



Neutral Citation Number: [2022] EWHC 1883 (Admin)

Case No: CO/4172/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2022

Before :

THE HONOURABLE MRS JUSTICE THORNTON DBE

Between :

THE QUEEN
(ON THE APPLICATION OF NEW EARTH
SOLUTIONS (WEST) LIMITED)

Claimant

- and -

ENVIRONMENT AGENCY

Defendant

- and -

(1) NOAH SOLUTIONS AS

(2) NORWEGIAN ENVIRONMENT AGENCY

Interested
Parties

Christopher Badger (instructed by **Mills & Reeve**) for the **Claimant**
Ned Westaway (instructed by **Environment Agency Legal Services**) for the **Defendant**

Hearing dates: 10th and 11th May 2022

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 14:00pm on Tuesday 19th July 2022.

The Hon. Mrs Justice Thornton:

Introduction

1. The Claimant, New Earth Solutions (West) Ltd, brings a claim for judicial review of the decision by the Defendant, the Environment Agency, to withdraw consent for the export of hazardous waste described as ‘Air Pollution Control Residue’ (“APCr”), also referred to as ‘fly ash’, to Norway. The decision was taken pursuant to the control regime for transfrontier shipment of waste laid down in EU Regulation 1013/2006 on shipments of waste and the domestic Transfrontier Shipment of Waste Regulations (2007/1711). The Environment Agency is the competent authority for England under the regime.
2. When notifying the Environment Agency of its proposal to export the APCr to Norway, New Earth Solutions specified the purpose of the shipment as waste recovery. The Agency initially granted consent but subsequently withdrew it on the basis that the purpose of the shipment was waste disposal. In contrast, the Norwegian Environment Agency, the competent authority for the country of destination, consented to the import of the waste on the basis it was a shipment for recovery.
3. The core issue between the parties is the correct categorisation of the waste operations, which take place in Norway, as a disposal or recovery operation.
4. The Environment Agency withdrew consent on the basis of two related assessments, both of which are challenged in this claim. The first is that the waste operations in Norway are properly classed as a D9 disposal operation under Annex I of the Waste Framework Directive (2008/98 EC), namely ‘physico-chemical treatment not specified elsewhere in this Annex which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1 to D12 (e.g., evaporation, drying, calcination, etc.).’ The second, and related, decision was that the principal purpose of the waste operations is waste disposal, not recovery.
5. New Earth Solutions contends that the waste operations comprise three separate and distinct waste processes: i) substitution of APCr for virgin limestone; ii) ‘neutralisation’ of sulphuric acid by mixing it (in colloquial terms) with the APCr; and iii) deposit of the neutralised mixture or treatment residue into landfill. It advances two grounds of challenge:
 - a. The Agency acted unlawfully in failing to classify the act of substitution of APCr for the raw material, pulverised limestone, as a recovery operation (Ground 1).
 - b. In the alternative, the Agency wrongly took into account the treatment of the sulphuric acid and subsequent disposal of the treatment residue in determining whether or not the substitution of APCr for pulverised limestone is, or is not, a recovery operation (Ground 2).

Factual Background

The parties

6. The Claimant is New Earth Solutions (West) Ltd (“New Earth Solutions”), a company which has developed and built a plant in Boston, Lincolnshire to collect and store APCr prior to export to Norway or Germany. New Earth Solutions holds an environmental permit, granted by the

Agency, for the repackaging and temporary storage of hazardous waste that allows the acceptance of up to 100,000 tonnes of APCr per year.

7. The Defendant is the Environment Agency (“the Agency”), the environmental regulator and the competent authority for England, in this case, the country of dispatch, under the transfrontier shipment of waste regime.
8. The First Interested Party is Norsk Avfall Shandtering AS (NOAH), the owner of the island of Langøya, situated in the Holmestrand Fjord and belonging to the Homestrand municipality of Vestfold and Telemark in Norway. The island is comprised of limestone. It was, for centuries, subject to quarrying including modern industrial quarrying of limestone for use in the cement industry starting in 1899. Quarrying ended in 1985 and the large craters created by the operations were later used for the deposit of hazardous and ordinary waste. In 1993, the island was acquired by NOAH, today owned by Gjelsten Holding. The APCr was to have been exported to the island.
9. The Second Interested Party is the Norwegian Environment Agency and the competent authority for Norway, the country of destination under the transfrontier shipment of waste regime. The Norwegian Environment Agency consented to the import of the waste on the basis it was a shipment for recovery.

APCr and how it is produced

10. Air Pollution Control residue (APCr) is the waste generated after contaminants are removed from gases produced in thermal processes, typically the combustion of municipal waste. Lime is used to ‘clean’ the gases (i.e., to remove the contaminants) before they are emitted to the atmosphere. APCr comprises predominantly lime and is strongly alkaline. APCr is a hazardous waste.

Description of waste treatment process(es) in Langøya Norway

11. Pigment manufacture at a titanium plant local to the island of Langøya generates an industrial acid waste stream. The acid waste is a corrosive liquid and comprises predominantly sulphuric acid with metal contaminants in solution. Historically, the acid was deposited into a local river, causing significant harm to local marine life before the practice was banned.
12. As a liquid and corrosive waste, sulphuric acid does not meet the waste acceptance criteria for deposit to land. Historically, the acid waste was treated with virgin limestone. This treatment process resulted in neutralisation of the liquid acid waste together with associated reactions which resulted in a reduction in the solubility and mobility of the metal and other contaminants, enabling the sludge generated to meet the waste acceptance criteria, so as to be suitable for deposit to land.
13. Instead of virgin limestone, the waste acid is now mixed with APCr, reducing the alkalinity of the APCr and reducing the acidity of the sulphuric acid, producing a treated sludge with a high calcium sulphate content. The toxic metals from both waste streams remain in the treatment residue but become less soluble as a result of forming metal sulphate compounds and the dioxins bound to the activated carbon are encapsulated by the sulphate compounds.

14. The sludge generated is then pumped into the Langøya quarry below sea level and the excess water drained off, to enable the waste to harden.

Chronology of decision making

15. On 23 December 2020, New Earth Solutions notified the Agency of its proposal to export 100,000 tonnes of APCr to Norway. The purpose of the shipment was said to be waste recovery with the waste operation specified as ‘recycling/reclamation of other inorganic materials’ (R5 in Annex II of the Waste Framework Directive) and the technology to be employed was described as neutralisation. The reason for export was said to be that ‘no facilities exist for this material in the UK’.
16. On 22 February 2021, the Norwegian Environment Agency consented to the export as an R5 recovery operation. On 24th February 2021, the Environment Agency also consented to the shipment. However, the Agency subsequently received an email from a Norwegian citizen questioning the Agency’s consent and querying whether there were facilities in the UK for the treatment and disposal of APCr. Accordingly, the Agency sought further information from NOAH, the Norwegian Environment Agency and New Earth Solutions.
17. On 10 June 2021, the Agency withdrew consent for the shipment on the basis New Earth Solutions had not supplied sufficient evidence to show that the deposit of the treated APCr in the quarry would meet the definition of a recovery operation and there were facilities for the material in the UK.
18. On 9 July 2021, New Earth Solutions requested an internal review of the Agency’s decision. A letter from its solicitors referred to the Agency’s ‘mistaken impression’ that APCr will be used as ‘a form of pre-treatment prior to disposal to landfill’. The letter explained that APCr was to be used as a direct substitute for virgin limestone to neutralise sulphuric acid waste. The operation was said to be a recovery operation which is complete at the point that the sulphuric acid waste is treated. The Agency was said to have fallen into legal error in considering the subsequent backfilling of the treatment residue:

“the fact that the treatment residue that is created is subsequently either backfilled or landfilled by the site operator is not a material part of this recovery operation. It is not necessary for NES to seek consent for the deposit of calcium sulphate in Langøya which is a separate and distinct waste operation conducted by NOAH.”

