



## R (on the application of Lafarge Aggregates Limited) v Secretary Of State For Environment, Food and Rural Affairs And The Environment Agency [2015] EWHC 2388 (Admin)

### Waste Recovery Operations And The Planning System

In Lafarge Aggregates Mrs Justice Patterson considered the nature and definition of waste recovery operations and the interaction with planning permission.

### Environmental Permits And Waste Recovery Operations

The deposit of waste requires an environmental permit for which an application is made to the Environment Agency (EA) under the Environmental Permitting (England and Wales) Regulations 2010. A permit is required for both recovery and disposal of waste.

The guidance produced by Defra on environmental permitting under Directive 2008/98/EC or the Waste Framework Directive (WFD) highlights the distinction between the two kinds of operation:

“3.5. One of the key aims of the Directive is to promote the better use of resources by encouraging the use of waste for beneficial purposes. To this end, recovery operations which result in waste being used in place of primary resources are to be encouraged over disposal operations which are intended to simply get rid of the waste safely. It is necessary therefore to distinguish clearly between disposal and recovery operations. An environmental permit is normally required for both types of operations but the applicable requirements differ according to the type of operation.”

The Regulatory Guidance Note EPR 13 sets out five questions for the determination of applications for licences:

- i) Is there a clear benefit from the activity?
- ii) Is the recovered waste material suitable for its intended use?
- iii) Is the minimum amount of waste being used to achieve the intended benefit?
- iv) Is the waste being used as a substitute for a non-waste material?
- v) Will the proposal be completed to an appropriate standard?

### Recovery Defined

Art. 3(15) of the WFD states recovery to mean: “... any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil that function, or waste being prepared to fulfil that function, in the plant or in the wider economy...”

Annex II of the WFD provides examples of Recovery Operations which include R 10 Land treatment resulting in benefit to agriculture or ecological improvement.

### Background Facts

The claimant - Lafarge - the “mineral operator” of a site known as Methley Quarry near Leeds - applied for planning permission for an extension of a sand and gravel extraction up to a total of 432,700 tonnes followed by the importation of around 270,000 cubic metres of inert materials. At the time of the application, a public footpath ran across the site.



Planning permission was then granted with a condition that the path be restored to its original course after works had been completed which included the infilling of the site.

The planning consent was then varied in 2012 to allow mineral extraction until 30 November 2014 with full restoration by the 30 November 2015.

## Ea Refuses Licence Application

Because the activities involved the deposit of waste the claimant had to apply for an environmental permit.

The EA, which is responsible for determining applications for environmental permits under the Environmental Permitting (England and Wales) Regulations 2010 refused to grant an environmental permit on the basis that the waste recovery plan did not meet the standard rules criteria and was not a recovery operation. It concluded that the proposed operation was in fact a disposal operation.

Relying on the EPR 13 guidance the EA also indicated in their reasons for refusal that the amount of waste proposed to be deposited to raise the land was considered out of proportion to the intended benefit of the path restoration; that given the volume of waste to be deposited, they did not agree that it had been kept to a minimum required to achieve the intended benefits.

Importantly, they added that there had been no proper consideration of other activities which would not involve the deposit of waste, such as a bridge across the water filled quarry, which would achieve the same end-benefit of reinstating the path to its original location.

## Claimant's Appeal

After the subsequent appeal, the inspector identified the main issues in his decision letter as:

(a) whether the proposed activity would be recovery or disposal; (b) whether the whole of the proposed activity would be construction; and (c) in conclusion, whether the proposal meets the requirements or conditions of the standard rules permit applied for.

The Inspector observed that:

“At the heart of this case is whether the reinstatement of the excavated section of the Footpath would be likely to occur if waste were not to be used. The material that once occupied the void has been removed and it is a requirement of the planning permission that the site and Footpath be restored. The appellant's engineering explanation for the scale and design of the proposed land form for the reinstatement of the Footpath has not been shown to be inappropriate, and is agreed within the Statement of Common Ground.

Both the scale of the landform, and the resulting cost of using non-waste materials, would make it likely that alternative approaches would be considered for the reinstatement of the Footpath. These approaches would reasonably be expected to include the redesign of the proposed landform. ....

The operation described in the application has been shown to be an act of construction. However, and following consideration of all material in this case, for the reasons above it has not been demonstrated that the operations would be an act of 'recovery' within the terms of Art. 3(15) to comply with the standard rules applied for...”

