PUBLIC ACCOUNTS COMMITTEE

ENVIRONMENTAL REGULATION INQUIRY

1. This is the submission of Gordon Wignall (9 pages total). My contact details are at the end of this document.

A. Introduction

2. I am a practising barrister / employed barrister and have been working in the waste and environmental permitting sectors for about 30 years.

3. My work arises in respect of difficulties encountered by operators when regulators dispute the meaning of a permit, or do not allow an operator to trade in a certain area, or contest whether or not a substance is or is not "waste".

4. Where it has not been possible for an issue to be resolved by the client, consultant or solicitor, then the matter is generally brought to a head by the service of a regulatory notice such as an enforcement or suspension notice. This will generate an appeal to the planning inspectorate (as the relevant independent tribunal). The alternative is for the client to bring the matter to a head, either by making an application to the High Court in public law proceedings, or where there is an automatic right of appeal to a regulatory refusal for permission, for instance direct to the Secretary of State.

5. The Call for Evidence refers to the Corry report and "Defra's Regulatory landscape". Dan Corry referred to risk-averse regulatory decision-making and the heavy influence of the "long-entrenched precautionary principle", missing the opportunity to achieve growth (Executive Summary).

6. Whilst this evidence refers to regulation by the EA, it should not be forgotten that local authorities also regulate permitted sites, some of them with considerable polluting capacities, such as steel works. Where they can, operators may use plant which is just under the relevant capacity limits in order to take advantage of less experienced staff working for local authorities. Much of what is said below about the EA applies to local authorities, although they have their own funding difficulties.

7. I am only involved in a very small number of regulatory decision-making processes and this submission does not intend to be critical of the many EA officers whose decisions are made cooperatively with operators.

B. Applying for an environmental permit

8. In applying for an environmental permit, there is a provisional stage during which the Environment Agency ("EA") checks that an application is "duly made". This stage is important for calculating certain steps set out in the current Environmental Permitting Regulations 2016 ("the 2016 Regulations"), in particular the date by which an application should be determined.

9. Permits come in two forms, standardised rules permits and bespoke permits. The standardised rules come in pre-packaged forms and the merits of an application for such a permit should be very straightforward. See the full list at: https://www.gov.uk/government/collections/standard-rules-environmental-permitting.

10. The 'duly made' stage should be a simple, straightforward process. The test is whether the application "seems adequate for us to begin to determine": has the fee been paid, has the application been made to the right regulator and has the "essential" information been provided? See Regulatory Guidance Note 3 *Deciding applications are duly made and requests for further information*.

11. The times by which a duly made application is to be granted are prescribed in the 2016 Regulations. For standard rules permits the time allowed is 3 months, and for bespoke permits the time allowed is ordinarily 4 months.

12. If a permit decision is not made by the prescribed date (which runs from the date of the application), then the applicant can appeal on the basis of a deemed refusal.

13. From discussions with environmental consultants and my own experience, I can say that these time periods are regularly exceeded by substantial periods of time.

14. Inappropriate requests for additional information are made, leading to some operators thinking that these requests are made deliberately in order to extend time-periods.

15. From a growth point of view, these delays are clearly extremely unsatisfactory. The EA urgently needs to focus extra staff in respect of the process of granting permits.

C. Regulatory guidance

16. Before guidance was moved to Gov.UK, the EA used transparently to work by reference to a set of Regulatory Guidance Notes (see for instance para.10 above). With the sensible use of discretion on the part of EA staff, these were used to produce practical working outcomes.

17. The picture today is mixed. Some relevant regulatory material is far too long and prescriptive, for instance in the case of the requirements relevant to obtaining a permit. There is a degree of overlapping guidance material on Gov.UK which makes it uncertain for an operator to understand how it is going to be regulated.

18. Some of the guidance material on Gov.UK is simple enough to read and understand, but it can be deficient where it does not include precise reference to the precise details of the applicable legislative provisions. The legislative targets at which the guidance is aiming need to be understood.

19. An operator's difficulties in understanding exactly what guidance is to be applied, are compounded by the fact that the EA applies "internal guidance" as well as that which is publicly set out. The status of this can be difficult to understand.

20. This is partly the consequence of the *Smarter Environmental Regulation Review*, launched in July 2012, itself intended "to reduce regulatory burdens". There was a Phase 1 report date 16 May 2013 and Terms of reference for Phase 2 were published in April 2014. However, the programme was abandoned by DEFRA in summer 2015, a fact which was only discovered after a contested FOI, the outcome of which was published in 12 October 2017 (ref. FS50658417).

