

“*Permit conditions may comprise some or all of the following: conditions stipulating objectives or outcomes; standards to mitigate a particular hazard/risk or conditions addressing particular legislative requirements”.*

 *“The requirement to avoid any pollution risk must be interpreted in a proportionate way. In practical terms operators should tackle the risks of any pollution that could occur unless they are so small that further action is not justified”.*

CONSIDERATIONS

The Agency will consider inter alia the adequacy of the operator’s management system, its technical competence, its record of compliance with regulatory requirements and adequacy of financial competence and any environmental or other consequences of failure.

ENVIRONMENTAL MANAGEMENT SYSTEM

The Environmental Management System is an integral part of the management system and the Agency will not hesitate to scrutinise any EMS submitted. Any fragility in the EMS will show in a Compliance Assessment Report which will then be used when revocation is being considered. Whilst for simpler regulated facilities externally certified schemes or a full EMS will be less appropriate than for the complex facilities, they *“should still be carefully encouraged by operators and where appropriate encouraged by regulators”.*

It makes life simpler for the revocation and appeal process if the EMS has been certified.

TECHNICAL COMPETENCE

Where there are criticisms of the site and its management, the absence of provable technical competence in the form of Certificates of Technical Competence (CoTC) will count against the operator. Employees who have successfully completed the WAMITAB course will continue to attract breaches until the certificate is issued.

RECORD OF COMPLIANCE

A poor record of compliance is defined in general terms as *“… a poor record of compliance with regulatory requirements (such) that it appears unlikely that (the operator) would comply with permit conditions”.*

Risk based compliance assessment includes targeting those facilities that pose the greatest risk to the environment or human health, have poorer standards of operation, are failing to comply.

COMPLIANCE ASSESSMENT

Compliance Assessment Reports based on inspections may go unanswered by the operator. If so it will be difficult to counter the CARs at the hearing of an appeal. It is useful at least to engage with the Agency both to acknowledge the positives in the CARs and declare an intention to build on them, deal with the negatives and counter anything with which issue is taken.

 It may not be asserted by the Agency that the site has been the cause of pollution or that the operation involves a risk of serious pollution justifying a suspension notice. The absence of a suspension may not impact on the issue whether all enforcement tools have been exhausted before proceeding to revocation. It is likely to be relevant where the pollution conditions of the permit have not been breached and thus at least count in the proportionality argument.

When it comes to proceedings, the Agency will argue that a breach of the conditions as to competence and management generally will reflect the risk of pollution even if actual pollution has not resulted.

Noncompliance findings are classified according to the Compliance Classification Scheme. The scheme categorises breaches based on their potential for environmental impact. Thus category 1 is for a noncompliance which has a potentially major environmental effect; category 2 is for a potentially significant environmental effect; category 3 is for minor environmental effect and where there is no environmental effect, category 4.

It is important to note that there can be a degree of overlap in scoring eg a where a defect in the infrastructure results from poor management, maintenance records and emissions.

Compliance scores are accrued throughout the calendar year to produce the operational risk assessment (OPRA) compliance rating. All sites start the year with a zero compliance rating. The scores are then graded into bands to help distinguish sites that are generally compliant from those which are poor performers. Band A-C is considered to be generally compliant with Band D, E and F being poor performers. In order to fall into band F a site must accrue a total compliance score of over 150 points throughout the year. Once a site reaches the level of poor performer it remains there for the rest of the year.

When considering revocation the Agency will look at the banding over a number of years.

The scores attributed in the CARs may be high because any breach attracts a score whether or not the facts constituting the breach overlap with other permit conditions.

The officer has no discretion as to the award of scores.

It is important to appreciate that any significant score will impact on an appeal despite the lack of discretion argument.

Where revocation is for noncompliance there will be a protracted history of breaches. The Agency will take into account potential consequences for the environment and people, for legitimate businesses, culpability of the permit holder and whether noncompliance is deliberate, prior warnings, advice and guidance, repeated failures of infrastructure or other management controls, reticence in explaining the circumstances of a breach and lack of cooperation, repeated noncompliance despite warnings and guidance, and where the noncompliance is not prolonged, any serious impact as a result of the failure to take appropriate measures within a reasonable time despite warnings and advice.

REVOCATION

Revocation is a *“draconian power unlikely to be widely used”*, where exhaustive use of other enforcement tools has failed to protect the environment or where neither the Agency nor the operator can think of a solution to ongoing pollution.

The enforcement tools to be taken into account when determining whether the use of such tools has been exhausted will be advice, warnings, enforcement notices and where appropriate suspension although suspension is only appropriate where there is a risk of serious pollution and this may not be the case in all instances of revocation.

APPEAL AGAINST REVOCATION

An appeal lies to the Secretary of State who may appoint the Planning Inspectorate to determine the appeal. The appeal is on the merits. All factual and legal matters are considered afresh. An appeal may be conducted by written representations or through a hearing or inquiry.

