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Case No: CO/3301/2021
AC-2021-LDS-000163

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Tuesday, 28th November 2023

Before:
FORDHAM J

- -

Between:

R (SUEZ RECYCLING AND RECOVERY UK LTD)	**Claimant**
- and –	
ENVIRONMENT AGENCY	**Defendant**

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- -

Andrew Thomas KC and Samantha Riggs (instructed by the Claimant) for the **Claimant**
Gwion Lewis KC (instructed by the Defendant) for the **Defendant**

- -

Hearing date: 16 & 17.10.23
Draft judgment circulated: 17.11.23

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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FORDHAM J

FORDHAM J:

Introduction

1. This is a case about Compliance Assessment Reports ("CARs") and the routes by which they can be challenged. Three possible routes of challenge have featured in the arguments. First, there is an "appeal". Second, there is a "complaint". Third, there is judicial review. At the heart of the arguments about appeal and complaint is the Regulators' Code, a statutory code of practice issued by Ministers pursuant to s.22 of the Legislative and Regulatory Reform Act 2006. In the arguments before me, the focus is on the version of the Regulators' Code issued in April 2014, which I will call "the 2014 Code". The case comes before the Court as a claim for judicial review. Suez is the Claimant and the Agency is the Defendant. Suez commenced the claim back in September 2021 and permission for judicial review was granted at [2023] EWHC 717 (Admin). The issues for the Court to decide have been agreed by the parties.

2. Suez, as the operator of the Byker Reclamation Plant ("the Plant"), is regulated by the Agency pursuant to an environmental permit. Condition 5.2.1 of the permit provides that emissions from the activities at the Plant shall be free from odour:

> ***at levels likely to cause annoyance outside the site, as perceived by an authorised officer of the Agency, unless the operator has used appropriate measures, including those specified in any odour management plan, to prevent or where that is not practicable to minimise the odour.***

3. The focus is on two particular CARs. The first was issued on 5 August 2020 ("CAR1"). It recorded an odour assessment undertaken near the Plant on 31 July 2020. The second was issued on 12 August 2020 ("CAR2"). It recorded an odour assessment undertaken near the Plant on 7 August 2020. CAR1 and CAR2 recorded assessments undertaken by authorised officers of the Agency. Each recorded a C2 (Category 2) breach of Condition 5.2.1, under what is known as the CCS (Compliance Classification Scheme). Each also recorded a Category 2 incident – in the nature of a red flag – under what is known as the CICS (Common Incidents Classification Scheme). In arriving at the assessments of non-compliance, and the CCS:C2 and CICS:Category 2 categorisations, the officers were using an intensity scale from 0/6 to 6/6. The intensity scores in CAR1 and CAR2 included some scores of 5/6 and 6/6.

4. Mr Thomas KC (who appears with Ms Riggs) for Suez emphasises that CAR-assessed CCS:C2 breaches can have a direct financial impact on an operator; and that they did on Suez in this case. The Agency imposes on operators an annual Subsistence Payment. This is designed to reflect regulatory interventions and the effort applied by the Agency in the previous compliance year. The Agency applies what are called Compliance Bands, applied to the Compliance Score, to calculate the following calendar year's Subsistence Payment for the Plant. Each CCS:C2 breach attracts a Compliance Score of 31. Because CAR1 and CAR2 related to assessments in two different calendar months – July 2020 and August 2020 – those scores were added together to give a combined Compliance Score of 62 for the Plant. An overall Compliance Score of 62 triggers Compliance Band E, which produces a 50% increase in the Subsistence Payment. That was a jump from around £5,000 in 2020 to around £7,500 for 2021. It was imposed by the Agency on Suez at the end of the financial year (April 2021).

5. Suez has wished, since August 2020, to challenge CAR1 and CAR2, both as to their lawfulness and also on the merits. A central aim has been to secure a decision taken "afresh". What happened was this. In 2020, Suez commenced a first claim for judicial review, challenging CAR1 and CAR2. The Agency responded that Suez should first exhaust its alternative remedy by way of a complaint. Permission for judicial review was refused, on that basis, in November 2020. The complaint ran its course. It was rejected at what is known as Stage 1 and was escalated to what is known as a Stage 2A independent internal review. On 30 June 2021, the Internal Reviewer upheld the findings of non-compliance, the CCS:C2 and CICS:Category 2 categorisations, and the CCS:C2 non-Compliance Scores in CAR1 and CAR2. Suez then commenced a second judicial review: the present claim. Suez says that the Agency has breached its public law obligations: (a) in issuing CAR1 and CAR2 in August 2020; (b) in making the Stage 2A decision of 30 June 2021; and (c) in not providing a merits re-evaluation by way of appeal. It is common ground, in the agreed issues, that all three challenges are properly before the Court. The claim relies on the 2014 Code, the 2006 Act and public law principles.

The CPR 54.17 Issue

6. A satellite issue arose regarding a witness statement of Jacob Hayler, Executive Director of the Environmental Services Association. The ESA is the trade body representing the resource and waste management industry in the UK. That statement describes the regulation of operators, refers to Agency and Government consultations, and addresses the topic of challenging CAR scores. The Hayler statement is described as "filed on behalf of the claimant". Mr Lewis KC for the Agency raises a point of principle. He says that, in principle, if material of this kind is to be admitted in judicial review, it ought to be in the form of an intervener's application pursuant to CPR 54.17(1)(a), a rule which permits any person to apply for permission to file evidence in judicial review proceedings. He says that is what procedural rigour requires.

7. I cannot accept that submission. If a party to judicial review proceedings – claimant, defendant or interested party – considers that a wider evidential perspective is relevant and can assist them and the Court, derived from some other person or organisation who can provide that perspective, it is open to that party to seek to adduce that evidence and to maintain reliance on it. It is open to that other person or organisation to choose to assist in that way. Unless adduced at the outset of the case, a direction or permission will be required. Principles of promptness, relevance and admissibility will always be applicable. But CPR 54.17 does not have to be used. That rule is a mechanism for a third party to take its own initiative, and be heard as an intervener in the case, including by putting in a witness statement. Where permission for the intervener course is granted, the intervener knows it will be heard on the issues in the case, independently of whether any party would welcome this, and independently of any action by a party. To illustrate that point, having received the Hayler statement, Suez could have chosen not to rely on it, not to make or pursue its application to adduce it, not to include it in the bundle or not to invite my attention to it. A person or organisation who provides a statement for a party to use, rather than seeking a direct CPR 54.17 route to the Judge, accepts this.

Guidance and Instructions

8. To make best sense of the issues in this case, I will start by introducing a number of 'guidance' and 'instruction' documents, emanating from the Agency, which the parties have placed before the Court. These cover a range of topics: waste operations; odour assessment; odour assessment at the Plant; the pandemic; incidents; complaints; and appeals. Some were published and are available in the public domain. But many are internal and unpublished. Those came to be disclosed in Suez's judicial review proceedings. It makes best sense to focus on the guidance and instruction documents which had preceded the issuing of CAR1 and CAR2, but I will mention some others along the way. Later in this judgment (§§39, 48 below) I will refer to the Agency's Enforcement Policy. I am going to give the key guidance and instrument documents shortened names, as found in the headings which follow.

The January 2020 Waste Policy

9. This is a published policy paper dated 15 January 2020. Its subject-matter is waste operations. It is entitled: "Waste Operations and Installations: Assessing and Scoring Environmental Permit Compliance". It describes the function of using CARs, as follows. The CAR is a document, issued by the Agency to the regulated waste site operator who holds the statutory permit, which by law is also required to be published by the Agency in its public register. The CAR records any non-compliance identified during the assessment. It records the Compliance Score. Its contents may later be revised and corrected. The permit holder will accumulate a Compliance Score, by reference to any recorded score in any calendar month, during the compliance year to 31 December. The score is referable to Categories of non-compliance using the CCS. The non-compliance category CCS:C2 is associated with "a significant impact on human health, quality of life or the environment". For an "amenity" permit condition – which includes odour – this is "actual" impact, rather than "potential" impact. CCS:C2 attracts 31 compliance points. At the end of the compliance year, the total Compliance Score will affect the site's Compliance Band and its Subsistence Payment, with Band E producing a 50% increase. The January 2020 Waste Policy has been superseded by the equivalent published policy paper dated 29 March 2023 with the same title.