21. RGN 3 (see above) and the other Regulatory Guidance Notes, for instance, are apparently still applied by the Environment Agency (RGN 2 and RGN 9 being still fully available). They can be located on Gov.UK, but RGN 3 is now marked "This document is out of date and was withdrawn (01/02/2016)", and the relevant Gov.UK page in respect of RGN 3 states: "Withdrawn because it has been reclassified as internal Environment Agency guidance". In other words, RGN 3 has not been withdrawn at all (because it is still available for the EA to apply), but the Gov.UK signals as to its status are very unclear.

22. Every now and then I come across evidence from the EA which refers to other forms of "internal" guidance, which an operator had no idea existed before the evidence was supplied. This guidance should be publicly available.

23. A useful contribution to growth would be for DEFRA and the EA to review the materials on Gov.UK to ensure compliance with sections 5 and 6 of the Regulators' Code (clear information and guidance, and transparency).

D. "Risk" and evidence-based regulation

24. The Regulators' Code requires regulation to be evidence-based and to focus on an assessment of the "risk" (see section 3). When it comes to the regulation of sites, my experience is that the main reason for the breakdown in relations between regulators and operators is a misunderstanding by individual officers as to what is meant by "risk".

25. An erroneous approach to the meaning of risk is endemic in EA / DEFRA regulatory publications and guidance as well as in the mind-set of officers during the process of regulating.

26. This is surprising since there are numerous publications available to assist with the risk-assessment process, for instance *Green Leaves III* (available at Gov.UK, although I do not recollect seeing it referenced on an environmental permitting page at Gov.UK).

27. The Health and Safety Executive, for its part, has had no difficulties in explaining what risk assessment is (see hse.gov.uk) and it should not be difficult for the EA to adopt a similar approach.

28. The key problem is the failure on the part of officers to understand the difference between a "harm" and a "likelihood" and that an appropriate risk assessment requires a degree of understanding of both. Too often "harm" and "likelihood" become amalgamated by the single word "risk".

29. The result of this confusion, in the cases in which I am involved, amounts to little short of speculation about the possible consequences of activities on a regulated site. The fact that officers feel able to indulge in such assertions can also lead them to suggest that what can only ever be a matter of opinion (since a statement about likelihood can never be more than an opinion), as though it were fact. This type of speculation occurs when officers fail to step back and look at their assertions in the round, and can too often fairly be said to be devoid of commonsense.

30. For instance, in one case it was asserted by the EA, first, that run-off which might occur from certain materials "has the potential to contain hazardous levels of heavy metals and asbestos", and to go on to state that this "could contaminate the food chain and impact plants and crops". There was then a long account of the potential perils involved to the environment if heavy metals or asbestos fibres were to accumulate in soil, and all as though these outcomes were in fact likely to happen. This was without establishing either the amount of run-off involved, the question whether there in fact there were any

heavy metals or asbestos present or likely to be present, or the likelihood of the material getting into plants, crops or the food chain.

31. As a regulatory approach this approach is unfair. First, the regulated party is always on the back foot, having to fight off ever-wider suggestions as to such "risks". Secondly, this approach appears to make officers think that evidence is not needed in order to assess the real risks, i.e. the actual harms or the likelihood that they might occur.

32. An important message to carry away from the above in the context of regulation, is that, whilst guidance documents need to be improved (see above), the key problem is not so much the written documents, but the fact that different officers have very different approaches to risk. In most regulated sites in which I have been involved, difficulties come when there has been a change in officers. Previous officers have regulated the sites with a good understanding of the potential harms and the likelihood that they might occur. In the context of risk assessment, the process of the training of officers is important in order to make sure that risk assessment is properly understood.

E. The precautionary principle

33. Experience shows that it is very likely that where an EA officer regulates an undertaking with an inappropriate understanding of the component parts of "risk" (i.e. harm and likelihood), there is also likely to be a plea to the precautionary principle, one of the "environmental principles" under the Environment Act, 2021.

34. Whilst there is no definition in the 2021 Act, the policy paper *Environmental principles policy statement* does contain the definition set out in the 1992 Rio Declaration: "where there are threats of serious or irreversible environmental damage, a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".

35. Too often officers misunderstand the precautionary principle.

36. The first error relates to the meaning of the words "threat of serious or irreversible environmental damage". Save arguably in the case of greenhouse gases and global warming, the only incontrovertible occasion when this part of the principle was without doubt applied was in the case of CFCs and other ozone-depleting substances.

37. Whilst environmental damage should always be avoided, it is not sufficient to apply the principle where the likely damage is not in fact "serious or irreversible".

38. The European Commission published a Communication *On the precautionary principle* (2 February 2000), which makes the further point that in reality the decision to act or not to act, is ultimately a political question.

39. The EA should either publish guidance as to what might constitute "serious or irreversible" environmental damage, or train its officers so that there is a consistent approach to this high standard.