The appeal will be conducted in the spirit of the Town and Country Planning (Hearings Procedure) (England) Rules 2000.

The Rules provide that hearing shall take the form of a discussion led by the Inspector and cross examination shall not be permitted unless the Inspector considers that cross examination is required to ensure a thorough examination of the main issues. The Inspector will identify what are in his/her opinion the main issues to be considered at the hearing and any matters on which he/she requires further explanation from any person entitled to appear or permitted to appear. Any such person is entitled to refer to issues which they consider relevant to the appeal but not identified by the Inspector. A person entitled to appear may call evidence but the Inspector may refuse to permit the giving or production of evidence or presentation of any other matter which he/she considers to be irrelevant or repetitious but where he/she refuses to permit the giving of oral evidence the person wishing to give the evidence may submit any evidence or other matter in writing before the close of the hearing. If cross examination is necessary the Inspector may close the hearing and direct an inquiry. The Inspector may allow any person to alter or add to a hearing statement received under the rules but the other party must have an opportunity of considering any fresh matter or document.

The appeal is made with detailed grounds and the Agency will respond with a hearing statement. The operator will prepare a statement and the Agency will reply.

That may not be the end of the documentary evidence. An appeal against revocation has the effect of allowing an operator to continue operating under the permit. Thus inspections will continue and CARs issued. The Inspector may be provided with evidence which may be as recent as days before the hearing despite any protest that the operator cannot deal with the evidence. It does mean that the Inspector may exercise a degree of latitude when it comes to addressing any late CARs in the hearing.

There is no reason why a further statement cannot be served on PINS and the Agency, dealing with any recent CARs or other matters which the operator considers should be considered and which it was not possible to deal with in the statement.

If the operator has not made representations against the historic CARs it will be difficult to address the merits or unfairness of a particular CAR although it will help if in the position statement an analysis of the good points which frequently emerge from an examination of the CARs can be put before the Inspector. Sometimes it is possible to create a positive picture from the CARs which will demonstrate that noncompliance has resulted from a particular problem which is now resolved. An analysis of the CARs may well demonstrate that many of the criticisms in the enforcement notices and notice of possible revocation have been resolved to the advantage of the operator even if other problems have arisen since. To leave the analysis to the hearing will irritate the Inspector and take up too much time. You should have as much before the Inspector in writing before the hearing. If you produce it on the day the least that can happen is that the Inspector will adjourn for an hour or so to consider the document.

It has been said that this appeal process is a unique and under analysed phenomenon. Previous decisions are used as guides although they are not precedent. The appeals may be less or more formal depending on the Inspector. One thing they are not is *“over judicialised”* by an insistence on the observance of court procedures. The Inspector will take the lead and say how he/she wishes the appeal to be conducted. As stated there is usually no cross examination of witnesses and no right to make speeches. There are occasions when an expert may be cross examined at the discretion of the Inspector but such questioning will be based on an inquisitorial principle bearing in mind that the Inspector will want help in his/her understanding of the case in respect of which a report is to be made to the Secretary of state.

Sometimes it may only be necessary to demonstrate that there is an issue between the parties eg in relation to an enforcement notice which is to be resolved by appeal. I have in mind a complex issue as to the exportation of shredded WEEE waste and GCO20 Electronic scrap, “Green “listed waste and pre notification under the TFS Regulations.

What would otherwise be a speech can be made subtly through the points to be addressed during the working of the agenda.

Whatever the procedure adopted the hearing must be full and fair and it is essential that any conflicting proposition is be tested. The rigorous examination essential to the determination of difficult questions must not be diluted. In the absence of cross examination the Inspector plays an *“enhanced role”* in resolving conflicts of evidence. As in an inquiry it is fair and appropriate for an Inspector to focus on the issues and be robust in giving clear indications about points which seem to him/her to be unrealistic or bad and requiring concentration on points where continued debate would be most helpful.

It may come as a surprise that a hearing which in the civil court may take a number of days can be dealt with by the Inspector in one day with a site visit and it remains a full and fair hearing.

Where there is a hearing or inquiry either party may apply for costs but an application for costs will only be allowed if the party claiming them can show that the other side has behaved unreasonably and put them to unnecessary expense eg where evidence is produced late in the proceedings. Thus one should take care not to seek to surprise the Inspector and Agency with evidence which should have been adduced before the appeal. Because it is a quasi inquisitorial procedure the inspector will not take kindly to ambush. The rule is that new evidence will only be accepted exceptionally where it is clear that it would not have been possible for the party to have provided the evidence when they sent their statement of case. The evidence must be relevant and necessary for his decision and not covered by other evidence and it must be procedurally fair to all parties to have the evidence taken into account. It may be possible to piggy back new evidence following recent CARs.