19. The letter from New Earth Solutions was accompanied by a report from an environmental chemist, Leslie Heasman, on the use of APCr as a substitute treatment reagent. Ms Heasman is a Chartered Chemist and fellow of the Royal Society of Chemistry. Her report explained that APCr has been used at the Langøya site since 1995 to treat the acid waste and to replace the use of virgin limestone. The APCr is used in the same way as the limestone and achieves the same treatment objectives. In her view, the use of APCr as a treatment reagent to substitute for virgin limestone meets the definition of recovery in Article 3(15) of the Waste Framework Directive. It is *“self-evident that the principal result is that the APCr serves a useful purpose as reagent substituting raw materials which would otherwise be used. I consider that the recovery of the APCr for use as a treatment reagent is likely to be*

categorised as an R5 operation... The APCr is not subject to, nor does it require, any pre-treatment prior to being used in the same way as limestone... The categorisation of the substitution of limestone by APCr should not be conflated with the separate categorisation of the use, or fate, of the treatment residue.”

20. In the course of its internal review, the Agency sought further information from New Earth Solutions, stating that:

“The additional information should, as a minimum, demonstrate why the mixing of the APC residue waste with discarded sulphuric acid can meet the criteria for a permanent deposit of waste into land, rather than be pre-treatment prior to disposal in a landfill. The information you have provided so far does not contain enough detail to allow me to fully understand this basis of the appeal.” (letter dated 29 July 2021)

21. New Earth Solutions responded by letter dated 17 August 2021, objecting to the Agency’s characterisation of matters:

“We would like to make it clear that this is not what our client is asking you to consider and not what it was asking the EA to consent. The operation at NOAH involving the use of air pollution control residues (“APCr”) is not a deposit for recovery operation. The recovery operation that our client is asking the EA to consider and consent is simply the recovery of APCr for use as a treatment reagent to substitute the use of a raw material, namely lime, in order to neutralise the sulphuric acid and convert it into an environmentally benign gypsum. We have enclosed a flow diagram which sets out the recovery process for which our client is seeking consent together with details of the subsequent processes employed at Langøya.”

22. A flow chart supplied with the letter identifies three stages of the process at NOAH’s site. The first stage (Process 1) is shown as substitution, with reference to ‘Alkaline treatment reagent. Lime or Air Pollution control residue’. An accompanying note states, *“This is the substitution process that comprises the recovery activity”*. Process 2 is described as a treatment process, in particular, ‘neutralisation of acid waste’ with the accompanying description *“The treatment achieves neutralisation of the pH, the formation of less soluble contaminant compounds, which are precipitated out from solution and the physical and chemical binding of contaminants into the sludge residue”*. The ‘neutralised treatment residue’ is then depicted moving into Process 3 for either recovery or disposal.

The decision under challenge

23. By letter, dated 10 September 2021, the Agency confirmed its decision to withdraw consent for the export on the basis that the proposed waste treatment operation is a disposal activity not a recovery operation. In summary, the reasons given were as follows:
- a. The initial decision to consent to the shipment was an error on the part of the Agency arising from working arrangements during Covid.
 - b. The treatment of the waste sulphuric acid with APCr does not amount to a recovery operation within the meaning of Article 3(15) of the Waste Framework Directive. APCr is hazardous, as is the sulphuric acid. Whilst the resulting treatment residue is less

hazardous than its component parts, it could not be considered benign, as New Earth Solutions had sought to suggest.

- c. New Earth Solutions' position was contradictory. The company had initially identified two waste operations; neutralisation followed by disposal and proposed that the Agency should only consider the former, not the latter. The company had since then suggested there was a further, and pre-cursory, operation of substitution which was the only operation the Agency could consider in deciding on the classification as disposal or recovery.
- d. As to substitution, the Agency did not accept *"that the mere decision to substitute one substance with another represents a recovery operation. Instead it is the substitution together with the reaction of APCr with sulphuric acid that forms a waste treatment operation. Annex I and II of the WFD appear to reference actual or concrete waste operations such as they occur in practice and not 'in principle' decisions to replace one substance with another."*
- e. In order to classify the reaction of the APCr waste with the sulphuric acid it was necessary to take account of the wider circumstances and the fate of the high sulphate waste. Any waste treatment operation could either be recovery or disposal. Having an appreciation of the wider treatment was consistent with the WFD. The waste treatment operation is best described as pre-treatment prior to landfill and the D9 disposal code is the most appropriate code. This view aligns with the definition of disposal in the WFD as it recognises the beneficial use of waste in disposal operations as a secondary consequence of the primary treatment operation.
- f. Even if the 'mixing' operation is to be judged strictly in isolation, there is a clear argument to say that this ought to be considered a disposal operation given the continued hazards association with the mixture.
- g. The case of SITA relied on by New Earth Solutions concerns an energy from waste operation and is not identical with the facts of the present case.
- h. Any disagreement between the UK and Norwegian competent authorities does not matter (Article 28(3) TFS Regulation).
- i. Accordingly, the treatment of APCr and discarded acid will amount to a disposal operation. In these circumstances the EA was obliged to follow UK policy, pursuant to which, shipments of waste to and from the UK for disposal are prohibited, save for a small number of exceptions which do not apply.

The views of the Norwegian and Swedish competent authorities

24. The Norwegian and Swedish competent authorities hold different views on classification of the waste operation(s) at NOAH's facilities.
25. The Norwegian Environment Agency considers the waste operations to be a recovery operation. It has explained its decision on the basis that NOAH needs to use suitable materials to neutralise and stabilise the sulphuric acid before landfilling. Regardless of whether NOAH obtains access to APCr the acid must be landfilled, but the landfilling cannot take place until the acid is neutralised and stabilised. APCr is highly suitable for neutralising and stabilising

the acid. NOAH can use limestone instead of APCr but it is less effective and large quantities of limestone must then be extracted. NOAH's use of APCr replaces the extraction and use of virgin materials (limestone) that would otherwise have been used. The principal result in this case is that the acid is neutralised and stabilised and this use of APCr is to be regarded as a recovery operation.

26. In contrast, the Swedish Environmental Protection Agency has expressed the view that APCr is used in a pre-treatment process (neutralizing and/or stabilizing other wastes) at NOAH's site. This process results in a new hazardous waste, which in turn is placed in a hazardous waste landfill. Although the APCr is useful in the pre-treatment, the treatment in its entirety is aimed for disposal of the waste (landfilling). The treatment should, therefore, be seen as disposal.