40. The second error is to forget that resort to the precautionary principle is only appropriate "in the light of the best scientific evidence". It can then be relied on if "no reasonable scientific doubt remains as to the absence of such effects". (See C-127/02 *Waddenzee*.)

41. In practice, an officer is likely to assert that 'we just do not know whether or not consequence x will follow, therefore the precautionary principle requires us to say that the activity in question is unlawful'.

42. The EA should always make sure that it obtains sufficient evidence to support its regulatory approach, or alternatively to invite an operator, proportionately, to supply the best evidence.

F. End-of-waste determinations

43. Manufacturers need to be sure that when they are making products out of waste, that the EA will not subsequently disagree that the products meet the end-of-waste 'test' derived from the Waste Framework Directive and now part of UK assimilated law (Art.6). So too they need certainty that a by-product resulting from a manufacturing process will meet the by-product test (Art.5).

44. Material which is not waste which is held without a permit is likely to be the result of a criminal prosecution by reason of the Environmental Protection Act 1990. Likewise, a 'failed' by-product is likely to be classed as waste and is likely to be subject to the same criminal charge.

45. In a nod to the circular economy, in June 2022, the ECJ has made it easier for waste to meet the requirements of the end-of-waste criteria. This indication has been given in C-238/21 *Poor Bau GmbH*.

46. The tests as set out in Art.5 and 6 are very short and should not need elaborate scrutiny.

47. A manufacturer can either commission its own assessment that a product is not waste, or it can go to the EA's waste panel for a formal determination. In the case of the former

process, there is a right of judicial review in the High Court if the EA does not agree with the assessment.

48. As to the latter process, some of the material required by the EA in its template 'End of waste request form' is not strictly necessary, in particular its requirement for comparison sampling data.

49. The EA should consider (i) whether its end-of-waste assessment requirements meet the regulatory requirements of the Regulators' Code and the need to achieve growth, (ii) whether the exercise of its discretion to assess a product as non-waste promotes growth and (iii) whether its determinations are made speedily.

50. As to (ii) above, there is a real danger that the EA will take an over-cautious approach to the question whether the product being assessed causes "harm" to the environment (or other harms).

G. Waste and Quality Protocols

51. The Waste and Resources Action Programme formerly curated a set of Waste Quality Protocols, being relatively short documents which prescribed the circumstances under which waste material would be considered by the Environment Agency to be waste.

52. These were very well-prepared documents made by various stakeholders. The last one was *Aggregates from Inert Waste* (October 2013). There were once about 18 of them.

53. Responsibility for the Quality Protocols ("QPs") was assumed by the EA in 2015. However, the Gov.UK site now only recognises 13 QPs and it is clear that it would be unwise for any undertaking to rely on a QP in order to avoid the risk of being prosecuted for holding waste, rather than a non-waste product. The EA states that it has been holding a review, but this has been exceptionally slow and unproductive. See: https://www.gov.uk/government/publications/waste-quality-protocols-review/waste-quality-protocols-review.

54. It would substantially encourage growth if the EA were to prioritise its review and re-activate the QP process as a matter of urgency.

I. The appeals process

55. The scope of the PAC's inquiry should extend to the independent appeal process.

56. Where there is an appeal against a regulatory decision (such as the refusal to grant a permit), the decision is taken again by the independent tribunal who "has the same powers as the regulator" reg.31(5) of the 2016 Regulations.

57. Appeals are left to the Planning Inspectorate, so that ultimately a planning inspector becomes part of the regulatory landscape.

58. Appeals to the Planning Inspectorate (as an independent tribunal) were instituted before the First-Tier Tribunal was instituted in 2007. The First-Tier Tribunal hears a wide-ranging variety of cases, not all of which need a legally trained judge.

59. Planning inspectors are not particularly well qualified to deal with permitting and waste matters. A First-Tier Tribunal would enable fellow experts to reach a conclusion about what are sometimes very complex issues. They would have practical experience as to what the conditions of a well-drafted permit look like, and would be much better placed to understand those important practical and technical issues of which inspectors have no experience.

60. A Tribunal of this nature should also be assigned those waste and by-product cases which are currently heard in the High Court. The High Court is an even worse arena for a dispute since a judge in the administrative court will not hear contested evidence and will always defer to the EA (as a matter of law). A full appeal should be available for these cases rather than the administrative law review.

61. Complex cases could be heard by a judge and assessors, just as in the Competition Appeal Tribunal.

62. In addition, a First-Tier Tribunal could hear those smaller disputes in cases where the only remedy has been a complaint to the EA (leading possibly to an appeal to an Ombudsman), or a (disproportionate) judicial review. (See *R. (on the application of Suez Recycling and Recovery UK Ltd) v Environment Agency* [2023] EWHC 3012 in the case of site investigation reports.

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