The May 2019 Odour Instruction

10. This is an unpublished instruction dated 30 May 2019. Its subject-matter is odour assessment. It is entitled: "Regulating Odour". It explains the odour intensity scale from 0/6 to 6/6, by what is called "sniff testing". The May 2019 Odour Instruction describes the basic procedures for carrying out an odour investigation, including for assessing compliance. This includes assessing and recording the odour intensity, description, persistence, extent and whether or not the odour is offensive or pleasant. It poses questions like: "How does it make you feel? Do you associate the odour with activities on site? What does it smell like and what does it remind you of?" The method describes using planned locations for assessments, upwind and downwind, followed by a visit to the regulated site suspected of causing the odour "to assess the causes of any odours and whether appropriate measures are being taken", approaching the regulated site "after considering health and safety hazards". It also speaks of demonstrating a permit breach by "proving" the elements of the "offence". The odour intensity range used in the May 2019 Odour Instruction is discussed in more detail in another published guidance document dated March 2011. This was entitled "H4 Odour Management: How to Comply With Your Environmental Permit". The

intensity range is described as follows: 0/6 (no odour); 1/6 (very faint odour); 2/6 (faint odour); 3/6 (distinct odour); 4/6 (strong odour); 5/6 (very strong odour); and 6/6 (extremely strong odour). The parties referred to the following amplification, evidently derived from another published document called "Frequently Asked Questions: Landfill Sites":

> ***0 = No Odour.***
> ***1 = Very faint odour (need to inhale into wind to smell anything).***
> ***2 = Faint odour (you can detect odour when you inhale normally).***
> ***3 = Distinct odour (there is clearly an odour in the air as you leave your car or enter the area).***
> ***4 = Strong odour (a bearable odour but strong, you could stay in the area for some time).***
> ***5 = Very strong odour (unpleasantly strong, you will want to leave the area quickly).***
> ***6 = Extremely strong odour (likely to cause nausea and a strong need to remove yourself from the odour immediately).***

The August 2019 Byker Instruction

11. This is an unpublished instruction dated 6 August 2019. Its subject-matter is odour assessment at the Plant. It is entitled: "Odour Assessment: Byker". It identifies key questions for determination, steps for substantiating and odour complaints, steps relating to going on site for a site inspection, and steps to follow when on site. It identifies the monitoring location points for use depending on whether the wind direction is north to south or south to north.

The July 2020 Pandemic Guidance

12. This is an unpublished 'guidance' document dated 28 July 2020. Its subject-matter is the pandemic. It is entitled: "Restart Regulation (Phase 2b): Carrying Out Compliance Inspections". It describes the presumption in favour of undertaking regulatory inspections "remotely" where practicable. Where this is not practicable, it describes the undertaking of "site-based inspections" but "working outdoors", subject to the inspecting officers having obtained prior authorisation from a line manager and Grade 7 manager.

The September 2016 Incidents Instruction

13. This is an unpublished instruction dated 23 September 2016. Its subject-matter is incidents. It is entitled: "Incidents and their Classification: the Common Incident Classification Scheme (CICS)". It explains that an incident includes an occurrence which may have an environmental and/or operational impact, including impact on human health or nuisance to the local community from a site regulated by the Agency. CICS classification takes place alongside recording any CCS permit condition breach. CICS:Category 2 ("significant effect on human senses") is illustrated by bullet point descriptions, one of which reads:

> ***an ongoing odour issue, which for a reasonable portion of the time, is of a significant intensity or extent.***

The 2019 Complaints Instructions

14. These are two unpublished operational instructions dated 17 January 2019 (entitled "Internal Review of Formal Complaints") and 24 June 2019 (entitled "How to Handle

Complaints (and Commendations))". Their relevant subject-matter is complaints. The January 2019 Complaints Instruction describes a complaint as an "internal review" involving "independent consideration", taking "all reasonable steps to ensure our actions are sound". The June 2019 Complaints Instruction explains that where there is both "a complaint and an appeal against a regulatory decision", it would not be "appropriate to deal with the complaint using two different procedures". It goes on to describe Stage 1, Stage 2 and Stage 2A of the complaints procedure, where Stage 2A is for less straightforward escalated complaints and involves "the commissioning of an independent internal review".

The November 2019 Appeal Instruction

15. This is an unpublished operational instruction dated 4 November 2019. Its subject-matter is appeals. It is entitled: "Dealing with an Appeal of a Regulatory Decision". It refers to the 2014 Code and has a section entitled: "What is a regulatory decision?" A predecessor unpublished operational instruction dated 5 February 2016 had dealt with both complaints and appeals.

The Factual Context

Location

16. If you stand on the north bank of the river Tyne looking towards Gateshead International Stadium, the Plant is in the area behind you. It is located on the south side of Walker Road (A186). Across Walker Road from the Plant are some residential areas. These include Fenning Place, Harbottle Court and Solway Street. These streets are all to the east of St Peters Road, a road which runs north from a junction with Walker Road, away from the Plant. In this area, Walker Road itself has a bus stop, a zebra crossing, and a location opposite the entrance to the Plant. To the west of the Plant there is a separate "HWRC" (household waste recycling centre) site. The HWRC site is an outdoor area with waste skips. There is a boundary between HWRC and the Plant. To the south of the Plant is a car park and allotments. Within the boundary of the Plant itself there are some outdoor areas, but all operations take place within buildings. Waste vehicles enter and leave the Plant. The buildings have windows and doors, with a top deck and a lower deck.

CAR1

17. The gist of the narrative content of CAR1 is as follows. The assessment (31 July 2020) was conducted by Sophie Siddle (Waste Regulatory Specialist) and Laura Linsley (Environment Officer). It took 2 hours 10 minutes, from 1120 to 1330. The weather was warm and dry. The wind was predominantly from the south-east. Monitoring took place from a number of locations with a minimum of 5 minutes at each. The officers began with the three upwind locations: the car park to the south of the Plant, the entrance to the HWRC, and the allotments. No odour was detected at these locations. At the Plant entrance (west north-west of the Plant) officers recorded a constant distinct household refuse odour (3/6) with two gusts of strong odour on the breeze (4/6). At Walker Road between the site entrance and the bus stop (north-west of the Plant) they recorded a strong household refuse odour (4/6). At the Walker Road bus stop they recorded a constant very strong household refuse odour present (5/6) with intermittent gusts of extremely strong household refuse odour on the breeze

(6/6). At the St Peter's Road junction with Walker Road (north north-west of the Plant) they recorded a constant very strong household refuse odour (5/6) with intermittent gusts of extremely strong odour (6/6). At Fenning Place they recorded a very faint household waste odour (1/6) with intermittent gusts of distinct household waste odour (3/6). At Harbottle Court and Solway Street they recorded very faint household waste odour (1/6). Returning to Walker Road near Fenning Place they recorded a constant distinct household refuse odour (3/6) with 7 intermittent very strong odour gusts (5/6). At the Walker Road zebra crossing they recorded a constant faint household waste odour (2/6) with 3 intermittent strong odour gusts (4/6). Back at Walker Road opposite the site entrance they recorded a constant distinct refuse odour present (3/6).

CAR2

18. The gist of the narrative content of CAR2 is as follows. The assessment (7 August 2020) was again conducted by Ms Siddle and Ms Linsley. It took 90 minutes, from 1400 to 1530. The weather was warm and dry. The wind was predominantly from the south. Again, monitoring took place from a number of locations with the minimum of 5 minutes at each. The officers began with the three upwind locations: the car park, the HWRC entrance and the allotments. No odour was detected. At the Plant entrance (west north-west of the Plant) they recorded a constant distinct household refuse odour (3/6) with three intermittent detections of strong odour on a light breeze (4/6). At Walker Road between the site entrance and the bus stop they recorded a distinct household refuse odour (3/6) and, when the reception doors to the Plant building opened, an extremely strong odour (6/6) was recorded as having escaped from the building. At the Walker Road bus stop (north of the Plant) they recorded an extremely strong household refuse odour (6/6) and, when the exit doors to the Plant had been closed, there was a constant very strong household refuse odour (5/6). At this point CAR2 records that:

> ***Officers were joined by [Suez's] Site Manager Stephen Atkinson and Site Supervisor James Graham who agreed they could smell an odour here. Their assessment was of a faint odour (2/6) and to them it smelt like leachate. Officers confirmed their assessment at the time of discussion was that of a strong to very strong (4-5/6) household refuse odour which becomes noticeable once you walk alongside to 'top deck' boundary on Walker Road.***

At Solway Street they recorded a constant faint household refuse odour (2/6), with intermittent detections of distinct household refuse odour (3/6) on the breeze. At Harbottle Court they recorded a strong household refuse odour (4/6) on the breeze, with a frequency of 8 intermittent detections of strong household refuse odour (4/6). At Fenning Place they recorded a constant strong household refuse odour (4/6). Walking along Walker Road they detected a very strong household refuse odour directly opposite the top deck to the Plant (5/6). As they continued west along Walker Road they recorded a constant strong household refuse waste odour (4/6) all the way alongside the area adjacent to the top deck of the Plant.