The Inspector therefore dismissed the appeal. The basis of his decision, in short, was that the Claimant had not shown that if waste were not used for the restoration of the path, the operation would otherwise have taken place using non-waste materials.

## Judicial Review

The Claimant then launched judicial review proceedings, challenging the decision by the Inspector on eleven grounds. The fundamental contention was that the planning inspector's conclusion regarding the alternative options was unlawful as the restoration was a requirement of a condition on the planning permission for the quarry

Patterson J approached the issues generally on the basis that if it were established that the operation was covered by the category at R10 of annex II (“Land treatment resulting in benefit to agriculture or ecological improvement”), then that would be definitive that the operation would be a recovery operation.

If the claimant's operation is not within R10 its operation may still be a recovery operation if it satisfies the test set within article 3(15). That does not have any of the criteria used by the interested party in its guidance note. In this case, she commented, "it is impossible to say that what was proposed was within R10".

## Recovery: "What Would Otherwise Happen"

Article 3(15) sets a test whereby "recovery" requires the decision maker to have regard to what would otherwise happen in the event that waste could not be used to fulfil the operation in question.

If the function that the waste would fulfil would be otherwise fulfilled to the same extent by non-waste materials then the operation would be recovery.

As Patterson J points out, if the operation would not take place at all or would, but not to the same extent, then the operation is not recovery:

"69.[. . .] the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources.

70. It is for the national judge to apply that criterion in the present case in order to classify the deposit of the waste at issue in a disused mine as either a disposal operation or a recovery operation".

The "essential characteristic" of a waste recovery operation is therefore that the "principal objective" is the "useful purpose" in replacing the other materials which would be used otherwise.

Whether the proposal is a recovery operation on that definition is "therefore, "a judgment to be reached on the facts of the individual case and against article 3(15) WFD."

Patterson J commented generally:

"Article 3(15), in my judgment, has the clear objective of securing the conservation of natural resources by the use of waste instead of the natural resource thus enabling the natural resource to be conserved for more beneficial use elsewhere. In other words, the useful purpose of the waste is in its substitution of the natural resource which would otherwise have been used in a particular function. As part of that substitution exercise the waste used would have to be proportionate to the natural resource which the waste was replacing for it fulfil its function in accordance with the WFD".

## Alternatives And The Planning Regime.

However, there would be flexibility under the planning regime and so the alternatives come into play:

"The planning permission requires the reinstatement of footpath 51 by virtue of condition 41....

But it is entirely possible for an application to be made to vary the conditions imposed upon the planning permission under section 73 or 73A of the Town and Country Planning Act 1990....

The three alternatives considered here, namely, the infilling of the void without restoration, the construction of a bridge over the wetlands and the permanent diversion of footpath 51 were all part of a legitimate examination of alternatives required under the environmental permitting regime.

It has to be remembered that the inspector was determining a refusal of an environmental permit against a different legislative framework to that with which he would grapple in the determination of a planning application.

They are two different processes but that does not mean that in determining one the decision maker has to close his mind to the existence of the other. In my judgment, he is entitled to take the existence of the other statutory regime into account". .

She continued:

"The legal issue is whether it was correct for the inspector to embark upon and carry out the exercise of considering alternatives. In my judgment he was. As an approach not only was it entirely consistent with the opinion of the Advocate General in Abfall, it was consistent also with proper reading of article 3(15).

"As the defendant and interested party contend permitting the use of waste after the removal of the prior materials was not in replacement of non-waste materials that would otherwise be used.

The claimant's submission therefore omits a chapter in the planning history. By reason of the excavation the non-waste material had already been extracted albeit an unknown amount may have been left elsewhere on site.

There is, therefore, in my judgment, no basis for saying that the nature of the material prior to excavation being carried out was relevant here as there could be no substitution".

She therefore held that the correct approach to Article 3 (15) in the present circumstances was to ask what would in fact happen if waste could not be used. The planning condition may be relevant but not definitive in the light of the statutory powers available to remove or modify planning conditions;

### Evidential Burden

She considered where the evidential burden would lie in such circumstances:

In my judgment, it was for the claimant to demonstrate that its proposals either came within one of the illustrative recovery operations set out under annex II to the WFD or complied with the wording of article 3(15).

It follows that the burden was upon the claimant to demonstrate, on the balance of probabilities, that its proposal came within either of those categorisations.

Linking this with the planning permission conditions, the evidential burden in showing that non-waste materials would have been used instead of a variation to the planning condition lay with Lafarge.

She therefore dismissed the application.

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