The legal framework

Introduction

27. International shipments of waste are strictly controlled by a framework of control laid down in the EU Transfrontier Shipment of Waste Regulation (Regulation 1013/2006 on shipments of waste) ("The TFS Regulation") and the Waste Framework Directive (Directive 2008/98/EC, as amended by Directive 2018/851) ("the WFD"), the latter which provides the foundation of waste law in the EU. The objective of the transfrontier shipment of waste ("TFS") regime is the protection of the environment with the effects on international trade being only incidental (Recital 1).
28. The TFS Regulation continues to apply as retained EU law. The domestic regulations, the Transfrontier Shipment of Waste Regulations 2007 (2007/1711) were subject to a number of amendments in connection with the UK's departure from the European Union, in particular the International Waste Shipments (Amendment) (EU Exit) Regulations 2019/590 making the TFS Regulation operable in UK law. The Waste Framework Directive is not retained EU law but is incorporated by reference in retained EU law and is the source of many of the principles applying in this case. Any decisions of the European Court of Justice prior to 31 December 2020 on the interpretation of key concepts found in the Waste Framework Directive or the TFS Regulation remain binding on the High Court.
29. The precise procedures and controls on shipments of waste depend on the origin, destination and route of the shipment; the type of waste shipped and the type of treatment to be applied to the waste at its destination (Article 1 TFS Regulation). Control is established via a system of prior notification of shipments of waste to competent authorities, enabling them to be properly informed about the proposed movement so as to take all necessary measures for the protection of environment and human health, including the ability to object to particular shipments of waste (Article 9 of the TFS Regulation and Part 5 of the Transfrontier Shipment of Waste Regulations 2007).
30. In England, the Agency is the relevant competent authority of dispatch (Regulation 6(a) 2007 Regulations). The Agency must comply with the current UK Plan for Shipments of Waste published by the Department for Environment, Food and Rural Affairs (DEFRA) (Regulations 11A and 15 2007 Regulations) which prohibits shipments of waste to and from the UK for disposal save in certain exceptional cases, which do not arise in the present case. The Plan implements long-standing UK policy of self-sufficiency in the disposal of waste by strictly limiting and describing the exceptions under which waste can be shipped to or from the UK

for disposal. Other countries in Europe do not have the same export policy as the UK and wastes can be exported from those countries for disposal.

31. For present purposes, the main relevant features of the TFS regime are set out below.

Distinction between waste shipped for recovery or for disposal

32. The distinction between the disposal and recovery of waste is of central importance in EU law on waste.
33. Article 4 of the Waste Framework Directive sets down a five-step waste hierarchy, in priority order, for waste legislation and policy as follows: (a) waste prevention; (b) preparing for re-use; (c) recycling; (d) other recovery, e.g., energy recovery; and (e) disposal. In this hierarchy, disposal is in last place, being the worst option. Recovery is in fourth place. In principle therefore, recovery is to be preferred over disposal. Recovery serves as a sensible use of waste as the waste replaces other materials which would otherwise have been used to fulfil a particular function. The distinction between recovery and disposal is based on a genuine difference in environmental impact through the substitution of natural resources in the economy and recognising the potential benefits to the environment and human health of using waste as a resource (Recital 19 of the WFD 2008).
34. Two significant policy drivers for waste management include the principle of self-sufficiency, whereby the European community as a whole should become self-sufficient in waste disposal, and the proximity principle whereby waste is disposed of in one of the nearest appropriate installations, in order to ensure a high level of protection for the environment and public health. Both principles militate against the movement of waste for disposal across borders (Article 16 of the WFD). The preamble to the TFS Regulation also notes that shipments of hazardous waste must be reduced to a minimum, a manifestation of the policy of self-sufficiency (Recital 8).
35. In similar vein, the EU TFS Regulation draws a clear and fundamental distinction between shipments of waste destined for disposal operations and those destined for recovery operations. Shipments of waste for disposal are actively discouraged and, subject to the imposition of ‘optimum supervision and control’ (see Recitals 14 and 20). In contrast, shipments of certain types of waste destined for recovery operations are subject to a ‘minimum level of supervision and control’ (Recital 15). The principles of proximity and sufficiency do not apply to waste for recovery so the waste can move freely between member states (see reference in SITA EcoService Nederland BV (formerly Verol Recycling Limburg BV) v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer (Case C-116/01) (“SITA”) at §25).

Definitions of recovery and disposal and lists of common operations

36. ‘Disposal’ is defined in Article 2(4) of the TFS Regulation by cross-reference to Article 3(19) WFD, which provides as follows:

“‘disposal’ means any operation which is not recovery even where the operation has as a secondary consequence the reclamation of substances or energy. Annex I sets out a non-exhaustive list of disposal operations.”

37. ‘Recovery’ is defined in Article 2(6) of the TFS Regulation, also by cross-reference to the WFD, (Article 3(15)), which provides as follows:

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

38. Both definitions refer to a non-exhaustive list of the relevant operations. Annex 1 sets out a list of 15 disposal operations, including: D1 (deposit into landfill); D2 (land treatment); D3 (deep injection); D4 (surface impoundment); D5 (specially engineered landfill); D6 (release into water body); D8 (biological treatment not specified elsewhere in this Annex which results in final compounds or mixtures which are discarded by means of any of the operations in D1-D12); D9 physico-chemical treatment not specified elsewhere in this Annex which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1- D12); D10 (incineration on land); and D15 (storage pending any of the operations numbered D1 to D14). Annex II sets out a list of recovery operations including: R1 (use principally as a fuel or other means to generate energy); R3 (recycling/reclamation of organic substances); R5 (recycling/reclamation of other inorganic materials) and R11 (use of waste obtained from any of the operations numbered R1 to R10).

39. The European Commission’s guidance explains the key distinction between recovery and disposal operations in colloquial terms, as follows:

“In a nutshell, disposal operations primarily result from waste management operations based on getting rid of waste, whereas the principal result of a recovery operation is ‘waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function or waste being prepared to fulfil that function in the plant or the wider economy.’”

40. In a decision of the House of Lords in United Utilities Water plc v Environment Agency [2007] UKHL 41, Lord Walker analysed the distinction as follows, at §15:

“But before exploring their intricacies I should draw attention to the very important distinction which Community environmental law makes between disposal and recovery. Disposal means, in colloquial terms, getting rid of rubbish as something worthless typically by landfill or by incineration. Recovery means making use of it typically by recycling it in one way or another. The terms in the French text of the Framework Directive (elimination and valorisation) bring out the distinction more vividly. The clear policy of the Framework Directive (since its amendment in 1991) has been to prefer recovery to disposal.”

The significance of the correct classification of a shipment of waste

41. Given the significance of the distinction between recovery and disposal and the variation in controls over such shipments, the correct classification of a waste operation as disposal or recovery is important. An incorrect categorisation is grounds for a competent authority to object to a shipment. One of the aims of the TFS Regulation, which is to render shipments of

waste for recovery easier than shipments of waste for disposal by laying down less restrictive rules for the former type of shipment, would be jeopardised if the classification of the purpose of those shipments were not scrutinised. A single operation may not be classified simultaneously as both a disposal and a recovery operation. To do so would put at risk the coherence and effectiveness of the legislation (Abfall Service AG (ASA) v Bundesminister Für Umwelt Jugend Und Familie (C-6/00) (2002) 1 CMLR 53 (“Abfall”) at §63).

A system of dual control

42. Prior notice of a shipment of waste must be provided to the competent authorities of dispatch and destination, via a notification document, which must include prescribed information laid down in Annex II of the TFS Regulation, including the purpose of the shipment (as either disposal or recovery) and:

“If the waste is destined for an interim recovery or disposal operation similar information regarding all facilities where subsequent interim and non-interim recovery or disposal operations are envisaged shall be indicated.” (Paragraph 5 Annex II Part 1)

“If the waste is destined for recovery: ... (d) the costs of recovery and the cost of disposal of the non-recoverable fraction.” (Paragraph 20 Annex II Part 1)

43. Each designated competent authority in the countries of dispatch and destination must check the classification by the notifier and object to a shipment which is incorrectly classified (Article 12 TFS Regulation).
44. The competent authority of dispatch is entitled to object to a shipment on the basis that it has been incorrectly classified as a recovery operation (Article 12(1)(h)), a provision of the TFS Regulation which was not in the 1993 version of the TFS Regulation. Both competent authorities must consent and neither bind each other (Article 28(3) TFS Regulation).
45. The judgment of each competent authority is determinative for the purposes of the statutory controls. That obligation derives, in particular, from Article 26 of the Regulation, which requires Member States to prohibit and punish any illegal traffic, in particular cases resulting from a knowingly false classification of the purpose of the shipment by the notifier, and from Article 30(1) of the Regulation, which expressly imposes a general duty on Member States to take the requisite measures to ensure that waste is shipped in accordance with the provisions of the Regulation (Provincia di Bari v Edilizia Mastrodonato srl (C-147/15) at §39 – 41).