Prior to CAR1 and CAR2

19. The evidence before the Court refers to features of the picture prior to CAR1 and CAR2. There are summaries of the Agency's odour monitoring at the Plant. One theme in some of the previous monitoring relates to a chemical "leachate" odour. This was suspected by Agency officers to have come from the Plant but was ultimately

attributed to leaking local authority waste lorries. A table of Agency monitoring contains some 23 entries between 9 January 2015 and 10 December 2019. Among these were five days of odour monitoring, undertaken three times a day, between 5 and 9 August 2019 in which Ms Siddle and Ms Linsley had participated. Ms Siddle and Ms Linsley also conducted the monitoring on 10 December 2019 and had undertaken a site inspection on 12 August 2016. The other entries involved monitoring conducted by other Agency officers. The maximum odour intensity previously recorded was at the level of 4/6 on 23 August 2019, inside the Plant building. The maximum off-site odour intensity recorded was at the level of 4/6, recorded on 23 August 2019. Off-site odour intensity was recorded at the level of 3/6 on 10 November 2015, 6 May 2016, 28 July 2017, 4 April 2018, 29 June 2018*, 5 July 2018*, 15 August 2018*, 26 June 2019, 9 August 2019 and 10 December 2019. These assessments* make reference to the "leachate" odour. Other entries were lower than 3/6. No entry was at 5/6 and no entry was at 6/6. CAR1 recorded that since August 2019 the Agency had provided an extensive amount of advice and guidance to Suez, and had required improvements in odour control at the Plant, as a result of which a revised odour management plan had been submitted on 31 July 2020 and was currently under review by the Agency. CAR1 also recorded that the Agency had previously recorded continued non-compliance of Permit condition 5.2.1, on 23 August 2019 and 10 December 2019, and that – so far during 2020 – the Agency had received 41 odour reports from nearby receptors noting a strong and very strong offensive bin type waste odour.

After CAR1 and CAR2

20. A CAR dated 1 October 2020 (from a visit on 15 September 2020) by Ms Linsley and Ms Siddle recorded household refuse odour at various levels (up to 4/6) at various locations but recorded no permit breach on that occasion. A CAR dated 27 November 2020 (from a visit on 13 November 2020) by Ms Linsley and Tony Roberts recorded odour being detected including a chemical type odour similar to "cherry" (at a level of 3/6 from different locations), but no "cherry"-type odour was detected on site during a site visit and, being unable to substantiate the same odours on site, no permit breach was recorded.

The Stage 2A Decision

21. Suez's challenge to CAR1 and CAR2 was dealt with by the Agency as a complaint, addressed in accordance with the 2019 Complaints Instructions. After its rejection at Stage 1 there was the escalation to Stage 2A with the commissioning of the independent internal review. The Independent Internal Reviewer was Mr Sean Pruce. He issued a 17 page report dated 13 June 2021. In that report Mr Pruce upheld the recorded scores, CCS:C2 breaches and CICS:Category 2 incidents. He reasoned that there was nothing of such significance in the challenge by Suez to lead him to recommend the amendment of the intensity scores of 5/6 and 6/6 in CAR1 and CAR2; and that the officers were on balance correct to state that the odour was emanating from the Plant, and in their assessment of the use of appropriate measures.

Issue (1): Appeal and the 2014 Code

22. The first agreed issue is this: Has the Agency complied with its duty under the 2006 Act in relation to the 2014 Code in considering the provision of a right of appeal

against an adverse score on a CAR? At the heart of this issue is a disagreement about a confining prerequisite. The Agency says that the objectively correct interpretation of "regulatory decision" in the 2014 Code §2.3 is:

> ***a decision, in the exercise of a regulatory function, which is adverse to a regulated person by imposing on them a mandatory obligation.***

Suez says that the underlined words add a confining prerequisite which constitutes an incorrect interpretation of "regulatory decision".

Points of Agreement

23. There is considerable common ground between the parties. Counsel agree on each of the following points, for the purposes of this first issue. (1) There is a distinction between "appeal" and "complaint". (2) A "complaint", under the 2019 Complaints Instruction, is a supervisory review which does not involve a merits re-evaluation retaking the impugned decision afresh. (3) An "appeal", under the November 2019 Appeal Instruction, does involve a merits re-evaluation retaking the impugned decision afresh. (4) An objective question of interpretation arises, as a hard-edged question for the judicial review court, as to the true meaning of "regulatory decision" in the 2014 Code. (5) The basic public law duties of the Agency, in having regard to the 2014 Code when making arrangements for appeals and complaints, involved correctly interpreting the 2014 Code, insofar as any objective question of interpretation arises. I interpose one familiar reference: Gransden v Secretary of State for the Environment (1987) 54 P & CR 86, 93-94 ("If the body making the decision fails to properly understand the policy, then the decision will be as defective as it would be if no regard had been paid to the policy"). (6) It would be open to the Agency to decide to make a departure from the 2014 Code – correctly interpreted – but this would need to satisfy applicable public law duties and is not, at this stage, a step which the Agency has taken. (7) The legally correct meaning of "regulatory decision" in the 2014 Code entails a decision of the Agency 'in the exercise of a regulatory function', which decision is 'adverse to a regulated operator'. (8) The Agency's interpretation of "regulatory decision" requires, as a confining prerequisite, that the decision be adverse in the specific sense of 'imposing on them a mandatory obligation'. (9) If this interpretation is incorrect because it is not (and is narrower than) the legally correct meaning of "regulatory decision" in the 2014 Code, the Agency has misdirected itself in law in making arrangements for rights of appeal.

The 2006 Act

24. By s.22(1) of the 2006 Act, Parliament empowered Government Ministers to issue or revise a code of practice in relation to the exercise of regulatory functions. By s.22(2), Parliament required a person exercising a relevant "regulatory function" to "have regard to" that code of practice, in determining any general policy or principles by reference to which that person exercises that regulatory function. The Agency is a body exercising relevant regulatory functions, by virtue of Sch.1 §1 to the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 (SI 2007 No. 3544). By s.32(2) of the 2006 Act, Parliament provided that:

> ***"regulatory function" means – (a) a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or (b) a function which relates to the securing of compliance with, or the***

> ***enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity.***

Reasoned Departure from the 2014 Code

25. The 2014 Code begins with a preamble which emphasises the s.22(2) statutory duty to "have regard to" the code when developing policies and operational procedures, but with this important caveat (relevant to agreed point (6) in §23 above):

> ***if a regulator concludes, on the basis of material evidence, that a specific provision of the Code is either not applicable or is outweighed by another relevant consideration, the regulator is not bound to follow that provision, but should record that decision and the reasons for it.***

Appeal and Complaint under the 2014 Code

26. The centrally important paragraphs of the 2014 Code are §§2.3 to 2.5:

> ***2.3 Regulators should provide an impartial and clearly explained route to appeal against a regulatory decision or a failure to act in accordance with this Code. Individual officers of the regulator who took the decision or action against which the appeal is being made should not be involved in considering the appeal. This route to appeal should be publicised to those who are regulated.***
>
> ***2.4 Regulators should provide a timely explanation in writing of any right to representation or right to appeal. This explanation should be in plain language and include practical information on the process involved.***
>
> ***2.5 Regulators should make available to those they regulate, clearly explained complaints procedures, allowing them to easily make a complaint about the conduct of the regulator.***

Regulatory Decision: the Agency's Documented Approach

27. The November 2019 Appeal Instruction – an unpublished document – answers the question "what is a regulatory decision?" in the following way (the numbering is mine):