Where one of the complaints relates to the infrastructure it will be essential to have the matter addressed before the hearing. This may not always be possible where the infrastructure problem is difficult to address in which case the more expert evidence one can adduce the better. It is about demonstrating that the operator is serious about ensuring future compliance and significant expenditure is one way of demonstrating that degree of serious commitment, not simply a promise of expense.

One should bear in mind that the hearing of an appeal will take place in the area of the site and may be in a local hall or some other convenient place. The Inspector may have visited the site before the hearing to have a look from the outside and will wish to visit probably on the day of the hearing. If therefore the site is in a mess it will not assist the operator.

When he or she visits the site there is no reason why an Agency officer cannot point out matters of interest and it is therefore essential that the operator or management is present to be able to hear what is being said and if there is a disagreement to say so.

The appeal is unlike a normal civil appeal and one should be prepared for a long day sitting from 10 am until one is finished with a site visit to follow if daylight permits. The inspector will have his/her own room; the parties their own and then the hearing room. The Agency is likely to set everything up.

The inspector will enter the hearing room on time. There is no usher to summon the parties and so it is wise to be there in the room on time.

It is hopeless to think that one can go into an appeal such as this without having mastered every detail of the case, from regulations and guidance to the reasonableness of the revocation based on whatever the grounds are.

The Inspector will produce an agenda and so one needs to be able to address each of the issues which he/she wishes to address without having had notice as one might in the civil courts. Essentially the agenda is likely to cover any procedural matters, the documents in the case, regulations and guidance and the issue namely was the revocation reasonable based eg on the competence of the operator, management competence, technical competence with qualifications, and the record of compliance; whether the exhaustive use of enforcement tools has failed to bring the operator into compliance and protect the environment, the tools used, the response to enforcement and environmental impact.

Whilst there is no calling of evidence as such and no cross examination when the Inspector asks questions it is sometimes possible to ask further questions of whoever is providing the information provided it is done in a manner which seeks information for the Inspector. It is a process of formal discussion, not a free for all.

It is likely that the Agency will have the officers and solicitor and possibly Counsel present. Counsel then takes the lead but will often turn to the officer for information or the Inspector may address the officer direct.

It is helpful for the operator to have one or more director present and any number of management or operatives who might be able to answer relevant questions put by the Inspector.

If an adjoining landowner is supportive it will be useful to have someone from that company to be present. They will have been notified of the proceedings. Sometimes they may have information relating to the history of the site which proves useful.

It is difficult to predict how the hearing will be run but the role of Counsel representing the operator is to seek to bring the evidence together, to ensure that each point is adequately answered, that nothing positive escapes the attention of the Inspector.

It is useful to discuss with the operator who of the individuals present is able to answer various questions which might be asked by the Inspector or raised by the Agency.

 It does not help to engage in acrimonious debate before the Inspector. It is better to get the issue out in the written documentation and let Counsel highlight it, leaving the Inspector to see how he/she wishes it to be dealt with. Speaking over one another in the hearing is of no use.

The best advice we might give is to prepare the written documents with care and to master every detail of the case and anticipate the agenda. If you do not, you can be sure the Inspector will have done so. Oh and take your hard hart and fluorescent jacket to the site which you will have visited before the Inspector sees it. It is only by visiting the site that you can get a proper feel for the issues.

REFERENCES

WASTE FRAMEWORK DIRECTIVE 2008/98/EC

WASTE (ENGLAND AND WALES) REGULATIONS 2011

ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) REULATIONS 2010

CORE GUIDANCE FOR THE ENVIRONMENTAL PERMITTING (ENGLAND AND WALES) REGULATIONS 2010

REGULATORY GUIDANCE RGN EPR 11 ENFORCEMENT POWERS

REGULATORY GUIDANCE RGN EPR 5 OPERATOR COMPETENCE

ENVIRONMENT AGENCY “HOW TO COMPLY WITH YOUR ENVIRONMENTAL PERMIT”

TOWN AND COUNTRY PLANNING APPEALS (HEARING PROCEDURE) (ENGLAND) RULES 2000

BUSHELL V SEC. OF STATE FOR THE ENVIRONMENT 1981 AC 75

SOUTH BUCKINGHAMSHIRE DC V PORTER (NO 2) 2004 UKHL 33 2004 1 WLR 1953

E V SEC. OF STATE FOR THE HOME DEPARTMENT 2004 EWCA CIV 49 2004 QB 1044

SOUTH CAMBRIDGESHIRE DC V SEC. OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT 2008 EWCA CIV 1010

TESCO STORES LTD V SEC. OF STATE FOR THE ENVIRONMENT 1995 1 WLR 759

DYASON V SEC. OF STATE FOR THE ENVIRONMENT AND CHILTERN DC 1998 JPL 778

CROYDON LBC V SEC. OF STATE FOR THE ENVIRONMENT 2000 PLCR 171

TURNER V SEC OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT 2015 EWCA 582

PLANNING INSPECTORATE APPEAL DECISIONS