Submissions

46. On behalf of New Earth Solutions, it is submitted that the waste operations at NOAH’s site in Langøya comprise three separate and distinct waste processes: i) substitution of APCr for virgin limestone; ii) ‘neutralisation’ of the sulphuric acid by mixing it (in colloquial terms), with the APCr; and iii) deposit of the neutralised mixture or treatment residue into landfill.
47. The APCr is recovered for use as a treatment reagent with the sulphuric acid, in substitution for the raw material, limestone, thereby conferring an environmental benefit. There is a process of

assessment and selection to ensure the alkalinity content of the APCr is suitable for use in this way. Even after acceptance, the APCr is continually monitored to ensure its ongoing suitability. Substitution is not a theoretical or ‘in principle’ decision as the Agency suggests. If the alkalinity of the APCr falls below 20% it is not accepted for use and slaked lime is used instead. Whilst the APCr does not need to be treated to perform its reagent role it needs to be suitable. Waste operations do not need to be complicated. As an example, Recital (22) of WFD reads: “*For the purposes of reaching end-of-waste status, a recovery operation may be as simple as the checking of waste to verify that it fulfils the end-of-waste criteria.*” Article 3(16) states that recovery operations can include “checking, cleaning or repairing”. Storage can amount to a waste operation. Substitution is a recovery operation, as defined in Article 3(15) of the WFD. Its principal objective is that the waste serves a useful purpose in replacing other materials (virgin limestone) which would otherwise have had to be used for that purpose. Accordingly, the Agency acted unlawfully in failing to classify the act of substitution of APCr for pulverised limestone as a recovery operation (Ground 1).

48. The second stage of the waste processes, neutralisation, sees the reclamation of APCr (R5) followed by subsequent disposal in landfill as a third and separate stage. The Agency has elided all three stages. Pursuant to the judgment of the European Court in SITA, the Agency should only have focused on the first of the three processes (substitution) at the site for the purposes of classifying the operation under the Transfrontier Shipment of Waste regime. The Agency should not concern itself with neutralisation of the sulphuric acid or the subsequent landfill activity, which is regulated by the Norwegian competent authority, and for which New Earth Solutions does not seek consent. The Agency is adopting the same approach to classification in the present case as the UK Government adopted in SITA, namely that each of the elements of a waste operation must be taken into account and a conclusion drawn on the basis of the overall contribution of the waste to the process as a whole. However, the European Court in SITA rejected this approach. Accordingly, in the alternative to ground 1, the Agency wrongly took into account the treatment of sulphuric acid and subsequent disposal of the treatment residue in determining whether or not the substitution of APCr for pulverised limestone is, or is not, a recovery operation (Ground 2).
49. The lists of recovery and disposal operations in the Annexes to the WFD should not be the primary focus in considering the classification of a waste operation. The lists may be helpful in clear cut cases, but their breadth and consequent substantial leeway for interpretation means they are less helpful in cases of ambiguity. Any conclusion that an operation is a ‘disposal’ operation must first consider the correct definition of ‘recovery’ in Article 3(15). The primary focus should therefore be on the principal objective of that operation. There is no indication in this regard that the Agency applied its mind to the appropriate and legally correct definition of ‘recovery’ in Article 3(15) of the Directive. The ‘principal result’ of an operation should be considered from the perspective of the waste operator in Norway and the issue of whether a particular operation is ‘recovery’ or ‘disposal’ is an issue of law, to be determined by the Court. It is not a question of the reasonableness of the Agency’s exercise of judgment.
50. On behalf of the Agency, it is submitted that the waste operations in Norway are correctly characterised as a D9 disposal operation (Annex 1 WFD Directive) and/or the main objective of the operations was the disposal of co-treated waste into landfill. The Agency was not confined to considering the selection of APCr in substitution for non-waste materials (Ground 1) or, alternatively, to the use of APCr as a neutralising reagent (Ground 2), in both cases ignoring the material fact that the resulting material is sent to landfill. The statutory terminology does not support New Earth’s interpretation which artificially disregards the underlying reason for carrying out the neutralisation operation (to ensure the waste is suitable for disposal to landfill). The treatment of waste acids for landfill does not become a recovery operation simply because it is co-treated with another waste stream, APCr, that also requires treatment prior to landfill. This would have potentially wider ramifications and would undermine the waste hierarchy by

treating disposal to landfill in the same way as genuine recovery operations. The Agency's interpretation is consistent with the statutory language, the statutory purpose and the approach taken in other cases.

51. The case of SITA is confined to its particular facts which do not arise in the present case. The lists of recovery and disposal operations are a necessary and appropriate focus. They remain an important reference point, despite the introduction of the definition of recovery in Article 3(15) of the Directive, which New Earth Solutions is obliged to disregard in order to sustain its challenge. Only in cases of genuine uncertainty or overlap will additional criteria need to be brought into play to assist in the task of interpreting the lists in Annexes 1 and II and in categorising the operations in any particular case as recovery or disposal. Consideration of the 'principal result' of waste treatment, for the purposes of the application of the definition of a recovery operation is prima facie a matter of judgment for the expert regulator, subject to any obvious errors of law in the exercise of its judgment in this regard. As the competent authority of dispatch, the Agency was entitled to come to its own view on the matter and the domestic Court in a judicial review should give weight to its view.

Discussion

Introduction

52. The core issue between the parties is the correct classification of the waste operations at the Langøya site in Norway as either disposal or recovery operations.
53. The two grounds of challenge advanced by New Earth Solutions overlap to a considerable extent. Both grounds rely on the application of the judgment of the European Court in SITA.
54. In coming to its contrary view that the operations are disposal operations, the Agency made two related decisions. First, it identified the operations as a D9 disposal operation, listed in Annex II of the Waste Framework Directive, namely 'physico-chemical treatment not specified elsewhere in this Annex which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1 to D12 (e.g., evaporation, drying, calcination, etc.)'. Its second and related decision was to identify the principal purpose of the waste operation as disposal, not recovery:

"... On consideration ... we believe that rather than recovery, the primary purpose of the proposed treatment operation is to safely dispose of the acid by way of neutralisation, using APCr ... in our view this does not amount to "recovery" within the meaning of the WFD..." (decision letter of 10 September 2021)

55. As referenced in the last sentence of the extract cited above from the decision letter, the Agency's conclusion in this regard is material because the definition of recovery in the WFD is 'any operation the principal result of which is waste serving a useful purpose by replacing other materials' (Article 3(15) WFD). The Agency contends that its assessment of the primary purpose of the treatment constitutes the application of judgment as competent authority under the TFS regime, to which this Court should afford deference.
56. In response, New Earth Solutions submits that, in considering the classification of the operations, the Agency should have not treated the lists of recovery and disposal operations in the Annexes to the WFD as its primary focus given the advent of the definition of recovery

in Article 3(15) of the WFD. Further, the classification of the shipment of waste is a question of law for the Court and not a matter for the exercise of the Agency's judgment.