> ***[1] A regulatory decision imposes mandatory obligations on an operator such as issuing a regulatory notice or a permitting decision. Advice and guidance is not a regulatory decision. [2] [CAR] forms, including responses to breaches of conditions are not regulatory decisions because the forms are a means of recording the compliance assessment monitoring we have carried out. [3] A regulatory decision can include taking a step that removes an operator from the regulated community, such as revoking a permit or removing an operator from a register of exemptions. Setting a charge for a site, which is payable under a charging scheme, is also a regulatory decision. [4] It is not a regulatory decision where statutory regimes, including ourselves, serve a notice of intent to enable operators to make representations before we make a decision. This includes where we impose a penalty after considering those representations. [5] We do not consider that we make a regulatory decision where legislation says we must impose a penalty and gives us no discretion about imposing the penalty. Similarly, we do not consider we are making a regulatory decision where the legislation sets out the amount of a penalty, unless we are given discretion over the amount.***

This text repeated what had been said in the February 2016 unpublished instruction on complaints and appeals. It includes "setting a charge for a site" at [3]. Mr Lewis KC told me that the Agency accepts that a decision to impose a "penalty", except in a case covered by [5], would be a regulatory decision. He says the second sentence of [4] is

not intended to be, and is not, treated within the Agency as meaning otherwise. The January 2020 Waste Policy – a published document – says this under the heading "appeal a regulatory decision":

> ***A permit holder can … appeal a regulatory decision we have made, for example: [a] a decision we make as a result of assessing or scoring permit compliance, for example if we decide to issue a regulatory notice; [b] a failure to act in accordance with the Regulators' Code.***

This description – at [a] – includes a decision to issue a regulatory notice, based on an adverse CAR or CARs.

A Decision-Maker Independent of the Agency?

28. Mr Thomas KC submitted that action in conformity with §2.3 of the 2014 Code may need to involve an appeal to a decision-maker independent of the Agency. Suez's primary case is that this is the nature of the appeal against CAR1 and CAR2 which, in law, the Agency needed to provide. I cannot accept this suggested approach to §2.3, whether as a matter of a legally correct interpretation or the application which public law standards of reasonableness or fairness required. What §2.3 says is "impartial". The second sentence of §2.3 makes clear that a regulator's officers can be involved in considering the appeal; but not if they took the decision or action being appealed. I cannot accept that there was or is any public law duty – in principle, or on the facts of this case – to provide an appeal to a decision-maker independent of the Agency.

Regulatory Decision: the Agency's Argument

29. I am now going to set out the essence, as I saw it, of the Agency's argument in support of the confining prerequisite. I have already described the Agency's documented approach (§27 above), the nature of the confining prerequisite (§22 above) and the points which are agreed (§23 above). The Agency argues as follows. The answer to the first agreed issue is "yes". The Agency has complied with its duty under the 2006 Act in relation to the 2014 Code, in considering the provision of a right of appeal against an adverse score in a CAR. The Agency has identified the objective and legally correct interpretation of "regulatory decision" in the 2014 Code §2.3. The Agency has therefore discharged its basic public law duty to understand the legally correct meaning. As the Agency has correctly appreciated, the legally correct meaning of "regulatory decision" in §2.3 is indeed this:

> ***a decision, in the exercise of a regulatory function, which is adverse to a regulated person by imposing on them a mandatory obligation.***

This prerequisite of an imposed mandatory obligation includes the Agency deciding "to issue a regulatory notice" pursuant to a statutory power, including where based on an adverse CAR or CARs, as described in the January 2020 Waste Policy. It therefore includes a suspension notice, or an enforcement notice. It also includes "setting a charge for a site", as seen in the November 2019 Appeal Instruction. That includes setting a Subsistence Payment for a new calendar year. But "regulatory decision" does not include a decision within a CAR. A CAR is a recording of "compliance assessment monitoring", as a "response to breaches of conditions", but it does not impose a mandatory obligation.

30. A regulated operator who receives adverse CARs containing non-compliance assessments would have no §2.3 route to appeal, unless and until the pattern of assessed non-compliance leads to (a) a decision to issue a regulatory notice imposing a mandatory obligation (such as a suspension notice or an enforcement notice) or (b) a decision setting a charge (such as an increased Subsistence Payment). These are formal decisions imposing a mandatory obligation on a regulated person. They are "regulatory decisions". In fact, category (a) – regulatory notices imposing mandatory obligations – achieve a right to merits re-evaluation by way of appeal through the statutory appeal route: see the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No. 1154) at reg.31(1)(f). So, it is only category (b) – the setting of a charge such as the increased Subsistence Payment – which would require the Agency to make an arrangement for an appeal against a "regulatory decision".

31. This analysis reflects the meaning and purpose of the 2014 Code. It is supported by the provisions and purpose of the 2006 Act. It draws a coherent and clear line. The Code does not say "regulator's decision" but "regulatory decision". The regulated person is "regulated" by a "decision" when they are constrained by the imposition of a mandatory obligation. That is the moment of crystallisation which warrants the description "regulatory decision". Anything else is vague and expansive. It would be an unrealistic, unworkable and burdensome concept of regulatory decision, far beyond the contemplation of the 2014 Code, if every CAR became appealable on its merits. The 2014 Code is, moreover, applicable to all relevant regulators and all relevant regulatory functions. Absent the principled line drawn by the imposition of a mandatory obligation, a vast collection of regulator's actions would come within §2.3 bringing widespread unlawfulness, absent a reasoned departure. The expansive approach would also collapse the distinction with complaints (§2.5), for which there would be little room. The mandatory obligation interpretation leaves proper, principled space for the alternative mechanism of a complaint. It gives a coherent interpretation to §§2.3 and 2.5 read together. It is the legally correct interpretation, not only in the context of the Agency, but across the wide range of regulatory authorities and regulatory functions. It makes sense that the right of merits appeal should be reserved for a formal decision imposing a mandatory obligation, and that any action short of that should attract instead the complaints procedure.

32. That, then, is the Agency's argument. Its logic means that Suez could have mounted an appeal – on the merits – at April 2021, against the decision to impose the £2,500 increase in its Subsistence Payment, in the application of Compliance Band E. But would such an appeal be an avenue for challenging the merits of the non-compliance assessments, scores and categories in CAR1 and CAR2? That is something to which I will need to return (§§42-47 below).

Discussion

33. I am not able to accept the Agency's arguments. I agree with Mr Thomas KC and Ms Riggs that the Agency's approach involves a material error of law. That is because "regulatory decision" does not have an objective true meaning which adds the confining prerequisite: imposing a mandatory obligation. In my judgment, the answer to the first agreed issue is "no". I will explain why.

34. The 2014 Code was intended to be clear and straightforward. The primary target audience was regulators and those whom they regulate. The phrase "regulatory

decision" was an important one. An avenue of appeal to an impartial decision-maker was called for, subject to reasoned departure. This was a responsibility of the regulator. It was a safeguard for the regulated person. But it was not considered necessary to supply a definition or impose a restriction. Alongside "a failure to act in accordance with this Code", the "regulatory decision" clearly needs to be a "decision". It is not "action", nor "advice", nor "guidance". All of those are words which feature elsewhere in the 2014 Code. It is not a communication that the regulator is proposing to, or minded-to, take a decision. It is something more specific and concrete than the "conduct of the regulator", which is what attracts the §2.5 complaint route. Moreover, the "decision" must be adverse to the regulated person or persons. The route of appeal is for, and under §2.3 has to be publicised to, "those who are regulated". They will be appealing "against" it. This is straightforward.

35. The concept of "regulatory function" is important. Everyone agrees that it is necessary for the adverse "decision" to be one taken by a regulator in the exercise of a "regulatory function". That does not make every act, in the exercise of a regulatory function, a "regulatory decision". Identifying non-compliance plainly falls within a regulatory function. The 2014 Code (§2.2) speaks of regulators "responding to non-compliance that they identify". One of the regulatory functions in the 2006 Act (part of s.32(2)(b)) is a function which relates to the securing of compliance with or the enforcement of conditions relating to an activity. The response may be advice (2014 Code §2.2) or advice to support compliance (§5.5). It may be "actions required" or it may be "decisions taken". This is reflected in §2.2, which speaks in this way of the response to identified non-compliance: "the advice being given, actions required or decisions taken". That paragraph continues, referring again to "advice, requirements or decisions". Elsewhere (§3.2), there is a description of the regulator's "decision-making" processes including when choosing the most appropriate type of intervention or way of working with those regulated. This too is straightforward.

