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R V RECYCLED MATERIALS SUPPLIES LTD [2017] EWCA CRIM 58: IMPLICATIONS FOR THE REGULATION OF POLLUTING FACILITIES

The recent Court of Appeal decision in *R v Recycled Materials Supplies Ltd* [2017] EWCA C rim 58 deals with the question of which authority is the appropriate regulator for regulated facilities under the Environmental Permitting (England and Wales) Regulations (EPR). The 2010 version of the Regulations with amendments was in force at the time of the offences but there are no material differences for present purposes in the current 2016 Regulations.

Generally the regulator is the Environment Agency (EA) in relation to facilities in England and the Natural Resources Body for Wales (NRBW) for facilities in Wales. These authorities oversee the most heavily polluting facilities, including waste operations.

On the other hand, local authorities are the designated regulators for certain facilities considered to be less polluting, including 'Part B activities' which are controlled for air pollution purposes only. Although the EPR set out rules for determining which body is the appropriate regulator, the position is sometimes less than crystal clear in practice as demonstrated by the Recycled Materials supplies (RMS) case.

Background:

The facts are simple. RMS operates a facility for recycling construction and demolition waste which is crushed and recovered to produce aggregates. The waste includes brick, tiles and concrete which are not segregated from other materials. RMS was granted an environmental permit (EP) by the EA to cover the waste operations on their site. However, the London Borough of Newham (LBN) separately issued a more limited EP for the crushing, grinding and screening of brick, tiles and concrete by means of mobile plant. Those activities are Part B activities and therefore should fall under local authority control to deal with air pollution.

RMS was prosecuted by LBN for failing to comply with a condition of their EP requiring vehicles transporting aggregates to be fully enclosed. RMS's conviction by the Crown Court was overturned by the Court of Appeal on the ground that dual regulation, although possible in some cases, was unlawful in the present circumstances. The court pointed out that regulatory functions in respect of regulated facilities including waste operations and waste mobile plant are allocated to the EA (or NRBW) under regulations 32(1) and (1A) of the EPR unless they are specifically allocated to local authorities under regulation 32(2), which includes:

'… (b) … Part B mobile plant but not in respect of any of the following regulated facilities carried on ….by means of mobile plant –

Prospect Law Ltd
23 Berkeley Square, London W1J 6HE
T +44 (0)20 7947 5354

Regus House, Pegasus Business Park, Castle Donington, Derbyshire DE74 2TZ
T +44 (0)1332 818 785

@prospectupdate
E info@prospectlaw.co.uk
www.prospectlaw.co.uk

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(i) a waste operation (unless it is a Part B activity) …'

The Court of Appeal accepted that this wording indicates that a waste operation may also be a Part B activity. However, the local authority would only have the function of issuing an EP if the activity on RMS's site was a 'Part B mobile plant which was 'by the tortuous route of double exceptions' carrying on a Part B activity.

However, the crushing, grinding and screening of brick, tiles and concrete were never carried out as separate activities but always as an integral part of the waste operation on RMS's site. For that reason the activity could not be considered a Part B activity and the plant if it was mobile was 'waste mobile plant' which is regulated by the EA and not 'Part B mobile plant'. Under those circumstances, the EA alone had jurisdiction and the LBN EP was therefore invalid. It followed that RMS had not committed an offence by failing to comply with a condition in an invalid EP.

The Court of Appeal stated that a defendant prosecuted for breach of a permit condition can challenge the validity of an EP in the course of a criminal trial. However, they added (without ruling on the point) that there was some force in the argument that any challenge to a permit condition may have to be made through the appeal process set out in the EPR – an appeal to the Secretary of State (DEFRA) in England or the Welsh Ministers in Wales. Such appeals have to be made within 6 months of the grant of the EP, so it may be too late to wait until the permit holder is prosecuted for failure to comply with a condition.

This case illustrates a number of important points:

1. If there is more than one EP governing the same activity on a site, one of them may be invalid. Dual regulation is generally frowned on. An exception contemplated by the EPR is the operation of mobile plant on the site of another regulated facility. In the event of inconsistency between the requirements of the two permits, the requirements of the EP for the latter prevail.

2. If any condition of an EP is unduly onerous to the permit holder an appeal should be made promptly. Otherwise, it may be too late to challenge it.

3. Although not relevant in the present case, the court noted that there is a power for the Secretary of State (or the Welsh Ministers) to make a direction under regulation 33 of the EPR that the regulatory functions of the EA/NRBW shall be exercised by the local authority or vice versa. Such a direction can apply to a single facility or a class of facilities. The power to make directions has been used where the experience of the 'other' regulator is more appropriate to a particular facility.

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By Andrew Waite

Andrew Waite is a solicitor and specialist in environmental law, advising on regulatory and liability issues for a broad range of industries. He defends prosecutions for breaches of environmental legislation, deals with regulatory appeals and civil litigation and advises on environmental issues relating to projects and transactions. He deals with all the main areas of environmental law including waste, energy, nuclear, contaminated land, pollution controls, environmental permitting, water rights, flooding, climate change and nature conservation.

Prospect Law and Prospect Advisory provide a unique combination of legal and technical advisory services for clients involved in energy, infrastructure and natural resource projects in the UK and internationally.

For more information please contact us on 020 7947 5354 or by email on: info@prospectlaw.co.uk.