57. Accordingly, the following issues arise for consideration by the Court:
- a. The application of SITA.
 - b. The interpretation and application of D9 of Annex I of the WFD.
 - c. The interrelationship between the lists of recovery and disposal operations in the Annex's and the definition of recovery in Article 3(15) WFD.
 - d. The role of the exercise of judgment by the Agency in its assessment of the 'principal result' of the waste operations.
 - e. Whether substitution of APCr for virgin limestone is a distinct waste (recovery) operation in its own right.

SITA and United Utilities v Environment Agency

58. New Earth Solutions places heavy reliance on SITA in support of its case that the Agency should only have taken account of the substitution of APCr for limestone in classifying the purpose of the shipment.
59. The claimant in SITA was a company in the Netherlands, which notified the relevant competent authority of its intention to ship two consignments of waste to be used in the cement industry in Belgium in a combined treatment process consisting of two stages. The first stage was combustion of the waste as fuel in cement kilns and the second stage was use of the ash residue as a raw material in the production of clinker which would be milled to make cement. Nothing would remain of the waste at the end of the process. The claimant described the consignment as waste intended for recovery, in particular, item R1 (use principally as a fuel or other means to generate energy) and R3/R5 (recycling/reclamation of organic/nonorganic substances). The competent authority rejected the use of the residue for the production of clinker as an R3/R5 recovery operation but accepted the purpose of the shipment could be considered a recovery operation, in particular an R1 operation (use principally as a fuel), but it should be subject to certain conditions. The claimant objected to the imposition of the proposed conditions.
60. In its judgment, the European Court introduced the issue of present relevance as follows:
- “By its first question the national court essentially asks whether, in the case where a waste treatment process includes several distinct stages, its classification as a disposal operation or recovery operation within the meaning of the [WFD] Directive must, for the purpose of implementing the TFS Regulation, be considered comprehensively, as constituting a single operation, or rather by examining each of the stages separately, as distinct operations.”*
(§34)
61. The Court went on to hold that, for the purposes of the WFD and TFS Regulation, a waste treatment process comprising several distinct stages was to be classified as either a disposal or recovery operation by reference to the first operation that the waste was to undergo after shipment only and not to the process as a whole (§49).
62. New Earth Solutions relies, in particular, on the following paragraphs of the judgment which, it submits, set down generally applicable criteria for the process of classification for the purposes of consent to export under the TFS regime:

“41. Nevertheless, while a single operation must be given a single classification in light of the distinction between a recovery operation and a disposal operation, a waste treatment process can in practice include several successive stages of recovery or disposal.

42. It follows from the Directive and the Regulation that, in such a case, the treatment process as a whole is not to be assessed as a single operation, but each phase must be classified separately for the purpose of implementing the Regulation when it constitutes a distinct operation in itself.

43. As is clear from the sixth indent of Article 6(5) and the fifth indent of Article 7(4) of the Regulation, an operation classified as waste recovery may be followed by a disposal operation of the non-recoverable fraction of that waste. In such a case, the classification of the first operation as a recovery operation is not affected by the fact that it is followed by an operation to dispose of the residual waste.

44. Moreover, point R11 of Annex IIB to the Directive makes clear that the use of residual waste obtained from any of the operations listed in that annex, in points R1 to R10, itself constitutes a recovery operation distinct from the recovery operation which precedes it. In accordance with the distinction thus laid down in the Annex, it must therefore be determined whether an operation falls under operations. R1 to R10 in that annex independently, without taking into account the possible subsequent use of the residual wastes obtained from any of those operations a use of which is itself covered by a separate operation.

45. As the Commission rightly points out, and as made clear by the Advocate General in paragraph 51 of his Opinion, when the question of classification of a waste treatment operation arises for the purpose of implementing the Regulation, only the classification of the first operation which that waste must undergo subsequent to its shipment is relevant in determining the purpose of that shipment.

46. When the Regulation refers to the shipment of waste and distinguishes between shipments of waste destined for disposal and those destined for recovery, it is directed at the treatment which that waste must undergo when it arrives at its destination, not the possible subsequent processing of waste which has been thus treated or its residues. Moreover, that processing may take place in a different treatment plant and following further shipment.”

63. The waste operations in play in SITA were R1, D10, R3, R5 and R11, in particular R1. It is apparent from paragraph 5 of the Court’s judgment that it had its mind on the relevant list entries:

“5 Annex IIA, headed “Disposal operations”, states “... D10 Incineration on land...”

6 Annex IIB, headed “Recovery operations”, states

“...R1 Use principally as a fuel or other means to generate energy... R3 Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes) ... R5 Recycling/reclamation of other inorganic materials...R11 Use of wastes obtained from any of the operations numbered R1 to R10...”

64. The relevant entries do not include a D9 operation.
65. I accept that paragraphs 41, 42 and 46, relied on by New Earth Solutions, are phrased in general terms, at least in the English language version of the judgment (the Court was not shown other language versions). However, paragraph 43 refers to the sixth indent of Article 6(5) and the fifth indent of Article 7(4) of the predecessor TFS Regulation (Regulation 259/1993). The former refers to *“the planned method of disposal for the residual waste after recycling has taken place”*. The latter provides that a competent authority may object to a shipment *“if the costs of the disposal of the non-recoverable fraction do not justify the recovery under economic and environmental considerations”*. These references lead the Court to conclude at paragraph 43 that *“an operation classified as waste recovery may be followed by a disposal operation of the non-recoverable fraction of that waste. In such a case, the classification of the first operation as a recovery operation is not affected by the fact that it is followed by an operation to dispose of the residual waste”* (emphasis added).
66. At paragraph 44, the Court draws on R11 in the list of recovery operations, ‘use of waste obtained from any of the operations numbered R1 – R10’, as indicating that the use of residual waste obtained from operations listed in R1 - R10, itself constitutes a recovery operation distinct from the recovery operation which precedes it. This leads the Court to conclude that *“In accordance with the distinction thus laid down in the Annex, it must therefore be determined whether an operation falls under operations R1 to R10 in that annex independently, without taking into account the possible subsequent use of the residual wastes obtained from any of those operations a use of which is itself covered by a separate operation”*.
67. Paragraph 45 of the judgment refers to paragraph 51 of the Advocate General’s opinion, which refers, in turn, to a composite waste treatment process which does not fall within any of the listed operations:

“In the case of a composite process which – as in the present case – cannot be accurately described as one of those listed operations, I concur with the Commission that it is the assessment of the first operation in the process which determines whether a shipment of waste intended to be subjected to the process requires notification under the Regulation as waste for disposal or waste for recovery.....”

68. It was nonetheless common ground that the waste operations under scrutiny comprised distinct operations:

“By its first question the national court essentially asks whether, in the case where a waste treatment process includes several distinct stages...” (§34)

“in the case in the main proceedings it appears from the order for reference that the national court is of the view that the processing which the waste at issue must undergo comprises two distinct operations.” (§47)