36. In my judgment, when the 2014 Code says "regulatory decision", it is not taking adverse decisions in the exercise of regulatory functions and then narrowing them down to confine them to adverse decisions "imposing a mandatory obligation". The 2014 Code did not provide any narrowing definition. It did not, in my judgment, provide any indication that this confining categorisation was intended; still less that it was to be understood on a straightforward reading. Given that "regulatory" is used in "regulatory function", I cannot see that "regulatory" when linked to "decision" narrows down to be confined to the imposition of a mandatory obligation. I can find no reflection of this in the text, whether on a first and straightforward reading, or whether adopting a forensic lawyer's analysis. No clue points in this direction.

37. I have referred to "regulatory function" under s.32(2)(b) of the 2006 Act. Under the twin provision – s.32(2)(a) – Parliament defined "regulatory function" as including the function under any enactment:

> ***of imposing requirements, restrictions or conditions.***

The same provision goes on to add "setting standards or giving guidance". In substance, what has happened is that the Agency has really focused narrowly on decisions "imposing" mandatory obligations, such as "requirements, restrictions or conditions". That, as I have shown, is an identifiable sub-species of decision in the exercise of regulatory functions, because it is an identifiable sub-species of regulatory

function. But I can find no textual or other clue that this narrowing down is what "regulatory decision" in the 2014 Code was achieving, or designed or intended to achieve. In my judgment, "regulatory decision" is the more straightforward concept, which does not have the further confining prerequisite.

38. I accept that this straightforward approach to "regulatory decision" is broad. I accept that it raises questions of appropriateness, proportionality and workability. A regulator may have very good reason for wanting to identify a narrowed category or menu of appealable regulatory decisions. But the answer to that appears on the face of the 2014 Code itself. Reasoned departure is flagged up as permissible by the preamble. It reflects the statutory duty to "have regard" to the 2014 Code. So, §2.3 does not itself impose a mandatory obligation – on regulators – to convene merits re-evaluation appeals against all regulatory decisions. The regulator is fully entitled – for identified and articulated reasons – not to do so. Its statutory duty (s.22(2)) is to "have regard" to the 2014 Code in determining general policy or principles by reference to which it exercises a regulatory function. The Agency is entitled to conclude that the application of the provision is outweighed by other relevant considerations. But it does need to ask itself that question. It needs to start in the right place. It needs to make a conscious decision, recognising that it is departing from the 2014 Code. It needs to record that decision. And it needs to have on record the reasons for that decision. None of that has occurred in this case, as Mr Lewis KC accepts.

39. On the other hand, the present case illustrates the implications of a narrow interpretation which confines "regulatory decision" to a decision which imposes a mandatory obligation (as to which see further §48 below). Officers of the Agency can decide that there has been serious non-compliance. They can decide to identify action as being required. They embody those decisions in a document which is issued. It is not advisory, or provisional, but conclusionary. It is publicly available. It promotes compliance and accountability. It can affect the actions of third parties. It affects commercial reputation. It could trigger breach of a contract. It forms part of the "history of non-compliance" which the Agency will consider in deciding to take any enforcement action – even if the action is not directly concerned with that "history": see the Agency's published "Enforcement and Sanctions Policy" (March 2022) at §8.1.7. It can trigger a Compliance Band which produces a financial charge: the Subsistence Payment. It can place an operator in an invidious position – whether to accept the adverse conclusion of non-compliance or to 'run the gauntlet' and defend a regulatory notice. All of this describes the adverse CAR. And, in my judgment, it falls within an objective interpretation of "regulatory decision".

40. It follows, in my judgment, that there was a material misdirection by the Agency as to the objective meaning of regulatory decisions in §2.3 of the 2014 Code. That material misdirection is found within the November 2019 Appeal Instruction and the January 2020 Waste Policy. In this case, the consequence was that when the CAR1 and CAR2 were sought to be challenged on their merits by Suez, no merits re-evaluation appeal was acknowledged by the Agency or supplied by it. That was the position, notwithstanding the first judicial review claim, and notwithstanding the invocation in those proceedings of the alternative remedy argument.

Interpretation and Application

41. In addressing this first agreed issue, I have considered the familiar public law distinction between an objective 'interpretation' of the meaning of a provision on the one hand, and an evaluative judgment in the 'application' of a provision on the other hand. I have elsewhere drawn attention, in the context of statutory provisions, to the "trap" of assuming that the Court has before it a question of 'interpretation' rather than one of 'application' (see Leeds City Council v Persons Unknown [2023] EWHC 1504 (Admin) at §6). I can see room for appreciation and judgment – as a matter of 'application' – in a regulator deciding what is truly a "decision", and what is relevantly "adverse". Mr Thomas KC's own formulation – speaking of a relevant "detriment" – really illustrated this. However, I cannot see how the Agency's approach – that "regulatory decision" is confined to an adverse decision 'imposing a mandatory obligation' – can be saved as an exercise in reasonable 'application'. The Agency has taken its stand, squarely and solely, on the basis that there was a single objective 'interpretation', correctly identified by it, confining "regulatory decision" to a decision 'imposing a mandatory obligation' on an operator. That, in my judgment, was a material error of law for the reasons I have explained. It means that the Agency's legal understanding of the 2014 Code involved a public law error.

The Agency's Logic: A Key Question

42. I have described the Agency's analysis: that an adverse decision imposing a mandatory obligation in principle attracts a merits re-evaluation appeal. I have also described the Agency's position on what this means for regulated operators against whom adverse CARs are issued. The Agency says such an operator will have a merits re-evaluation "appeal" at the point where those adverse CARs have become the basis for (a) the issuing of a regulatory notice or (b) the imposition of a financial charge. What that means, as I have explained, is that §2.3 of the Code – on the Agency's approach – entered on the scene in the present case in April 2021. That is for two reasons. First, because the increased Subsistence Payment was calculated and imposed. It was based on the adverse CARs. It used the Compliance Band applicable to the CCS:C2 breach Compliance Scores in CAR1 and CAR2. Secondly, because the reg.31(1)(f) statutory appeal does not extend to a challenge to an increased Subsistence Payment, so the appeal arises under the 2014 Code.

43. That is the Agency's logic. But it raises an obvious, key question. Suppose I am a regulated operator. Suppose I receive adverse CARs whose contents I want to challenge on their merits. Suppose I have not yet received any regulatory notice or the imposition of any financial charge, based on those CARs. But suppose the imposition of a financial charge comes along, based on those CARs, so that I can now mount a merits "appeal". Here is the key question. In that merits appeal, against that financial charge, can I challenge the merits of the underlying CARs on which the financial charge is based?

44. The materials filed by the Agency in these proceedings did not seem to me to give any clear answer to that question. Yet it is a question exposed by the Agency's logic. And it was a question of direct practical significance in the present case. There has been no regulatory notice in this case, so there was no reg.31(1)(f) appeal route for Suez. But there was the April 2021 imposition of the increase Subsistence Payment, based directly on the adverse CAR1 and CAR2. The increased Subsistence Payment was, on the Agency's analysis, a "regulatory decision" for the purposes of §2.3 of the 2014 Code. There had been no reasoned departure from the Code, as the Agency has

acknowledged. Suez wanted to challenge CAR1 and CAR2 on their evaluative merits. So: the question is staring us in the face. Could Suez do what it wanted to do, through the mechanism of an appeal against the increased Subsistence Payment? Yes or no?

45. I pause to add this: that transparency and accountability are key principles for regulators (see s.21(2)(a) of the 2006 Act); that a key and stated purpose of the 2014 Code (see the Foreword) is to promote the development of transparent and effective dialogue and understanding between regulators and those they regulate; and that the 2014 Code expressly says that routes of appeal need to be clearly explained, and publicised, with a timely explanation in writing in plain language and with practical information (§§2.3 and 2.4). These points indicate that we could expect clarity.

46. It did seem that Mr Lewis KC was placed in some difficulty in giving the Court a straightforward answer to this key question, on each of the two days of the substantive hearing. Starting with the prospect of an enforcement notice, Mr Lewis KC said that the Agency accepted that a regulated operator would be entitled – using the statutory appeal route in reg.31(1)(f) – to appeal against an enforcement notice by contesting the merits of non-compliance CARs on which the notice was based. That left the scenario which arises in the present case, in which the 2014 Code §2.3 appeal is in play, there being no statutory appeal. That scenario is the regulated operator facing the appealable year-end increased Subsistence Payment. On that point, Mr Lewis KC's answer crystallised at follows. The operator would not be "precluded" from seeking to impugn the merits evaluation embodied within the adverse CARs on which the increased Subsistence Payment was based. But that was subject to a qualification. The qualification was that it "may be" that the operator who took this course could find themselves facing an objection. The objection would be that a complaint could have been raised promptly and directly to challenge the adverse CARs. It would not be a good idea for a regulated operator to fail to invoke promptly the complaints procedure in relation to any adverse CAR whose merits were not accepted. In policy terms, it was moreover preferable that challenges to CARs should be prompt. That was especially important because of a 'policy' point: there could be questions of objective truth, which it would be better to establish promptly. Accordingly, the operator should be expected to use the complaints mechanism as a prompt and direct mode to challenge an adverse CAR.

47. As I see it, there are these key points. First, it would have been very easy for the Agency to say to Suez that the merits route of challenge to the CARs in this case was straightforward. The August 2020 CARs were not themselves appealable as regulatory decisions. But the April 2021 increased Subsistence Payment – a consequence on which Suez has been relying – was appealable as a regulatory decision, and the adverse CARs could be impugned on their merits through that appeal. That would, at a stroke, have resolved a principal issue raised by Suez. Secondly, this solution would have held the Agency's line, about waiting until adverse assessments are embodied in action imposing a mandatory obligation, before the appeal protection is triggered. Thirdly, this position was not adopted, and has not been adopted. Fourthly, the 'policy' point about prompt challenge and resolving questions of objective truth, are in fact reasons for a merits-based prompt challenge. That would favour a merits-appeal, pursued promptly. Fifthly, a merits appeal against an increased Subsistence Payment where the only merits which are appealable is the mechanism of identifying the compliance band and making the appropriate

adjustment seems destined to resolve into a question of whether the Agency was able to "do the maths". Sixthly, there is an obvious danger of a merits-lacuna, whereby the merits of the adverse CAR can never be impugned, even though it is the direct basis for what the Agency accepts is a merits-appealable decision. Why? Because the immediate remedy is a review of the CAR and not a merits re-evaluation; and because the subsequent merits appeal remedy does not extend to the CAR merits. I have found this an uneasy position. It has assisted my thinking about the virtues of the straightforward, unconfined, interpretation of "regulatory decision".

Virtues

48. My thinking was also assisted by recognising some further virtues which can properly be claimed for the unconfined interpretation of "regulatory decision" under the 2014 Code. A first virtue is that this analysis confronts the regulatory realities for the regulated operator. I have touched on some of this already (§39 above). I accept the submissions of Mr Thomas KC that these realities can, in and of themselves, bring dilemmas and detriments. Adverse CARs are conclusions of non-compliance. They are recorded by the regulator. They are published by the regulator, in the public interest, in the public domain. This is what I was told. The results have always been published and third parties could – by email request – obtain the CARs themselves. For the future, the CARs are themselves published online. That of course promotes transparency, and the public interest, in the important regulated world of environmental protection. The CAR is the regulator recording, for all the world to see, a finding of compliance or non-compliance. An adverse CAR may lead to enforcement action, or to an increased financial charge. Or it may not. There may be a delay. The adverse CAR may become historic. It may form part of a compliance record, relied on at some future point. It can inform a decision to pursue enforcement action, reached by reference to the Enforcement and Sanctions Policy" (March 2022), without the historic CAR itself being the subject-matter of that enforcement action. Published regulatory conclusions of non-compliance are damaging; just as published regulatory conclusions of compliance are beneficial. Adverse CARs can affect commercial reputation and standing. They can affect contractual dealings. And so, as to all of this, they should. Provided that they are justified and merited. Another regulatory reality is that CARs call for action. They call, publicly, for action. There is a place in the CAR for the Agency to describe actions which the regulated operator is to take, to rectify non-compliance and to prevent repetition. These may be costly. Again, this is as it should be. Provided that the findings of non-compliance are justified and merited. The regulated operator who wants to test the merits evaluation, but finds that they cannot do so, is in a position which may be invidious. Suppose they have a good point which would succeed on a merits re-evaluation, but not without a merits re-evaluation. Should they back their own position on the merits and decline to answer the public call to action? Or should they fall into line, taking costly and unwarranted action? Mr Lewis KC did not contest that there are real-world detriments of these kinds, arising from adverse CARs. Viewed in this way, there is a virtue in having the merits mechanism of the appeal – not the supervisory review mechanism of the complaint – available promptly, to inform what follows.

49. A second virtue lies in remembering the nature of the issue which divides the parties. Everybody agrees about there being a right of prompt challenge to an adverse CAR. Everybody agrees that the Agency has to take steps to provide the mechanism for that

prompt challenge. It follows that there is, inevitably, an administrative and decision-making burden. That can follow, in principle, from all adverse CARs. The only question that divides the parties is as to whether the prompt remedial avenue should be in the form of a merits re-evaluation "appeal", or a supervisory review "complaint". There is also this point. The more that Mr Lewis KC for the Agency emphasised the conscientiousness and scrutiny which can be brought to bear on a complaint, the narrower that distinction becomes. And his point about policy reasons for objective truths being resolved promptly tends to support a merits mechanism rather than a review mechanism.

50. The third virtue arises by way of a congruence with two past statements made by the Agency in the public domain, back in 2018. This material was identified by Mr Hayler. I have explained how the Agency's internally expressed approach to "regulatory decision" is articulated in the November 2019 Appeal Instruction, as it was in the February 2016 equivalent. I have also referred to the published description in the January 2020 Waste Policy. In identifying this 2018 material, I emphasise that there is no legitimate expectation argument said to have arisen out of what was said in 2018. And there is no policy-adherence argument arising out of the 2018 materials. The 2018 materials are nevertheless helpful, for three reasons. First, because the ideas which were communicated by the Agency in 2018 fit with the idea of allowing prompt merits re-evaluation challenges to CARs. Secondly, because these 2018 statements temper the force of arguments about workability or burden. Thirdly, because these 2018 statements fit with Mr Lewis KC's 'policy' point about objective truths being established by prompt and direct challenge.

The 2018 Statements

51. The first 2018 statement is in an archived Information Sheet issued by the Agency, version 2 of which was published in August 2018. This one-page document is entitled: "Information on Compliance Assessment Report Forms". It is written in user-friendly, straightforward language. It says this (the paragraph numbering is mine, for ease of later cross-referencing):

> ***[Q1] What happens when the CAR form has been completed? [A1] Once the CAR form is complete it is issued to the site operator. The site operator then has the opportunity to comment or challenge what is on the CAR form. The site operator has 28 days to challenge any of the non-Compliance Scores and comments through provision of additional information or evidence. This is a requirement of the Regulators' Code. After 28 days, the CAR form then becomes a public register document.***
>
> ***[Q2] What happens if the site operator challenges what is on the CAR form? [A2] The operator has the right to challenge the CAR form within 28 days of issue. We are required to review the CAR form Compliance Scores and comments for accuracy if the operator disagrees with a decision that we have made. We make the final decision on whether the CAR form is accurate and explain our reasons to the operator.***

This does not use the word "appeal". It references at [A1] the 2014 Code without saying whether it is referring to §2.3 (appeal) or §2.5 (complaint). It uses, at [A2] the word "Review". But the references at [A2] to "accuracy", "review … for accuracy", "disagrees" and "accurate" are – in my judgment – clear indicators of merits re-evaluation. And this would fit with Mr Lewis KC's 'policy' idea of promptly establishing objective truths.