69. The decision of the House of Lords in United Utilities Water plc v Environment Agency (HL(E)) [2007] 1 WLR, is relied on by the Agency to dispute the application of SITA to the present case. United Utilities concerned the need for a Pollution Prevention and Control (PPC) permit, pursuant to the Pollution Prevention and Control Regulations 2000 (2000/1973), for aspects of operations conducted by United Utilities as part of its waste sewerage operations. Although focused on pollution prevention and control rather than the transfrontier shipment of waste regime, the House of Lords was required to consider section 5.3(c)(ii) of Schedule 1 of the PPC Regulations, which provides that a PPC permit is required for the ‘*disposal of non-hazardous waste . . . by... (ii) physico-chemical treatment, not being treatment specified in any paragraph other than paragraph D9 in Annex IIA to [the Framework Directive] which results in final compounds or mixtures which are discarded by means of any of the operations numbered D1-D12 in that Annex.*’ Accordingly, the House of Lords considered the D9 listing.
70. Lord Hoffman posed the rhetorical question of why it was not sufficient for the Regulations to simply designate physico-chemical treatment of the waste as an activity requiring a permit before stating that:
- “the answer is that it was necessary to distinguish between such treatment for the purposes of disposal and the same treatment for the purposes of recovery...the exclusion of recovery processes from the permit regime was no doubt part of a policy of encouraging recovery”.*
(§5)
71. In his analysis, Lord Walker distinguished D9 (and D8) operations from other operations listed in the Annexes of the WFD, describing them as ‘generically different’ from other of the operations. In particular, he acknowledged the necessity of identifying the destination of the waste following its physico-chemical treatment:
- 19 The purpose underlying section 5.3(c).... and both sides agree, with varying degrees of enthusiasm, that a purposive construction is needed - cannot be understood without looking at the whole of Annex IIA and Annex IIB to the Framework Directive.*
.....
- 20 Annex IIA contains 15 items, D1 to D15. D1 to D7 and D12 are all types of disposal by landfill or specialised methods akin to landfill. D10 and D11 are incineration (on land or at sea). All these activities are methods by which waste is finally disposed of D8 and D9, by contrast, are activities of treatment which produces a physical result (a product) which is “discarded by means of any of the operations numbered D1 to D12”. D13, D14 and D15 refer to ancillary activities (blending, repacking, and temporary storage).*
- 21 ...If I am right in supposing that D8 and D9 are generically different from the group of activities consisting of D1 to D7 and D10 to D12 (because that group lists activities by which waste is finally disposed of or discarded)*
- 26 ...it becomes apparent that some activities (D8 and D9) are defined, not only in terms of their physical product, but also in terms of the final destination of that product.... its meaning is to be spelled out,by looking to the product’s eventual destination when it is discarded.” (emphasis added)*
72. Moreover, and significantly, Lord Walker specifically rejected the applicability of SITA to D8/9 disposal operations:

“25 The SITA case does not seem to me to assist the appellant either. It concerned the shipment of waste glue and other substances from the Netherlands to Belgium for use in the cement industry by two sequential processes: first burning as fuel in cement kilns, and then production of clinker from the residue for use in cement-making. The Court of Justice’s decision that the first operation was decisive for classification purposes turned largely on the inclusion in Annex IIB of head R11 (“use of wastes obtained from any of the operations numbered R1 to R10”). There is no comparable provision applicable in this case. On the contrary, the possible interaction between D8 and D9 suggests that intermediate activities are relevant to the definition of “installation”. (emphasis supplied)

73. On the basis of its analysis of the D9 listing, the House of Lords rejected the argument advanced by United Utilities, that a permit was not necessary for a site where domestic sewage and trade effluent was partially treated by biological or physico-chemical treatment before being transported by pipeline to a central site for further treatment prior to some of the final product being disposed or by incineration or landfill. The company had accepted that the central site required a permit but disputed the need for a permit for the separate site where the physico-chemical treatment took place. United Utilities advanced a similar argument before the House of Lords as New Earth Solutions seeks to advance before this Court, namely, to separate out consideration of the treatment of the waste before its final disposal. The House of Lords rejected the submission on the basis of an analysis of the characteristics of a D9 disposal operation.
74. Accordingly, I reach the following conclusions.
75. SITA concerned a composite operation which could not be accurately described as falling within any of the listed operations in Annexes I and II of the WFD. It was common ground the operations comprised two distinct operations. The R1 operation of burning waste as a fuel in cement kilns was the primary operation followed by the use of the residual fraction of the waste. Paragraphs 41, 42 and 46 of the judgment are phrased in general terms, suggesting support for New Earth Solutions’ submission that the case lays down generally applicable criteria for the classification of successive operations for the purposes of the TFS. However, paragraphs 43 – 46 go on to develop the Court’s analysis by reference to a composite operation which does not fall within any of the listed operations comprising the disposal of the non-recoverable fraction of waste after a primary operation of recovery. This then is the context in which the Court comes to the conclusion that: *“in such a case, the classification of the first operation as a recovery operation is not affected by the fact that it is followed by an operation to dispose of the residual waste”* (§43) (emphasis added).
76. In United Utilities, the House of Lords rejected, in clear terms, the application of the principle in SITA to a D9 operation. The Court analysed a D9 operation as generically different from D1- D7 and D10 – D12 operations. A D9 disposal operation is characterised, not only in terms of its intermediate treatment activity, but by looking to the eventual destination of the waste when it is discarded.

The interrelationship between the lists of operations and the definition of recovery

77. New Earth Solutions contends that the Agency should not have made the lists of operations (Annexes I and II WFD) its primary focus in considering the classification of the operations. It should instead have considered the principal objective of the operation, including whether

the waste serves a useful purpose by replacing raw materials, as per the definition of recovery.

78. A body of case-law of the European Court of Justice, built up in relation to previous versions of the Directive, established that the lists are intended to represent the most common disposal and recovery operations carried out in practice. They were not however an exhaustive list (§60 Abfall). Only where waste could not be brought within one of the operations referred to in the Annexes to the Directive, was there a need for a case-by-case assessment (§64 Abfall).
79. The question that arises in the present case is whether, and how, the case law developed under previous versions of the Directive, which did not contain a definition of recovery, should be applied in the context of the introduction of the definition of recovery in Article 3(15) of the 2008 Directive.
80. In R (Lafarge Aggregates Ltd) v Secretary of State for Environment Food and the Regions [2015] EWCA Civ 1149 (“Lafarge”), Lord Justice Sales (as he was then) acknowledged the potential differences between the 2008 Directive and previous versions. The Court noted that the recitals to the 2008 Directive are more extensive than and do not fully correspond with recitals to previous Directives (§6) before going on to state that:

“10. The previous Directive did not include a general definition equivalent to Article 3(15), but simply set out lists of recovery operations and disposal operations in Parts A and B of Annex II to that Directive. These were treated as mutually exclusive categories, as they are in the Annexes to the WF Directive.

...

12. A body of case-law of the ECJ built up in relation to the previous Directive which gave guidance on this. It is not altogether clear how directly this case-law should be transposed when dealing with the WF Directive.”

81. However, Lafarge was decided before the decision of the European Court in Provincia di Bari v Edilizio Mastrodonato Srl C-147/15, the latter which was decided after the adoption of the definition of recovery in Article 3(15) WFD Directive. The Court reached the following view as to the role of the lists:

“37 Article 3(15) of Directive 2008/98 defines, inter alia, the ‘recovery’ of waste as an operation the principal result of which is that the waste in question serves a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function.....

38 Thus, that definition corresponds to the definition developed in the Court’s case-law, according to which the essential characteristic of a waste recovery operation is that its principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used for that purpose, thereby enabling natural resources to be preserved (judgment of 27 February 2002 in ASA, C-6/00, EU:C:2002:121, paragraph 69).

39 It follows that the main objective of the recovery operation must be the conservation of natural resources. Conversely, if the conservation of natural resources constitutes only a secondary effect of an operation the principal objective of which is the

disposal of waste, this cannot affect the classification of that operation as a disposal operation (see, to that effect, judgment of 13 February 2003 in Commission v Luxembourg, C-458/00, EU:C:2003:94, paragraph 43).