52. The second 2018 statement is the Agency's published "Summary of Consultation Responses and Decisions" (December 2018) following its "Consultation on Assessing and Scoring Permit Compliance". One specific question was about clearer descriptions of non-compliance, as to which some consultees had drawn attention to subjectivity and inconsistency. In that context, the Agency's December 2018 statement said this:

> ***We are bound by the Regulators Code so our regulatory decisions can be challenged. If an operator believes our interpretation about the impact of a particular breach is incorrect or inconsistent with the guidance, they can appeal our decision.***

Mr Lewis KC told me that his instructions are, from within the Agency, that the word "appeal" is regarded here as having been a mistake; and the word which should have been used was "complaint". I find this a conundrum. The statement refers to the 2014 Code ("the Regulators Code"), to the trigger for appeal ("regulatory decisions") and to the merits ("incorrect"). The word "appeal" – accurately used – therefore fits perfectly. Whatever was actually intended, it is sufficient if I focus objectively on the words which were publicly communicated.

Conclusion on Issue (1)

53. For the reasons I have given, I cannot accept that the legally correct meaning of "regulatory decision" in the 2014 Code entails the Agency's confining prerequisite. It is the more straightforward concept, thus:

> ***a decision, in the exercise of a regulatory function, which is adverse to a regulated person ~~by imposing on them a mandatory obligation~~.***

I therefore conclude that Suez succeeds on Issue (1). Suez has shown a material error of law in the Agency's consideration of the question of providing it a right of merits appeal. In light of my conclusion, the claim must succeed. But the other Issues were fully argued, and I will deal with them.

Issue (2): Common Law Procedural Fairness

54. Agreed Issue (2) is this: Was the Agency required to provide a right of appeal against CAR decisions containing adverse Compliance Scores, as a matter of common law procedural fairness?

55. On this issue, Mr Thomas KC submitted, in essence as I saw it, as follows. The famously context-specific minimum standards of procedural fairness operate to impose a public law duty on the Agency, independently of any question relating to the 2014 Code, to provide an entitlement to a merits appeal in the case of any CAR containing any adverse Compliance Score. Otherwise, the operator has been 'condemned unheard'. As Lord Mustill explained in R (Doody) v Secretary of State for the Home Department [1994] 1 AC 531 at 560F:

> ***Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on [their] own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.***

Here, the opportunity must be given "after [the decision] is taken, with a view to procuring its modification". The starting point is that an adverse CAR is issued without any prior 'minded to' decision, such as would enable the regulated operator to make informed representations and supply evidence before the writer of the CAR arrives at their decision. Unmitigated, that produces a procedural unfairness in the particular context of CARs with their adverse regulatory consequences and detriments. Absent a pre-decision stage, the minimum common law standards of procedural fairness must require an opportunity to make informed representations, and provide evidence, to seek to persuade the Agency to revise and correct the CAR. Since the CAR decision-maker has, at that stage, made their decision, the necessary opportunity must be one involving a different decision-maker. That means there must be a post-CAR right to request merits re-evaluation; in other words, a merits appeal.

56. I cannot accept that common law procedural fairness provides a freestanding guarantee that all CARs must attract a right to pursue a merits re-evaluation. It is necessary to confront the consequences of that logic. The starting point is that – as is agreed between the parties – there is in the 2014 Code an applicable statutory code addressing, in the regulatory context, the question of a right of merits re-evaluation ("appeal"). That statutory code is accompanied by a duty in primary legislation of "due regard", and a public law duty of adherence absent reasoned departure. Suez's case, at its highest, is that this applies to CARs. But the logic of the common law argument is that it would never be open to the Agency to adopt a position of reasoned departure from §2.3 of the 2014 Code. That would be the position whatever the cogency of the reasoning identified. It would be the position even if the Agency's stance straightforwardly recognised (which it currently does not) that Suez's April 2021 increased Subsistence Payment would be appealable by a mechanism in which the merits of CAR1 and CAR2 could be impugned.

57. There can be cases where standards of procedural fairness are reflected in generalised conclusions about the system or structure of a public authority's decision-making arrangements. But there are many other situations in which generalisations are avoided and the question of procedural fairness is resolved on a case-by-case basis. It is, of course, difficult to approach any question about a 'right of appeal' on an 'ad hoc' case-specific basis. But I do think that the question whether there has been a common law procedural unfairness, in the making and maintaining of an adverse CAR, will depend on individual facts and circumstances. There will be many cases in which an adverse CAR is issued after a discussion with the operator which allows a chance for informed representations. There may be situations where the writer of a CAR can properly be invited to revisit it, with a view to revision or correction, with a sufficiently open mind in the light of what is put forward. I am not persuaded that any generalised conclusion can properly be arrived at, requiring at common law an additional layer of procedural protection in every adverse CAR case. Still less could I have accepted Mr Thomas KC's position that the right of appeal should be to a decision-maker independent of the Agency, or that it must be a mechanism allowing for experts' reports.

58. In all the circumstances, and for the reasons that I have given, I reject the invitation to find that the Agency was required to provide a right of merits appeal against adverse CARs as a matter of common law procedural fairness. On this part of the case I accept the submissions of Mr Lewis KC.

Issues (4) and (5): The CAR1/CAR2 Issues

59. Agreed Issues (4) and (5) concern the officers' decision-making in relation to CAR1 and CAR2. These Agreed Issues are formulated as follows:

> ***(4) Were the odour assessments that informed the Agency's CAR reports dated 05.08.20 and 12.08.20 lawful? In particular: (i) Did the Agency's officers carry out an adequate investigation that complied with the Tameside duty of sufficient inquiry? (ii) Did the officers investigate in accordance with the guidance that applied to such investigations at the time? (iii) Were the officers' decisions as to (a) breach of the permit and/or (b) 'Compliance Classification Scheme' ("CCS") scores vitiated by a mistake of fact? (iv) Were the officers' decisions as to (a) breach of the permit and/or (b) CCS scores vitiated by irrationality?***
>
> ***(5) When the Agency's officers completed the two CAR reports dated 05.08.20 and 12.08.20, did they act in accordance with: (i) the Agency's guidance on the CCS; (ii) the Agency's guidance on the 'Common Incidents Categorisation Scheme' ("CICS")?***

60. On this part of the case, Mr Thomas KC submits – in essence as I saw it – as follows. There was both a failure of legally sufficient enquiry and a failure to act in accordance with applicable guidance because Ms Siddle and Ms Linsley did not go onto the site. The importance of going onto the site, and indeed going into the buildings, is that otherwise the decision-maker assessing compliance and non-compliance is denied highly relevant information both as to the nature of odour and as to its attribution and source. This point is well illustrated by prior incidents of a chemical "leachate" smell which featured in many earlier CARs but which was ultimately found to be attributable to leaking local authority vehicles rather than the Plant (see §19 above). It is also illustrated by the subsequent "cherry" odour incident, whose suggested attribution to the Plant was refuted by officers entering into the Plant buildings (see §20 above).

61. Relevant and recent Agency documents described the site visit in imperative terms. The May 2019 Odour Instruction stated that, after testing and recording observations outside the site: "You should then visit the permitted site you suspect is causing the odour to assess the causes of any odours and whether appropriate measures are being taken". The August 2019 Byker Instruction stated that, after testing and recording observations outside the site: "If any odours are detected you *must* go onto the site and carry out a site inspection to assess whether the site operator has taken appropriate measures to reduce the risk of odour". Properly interpreted and applied, the July 2020 Pandemic Guidance did not preclude entry into the Plant buildings – which moreover Suez was offering at the time of the August 2020 assessments – in circumstances where entry was necessary for a legally sufficient enquiry. Still less did the July 2020 Pandemic Guidance preclude entry onto the site, within the site boundary, but remaining outside the Plant buildings. This would have enabled the officers to stand immediately adjacent to Plant building doors. That would have provided clearly relevant evidence, of a kind which the officers were denied. The officers could also have stood on the boundary between the Plant and the HWRC to the west, another step identified in the August 2019 Byker Instruction. That would have been relevant on the question of attribution of any odour to the Plant as opposed to the HWRC. Insofar as the officers were prevented from entering the site by a refusal of authorisation by their superiors, that refusal was itself without reasonable justification and put the officers undertaking the CARs in breach of the public law obligation of legally sufficient enquiry.

62. Then there are the officers' decisions as to permit breach, CCS scores, CCS categorisation and CICS categorisation. Here, there was unreasonableness, mistake of fact, and non-compliance with Guidance. The scores of odour intensity including 5/6 and 6/6 are demonstrably unreliable and must have been exaggerated perceptions, when put alongside all the evidence in the case. At the time of the assessment visits themselves the track record of the Plant – notwithstanding any issues that had been identified – had never involved any score of 6/6 or 5/6. There was no reason or change which could have supported a sudden spike or gear-change in detected odour. The scores of 5/6 and 6/6 would, if those criteria (see §10 above) had been correctly and reasonably applied, have meant that the officers would have needed to leave. Odour intensity scores of this nature detected at these distances from the Plant are, moreover, irreconcilable with the tolerability of the working environment for Suez's employees. The scores must have been exaggerated and unreliable when put alongside everything else that is known. That includes what is now objectively ascertainable. It includes the materials that were provided for the complaint and the Stage 2A escalation. There is a technical expert report which makes a number of cogent observations. There is material relating to the wind conditions on the days in question. There is photographic evidence from the days in question which shows whether or not residents were able to have windows open. There are statements from several neighbours, as well as from several employees of Suez. There is the course of compliance testing undertaken by Suez itself in accordance with its Odour Management Plan. In the light of all these points, the assessments of odour intensity scores were not lawful; and nor were the purported findings of CCS:C2 breaches; and CICS:Category 2 incidents.

63. I cannot accept these submissions. On this part of the case I accept the submissions of Mr Lewis KC. The relevant permit condition is expressly framed in terms of the assessment of an agency officer. The function of that assessment is to evaluate the position from the perspective of protecting neighbouring members of the public from experiences arising from odour emanating from the Plant. The officers had to consider the nature and intensity of the odour. What was set out in detail in the reasoned CARs was that the officers had experienced at the various locations. At some locations and for substantial periods of time what they recorded was discernible but minor. The officers were familiar with the Plant and indeed had undertaken an assessment, at which much lower intensity levels have been discerned by them. On the face of it, what they experienced was serious and severe, and that is what they recorded. There is no basis at all, in my judgment, for a judicial review court to go behind that and conclude that what was experienced by the officers was exaggerated by them. My jurisdiction does not extend to merits re-evaluation, nor eliciting and evaluating the sort of information that would inform a merits re-evaluation. I have some witness statements from some neighbours, and from some employees; the observations made by the experts; the points made about the seriousness of the experience reflected in 5/6 and 6/6 intensity scores; points made about previous CAR assessments and subsequent CAR assessments; points made about other smells on other occasions; and about testing undertaken by others on other dates. But neither individually nor cumulatively are these, and the other points and materials, a basis for treating a factual position as "verifiable" and "clearly established" so as to warrant characterising the described exercise of subjective evaluative judgment as erroneous in fact; nor as unreasonable. The same is true of the evaluative conclusions as to cause and attribution. The officers took and described steps which they felt enabled them to

conclude that the unmistakable source of the domestic waste odour was the Plant; not the HWRC; nor any other source.

64. So far as the nature of the inspection is concerned, it is true that the Agency Instructions relied on do record the importance of attending the site, which includes entering the buildings. But the officers were attending during the pandemic. And there was a pandemic-specific instruction: the July 2020 Pandemic Guidance. That relevant Guidance provided for attending in person. It provided, contingently, for attending within the boundaries of a site, but remaining outside buildings. The contingency was prior approval by the relevant superior officers. That specific Guidance was complied with in this case. In the case of CAR1 and CAR2 not only had the required approval not been given, but it had specifically been refused as unnecessary. There is, in my judgment, no basis in public law terms for characterising that refusal as unreasonable. Viewing the various Agency documents together and as a whole there was no breach of policy or instruction, but rather compliance. Remembering that the public law standard of legally adequate enquiry involves a built-in latitude for the decision-maker, and not a hard edged substitutionary review, I find it impossible to conclude that there was an insufficiency of enquiry.

Issues (3) and (6): The Stage 2A Issues

65. Agreed Issues (3) and (6) both concern the Stage 2A Decision. Agreed Issue (3) is: "Was the Stage 2A Review decision procedurally fair?" Agreed Issue (6) is: "Was the Stage 2A Review decision vitiated by irrationality?" I will use the language of "reasonableness" rather than "rationality".

66. The starting point for this part of the analysis is that the Stage 2A Decision-Maker – the Independent Internal Reviewer, Mr Pruce – was dealing with a complaint, by way of a supervisory review, pursuant to the relevant complaints procedures. I have already dealt with all the issues relating to whether Suez ought to have been afforded something different: a merits re-evaluation, by way of appeal. Viewed as a supervisory review of a complaint, I find it impossible to conclude that there was any breach of public law duties of procedural fairness or substantive reasonableness. On this part of the case I accept the submissions of Mr Lewis KC.

67. The supervisory review was careful and thorough. Clear and careful reasons were given and there is rightly no challenge to those reasons as having been legally inadequate. Suez had a full and fair opportunity to put forward all representations, materials and evidence for consideration. That opportunity was taken. A comprehensive case was put forward, asking for the CARs to be revised and corrected. The Stage 2A Decision took into account the various points that were being made by and on behalf of Suez.

68. Ultimately, the Stage 2A Decision-Maker focused on the position of the two officers. Theirs was a subjective evaluative judgment of their experience of the odour. They had identified what they had done to satisfy themselves as to its source. The Stage 2A Independent Internal Reviewer was plainly anxious to understand whether the experience was exaggerated because it could not be squared with the graphic description of 5/6 and 6/6 odours. As Mr Pruce recorded in the Stage 2A Decision, the following response was elicited by that enquiry:

> ***In my discussions with the EA's Waste Regulatory Specialist [Ms Siddle], she described the odour at one stage as being stomach churning and that she had to move away, something she had never had to do at the site or any other site. It was the first time she had felt that she could not continue the inspection. She confirmed that when experiencing the odour at its most intense it was exactly as described in [the relevant sources] for an intensity of 6/6. When questioned, she confirmed that she is very confident that the odour intensity was at 5/6 ("very strong odour, unpleasantly strong, you will want to leave the area quickly") and 6/6 ("extremely strong odour, likely to cause nausea and a strong need to remove yourself from the odour immediately").***

69. I cannot accept that the Stage 2A Review decision was vitiated by unreasonableness or procedurally unfair.

Conclusions

70. For the reasons that I have given, I will allow the claim for judicial review on Agreed Issue (1). I reject it on all of the remaining Agreed Issues (2) to (6). It is an open question whether Suez could ever have succeeded, or now succeed, on a merits re-evaluation. The Agency did not advance – and I would not have accepted – a contention at common law or under the statutory overlay: that issues relating to a merits re-evaluation appeal lack materiality or utility, because the outcome for Suez would inevitably (or highly likely) have been the same (or not substantially different). Having circulated this judgment as a confidential draft, I am able to deal here with any consequential matter and describe the order of the Court disposing of the proceedings.

71. There are two contested consequential issues: remedy and costs. It is common ground that my judgment means that the Stage 2A Decision should be quashed. Mr Thomas KC and Ms Riggs say I should also (as "the just result" in order "to achieve finality") quash the adverse CCS Scores and recorded breaches of permit condition 5.2.1 in CAR1 and CAR2 and should order the Agency to pay 75% of Suez's costs. Mr Lewis KC says there should be no further quashing order and the costs order should be limited to 30%. As to remedy, I will order: "(1) The claim for judicial review is allowed on the basis of the first agreed issue (Judgment §22), namely that the Agency has failed to comply with its duty under the 2006 Act in relation to the 2014 Code in considering the provision of a right of appeal against an adverse score on a CAR. (2) The Stage 2A Review decision (dated 30 June 2021) is quashed and the Claimant's challenge to CAR1 and CAR2 is remitted to the Defendant for reconsideration". This reflects the nature of agreed issue (1), my conclusion on that issue, and the open question (§§22, 40, 53, 70 above), in circumstances where Suez's direct challenges to CAR1 and CAR2 and the reasonableness of upholding them have all failed (§§59-70). I will order the Agency to pay 60% of Suez's costs, to be the subject of detailed assessment if not agreed. Suez is the clear winner. Issue (1) was, by the time of the substantive hearing, very much the main event. But five further grounds were pleaded, maintained and argued. They were distinct. They needed to be dealt with in evidence, authorities and submissions. They failed. My costs order strikes what I consider – standing back – to be the fair, just and proportionate balance. There was no application for permission to appeal.