40 *In this regard, it is apparent from Article 3(15) and (19) of Directive 2008/98 that the purpose of Annexes I and II to the directive is to set out the most common disposal and recovery operations, not to provide an exhaustive list of all the disposal and recovery operations covered by the directive.*

41 *That being said, it must be possible to classify any waste treatment operation as either a ‘disposal’ or a ‘recovery’ operation, and, as is apparent from Article 3(19) of Directive 2008/98, a single operation may not be classified at the same time as both a ‘disposal’ and a ‘recovery’ operation. Consequently, as is the case in the main proceedings, in a situation where, having regard solely to the terms of the operations in question, a waste treatment operation cannot be brought within one of the operations or categories of operations referred to in Annexes I and II to the directive, such operations must be classified on a case-by-case basis in the light of the objectives and definitions set out in the directive (see, by analogy, judgment of 27 February 2002 in ASA, C-6/00, EU:C:2002:121, paragraphs 62 to 64).*

42 *It is a matter for the referring court, having regard to all the relevant factors of the dispute in the main proceedings, and taking into consideration the objective of protecting the environment pursued by Directive 2008/98, to determine whether the main purpose of the backfilling of the quarry at issue in the main proceedings is to recover waste other than extractive waste intended to be used during this operation.”*

82. Accordingly, the present position is the same as under previous versions of the Directive. The lists represent the most common disposal and recovery operations in practice. It is only if the waste operation in question does not appear on the list that the decision maker must classify it as disposal or recovery operation, on a case-by-case basis, in light of the objectives and definitions in the directive, which will include the definition of recovery in Article 3(15).
83. Cases of genuine uncertainty may include operations with elements of both recovery and disposal in which case it may become necessary to look for the ‘principal result’ (in the case of recovery) or the secondary consequence (in the case of disposal).
84. In Lafarge, the presenting difficulty for the Court was that the descriptions of items in Annex I and Annex II overlapped. In particular, the backfill operation could be characterised as falling within paragraph D1 in Annex I or within paragraph R10 in Annex II:

“That drafting technique, however, gives rise to difficult questions of categorisation of operations, since the descriptions of items in Annex I and in Annex II can in certain cases overlap. For example, the use of waste for backfill in the present case could be described as “Deposit into or on to land” (D1) or as falling within R10, as “Land treatment resulting in ... ecological improvement”. (§11)

85. Sales LJ concluded this meant that additional criteria were required to assist in the task of interpreting the items in the respective lists and in categorising the particular operations in any particular case as recovery or disposal of waste. This analysis is consistent with the position of the European Court in Mastrodonato.

86. There was also a dispute between the parties in this case as to the necessary conditions for an operation to meet the definition of ‘recovery’ in Article 3(15) of the WFD. The Agency submitted that recovery is defined as an operation of which ‘the principal result’ meets two conditions 1) serving a useful purpose and ii) replacing other (non-waste) materials which would otherwise have been met. It relied on the analysis of the Advocate General in Mastrodonato in this regard (§53). New Earth Solutions submitted that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serves a useful purpose in replacing other materials which would have had to be used for that purpose. No other benefit is necessary. For the reasons set out below, I am not however persuaded that this issue has a material bearing on the outcome of the case and I do not therefore address the issue further.
87. Accordingly, I reach the conclusion that the list of recovery and disposal operations in Annexes I and II to the WFD directive set out the most common disposal and recovery operations. Where, having had regard solely to the lists, there is genuine uncertainty or overlap such that the waste operation cannot be brought within one of the operations or categories of operations referred to in the lists, then the waste operation(s) must be classified on a case-by-case basis, using additional criteria, in the light of the objectives and definitions set out in the directive, which will include the definition of recovery in Article 3(15) of the WFD. Cases of difficulty will include where operations overlap (as in Lafarge) or contain elements of both disposal and recovery, whereby it may become necessary to identify the ‘principal result’ and/or ‘secondary consequence’ of the operation.

The legal principles applicable to the review of the Agency’s assessment as to the principal result of the waste operations

88. The parties were in dispute as to the role of the exercise of judgment by the Agency in its position as competent authority in coming to the view that the principal purpose of the waste operations was disposal not recovery.
89. The following general principles of judicial review are well established. The scope of judicial review, in terms of both the intensity of the scrutiny and the weight to be given to any primary decision maker’s view is acutely sensitive to the regulatory context (R (Spurrier) v Secretary of State for Transport [2019] EWHC 1070 (Admin) at §147). The margin of appreciation afforded by the Court will depend on the circumstances but will be substantial where a decision is highly dependent upon the assessment of a wide variety of complex technical matters by those who are expert in such matters and/or who are assigned to the task of assessment (R (Mott) v Environment Agency [2016] EWCA Civ 564). The Court should be slow to impugn decisions of fact made by an expert and experienced decision-maker (R v Director General of Telecommunications ex parte Cellcom Limited [1999] ECC 314 at §26 Lightman J). A court must assess whether a particular issue is a matter of technical or scientific judgment rather than legal analysis. (Mott, at §77 Beatson LJ). It is not the role of a court to resolve conflicts of expert evidence, particularly not in favour of a claimant on whom the burden of proof lies.
90. The legislative framework for TFS requires the Agency, as competent authority, to check the proposed classification of a shipment and object to a shipment which is classified incorrectly (Article 12h) TFS Regulation). Article 28 of the TFS Regulation which was also not in the

previous version of the Regulation, specifically recognises the potential for the competent authorities of dispatch and destination to disagree on the classification of the waste treatment operation and provides that in such a case the provisions regarding disposal shall apply. (Article 28(3)). Thus, the statutory regime recognises the exercise of discretion necessarily arising and available to competent authorities in the classification process. It is apparent from the nature of the information required in the notification document that the competent authority is required to form a judgment as to the correct classification of the operation (Paragraph 20 of Annex II, Part 2 (see paragraph 42 above)). Moreover, the Member State of dispatch may have a particular interest in preventing the export of hazardous waste for disposal since such disposal may have serious environmental consequences for the member state of dispatch by virtue of the burden; of ensuring that the waste is disposed of in close proximity and in accordance with the principle of self-sufficiency (Advocate General in Abfall at A51).

91. As the national specialist environmental regulator on waste, the Agency has an expertise that is beyond the province of the Court. The approach in Lafarge, is illustrative in this context. The case concerned the proper interpretation and application of the concepts of “recovery” and “recovery operations” in Article 3(15) WFD. The Environment Agency decided that the operations proposed by Tarmac/Lafarge did not constitute recovery operations for the purposes of the Waste Framework Directive and its decision was upheld by the Inspector on appeal on the basis of modified reasoning. The Court of Appeal was only prepared to intervene in the Agency’s decision making on grounds of irrationality:

“On the evidence before him and on the basis of findings made by him, the Inspector clearly should have found that the backfill operation to create the lakes and the land bridge at the Quarry site was a legitimate function which would have had to be carried out in any event, whether waste was used or not. All the evidence indicated that Tarmac would indeed be required by the Council to comply with the planning obligation to which it was subject to restore the Quarry site, whether waste was used for that purpose or not. There was no evidence to suggest otherwise. In the circumstances it was irrational for the Inspector to reach any conclusions other than that Tarmac would be required to comply with the planning obligation which it had assumed by accepting the restoration condition.”

92. It follows that I accept the Agency’s submission that the assessment of the ‘principal result’ of a waste operation is prima facie a matter of judgment and evaluation for the Agency as the expert regulator, to which the Court must afford a margin of appreciation.

Substitution as a distinct waste operation

93. The parties were in dispute as to whether the process of substitution is a distinct operation in its own right. The issue has the potential to go beyond the present case and beyond the transfrontier shipment of waste regime, to waste regulation as a whole. The Court was not addressed in detail on the definition or scope of ‘operation’ in EU waste legislation. There was no indication that the parties had undertaken a comprehensive assessment of other potentially relevant legislation or case law. The Court was not addressed in any detail on the wider ramifications said by the Agency to arise from any decision by the Court to the effect that the treatment of waste acids for landfill becomes a recovery operation due to co-treatment with another waste stream, including what is said to be, the potential undermining of the waste hierarchy.

94. Accordingly, given the issue only becomes of relevance if New Earth Solutions succeeds on the other legal issues raised above, I simply note at this juncture that substitution is not listed as one of the common recovery operations in Annex 1 of the Directive. Further, Articles 11 and 12 of the TFS Regulation entitle a competent authority to object to a shipment of waste destined for disposal or recovery, respectively, if the waste will be treated in a facility ‘*which is covered by Directive 96/61/EC but which does not apply best available techniques, as defined in Article 9(4) of that Directive in compliance with the permit of the facility which does not apply best available techniques.*’ (Directive 96/61/EC is now published as the Industrial Emissions Directive 2010/75/EU). The requirement for polluting industry to use Best Available Techniques (BAT) to reduce pollution is a central feature of the pollution prevention and control licencing regime. Using waste instead of raw materials for the treatment of other wastes, for both disposal and recovery, is considered BAT on the basis it is said to be an efficient use of materials and minimises environmental impacts. The relevant EU BAT Conclusions Decision on hazardous waste identifies BAT for the treatment of waste as substituting raw materials for other waste. This is also reflected in relevant DEFRA guidance. On this basis, operators of licenced installations should therefore be substituting waste for raw materials when treating other waste as an aspect of best practice for pollution control. I am inclined to accept the Agency’s submission that this may be said to indicate that substitution is regarded as a characteristic of a waste treatment operation rather than a separate recovery operation in its own right.

Application of the law to the facts

95. I turn now to apply the legal principles set out above to the facts of the present case.
96. As the designated competent authority in the country of dispatch, the Agency was required to check the classification of the purpose of the shipment provided by New Earth Solutions and to form its own assessment (Article 12 TFS Regulation). The Agency was entitled to object, as it did, to the proposed shipments on the basis that they had been incorrectly classified as a recovery operation (Article 12(1)(h) TFS Regulation). The fact that the Norwegian Environment Agency takes a different view of the waste treatment operations and assesses the purpose of shipment as a recovery operation is of no consequence in this regard (Article 28(3) TFS Regulation). Similarly, the fact that the Norwegian operator, NOAH, considers the operations to be a recovery operation is not determinative. European Commission guidance makes clear that “*Generally it has to be stressed that just because an operation is given a description by the operator in line with the terminology of the definitions of the WFD this does not automatically make the operation such an operation*”. As the competent authority of the country of dispatch, the Environment Agency was justified in having a particular interest in preventing the export of hazardous waste for disposal on the grounds of the burden on the Agency to ensure that hazardous waste is disposed of in close proximity and in accordance with the principle of self-sufficiency (Abfall - Advocate General’s opinion at A51).
97. In coming to its view as the correct classification of the waste operations, the Agency was required, and entitled, to take account of the lists of recovery and disposal operations on the basis they represent the most common recovery and disposal operations (Abfall and Provincia di Bari v Edilizio Mastrodonato).
98. It was common ground that the treatment residue (the neutralised sulphuric acid and APCr) was to be disposed of into landfill at NOAH’s site in Norway. The Agency was entitled to look

across the entirety of the waste operation, in particular, both the physico-chemical treatment followed by final disposal, to come to its view that the relevant listed operation was a D9 disposal operation. The principle of SITA that classification of waste operations for the purposes of transfrontier shipment is by reference to the first operation the waste undergoes has no application to a D9 operation (SITA and United Utilities). SITA concerned a composite operation which could not be accurately described as falling within any of the listed operations, whereas here, the competent authority has assessed the relevant operation as a D9 operation. It was common ground in SITA that there were two distinct operations where this is disputed by the competent authority in the present case. Accordingly, I am not persuaded of any error of law in the Agency's assessment of the operations as a D9 disposal operation.

99. On the basis of its view that the waste operations fell squarely within the listed D9 operations there was no need for the Agency to assess the operations by reference to the definition of recovery in Article 3(15) WFD (Mastroandato). Nonetheless, the Agency adopted a belt and braces approach, and it made a second, related, decision that the principal result of the operations was disposal not recovery. It reached the same view as the Swedish Environment Agency that, in short, the APCr is useful in the pre-treatment of the sulphuric acid but the treatment in its entirety is aimed for disposal of the waste (landfilling).
100. The Agency was entitled to exercise its judgment in this regard, and it has explained the basis for doing so in the key decision-making documents, namely the letters of 12 April 2021, 10 June 2021, 1 July 2021 and 10 September 2021, which the Agency says must be read together. From a review of them it is apparent that the Agency made inquiries of the Norwegian Environment Agency, NOAH and New Earth Solutions seeking information about the waste operations in question. The Agency rejected the characterisation of the treatment residue as equivalent to gypsum and a construction material. Its assessment was that whilst the residue from the mixing of the sulphuric acid and APCr might be less hazardous than its component parts, it continued to contain various contaminants, could not be considered benign and should not be confused with products manufactured from gypsum or the mineral itself. The Norwegian Environment Agency and NOAH had confirmed that the objective of the operations was landfilling ('basically to fill in the hole in the ground that the quarry left behind and rehabilitate the landscape and infill in the empty quarries at Langøya' (email from the Norwegian Environment Agency)). The Agency explained that it generally regards the addition of APCr to sulphuric acid to reduce the leachability of metals as pre-treatment prior to landfill, a position it has taken in relation to other requests for shipments of APCr.
101. In its submissions to the Court, the Agency further explained that its assessment accords with DEFRA's 2011 *Guidance on applying the waste hierarchy to hazardous waste*, which addresses the treatment of gas treatment residues (including APCr), some of which may contain dioxins and heavy metals. The processing of the waste stream is said to be important for environmental protection. For landfills the guidance states that the waste is likely to require some form of treatment to fulfil the waste acceptance criteria for deposit to landfill. The guidance advises that where possible, the operator of the treatment process should consider making use of the neutralisation capacity of the material, which has the potential to replace raw binder materials used in treatment such as lime (in for example neutralisation / precipitation treatment).
102. New Earth Solutions relied on the statement of Leslie Heasman but she was not put forward as an expert and her evidence was permitted before the Court on the basis it was before the Agency during its decision making. In any event, it is not for the Court to resolve disputes of expert evidence. Other than Ms Heasman, New Earth Solutions relied, in effect, for support for its case on the position of the Norwegian Environment Agency, which, by virtue of the legislative framework, cannot bind the Agency. Accordingly, in my judgment there were

rational and evidence-based grounds for the Agency's view, and I am not persuaded of any error of law in the Agency's exercise of its judgment. There is a clear contrast in this regard with the Court of Appeal's decision in Lafarge where the Court concluded that the Inspector in that case could not rationally have come to the view on the evidence that he did.

103. In light of these conclusions, it is not necessary for the Court to address the question of whether substitution of APCr for virgin limestone may be regarded as a distinct waste recovery operation, particularly given the potentially wider ramifications of any Court ruling on the issue and the limited submissions before me on these wider aspects. Even if substitution of APCr for pulverised limestone is a distinct operation, any such finding does not have the significance contended for it by New Earth Solutions in light of the other conclusions I have reached on the law. It would still have been open to the Agency to look at the treatment and subsequent disposal of the waste in deciding the operations were a D9 disposal operation or to look at the principal purpose of the operations. As the Agency pointed out in its decision letter, it is entirely consistent with the definition of disposal for a disposal operation to have, as a secondary consequence, the beneficial use of waste.

Conclusion

104. For the reasons set out above, the claim fails.