

Final position statement: Environment Agency's response to the High Court judgment in *R (Suez Recycling and Recovery UK Ltd) v Environment Agency* [2023] EWHC 3012 (Admin)

1. On 28 November 2023, the High Court gave judgment in *R (Suez Recycling and Recovery UK Ltd) v Environment Agency* [2023] EWHC 3012 (Admin). In this claim for judicial review, the claimant challenged (i) two 'Compliance Assessment Reports' ("CARs") issued by the Environment Agency on two dates in August 2020 in relation to the claimant's waste transfer facility in Byker, Newcastle; and (ii) the Agency's response under Stage 2A of its complaints procedure to complaints the claimant had made about the two CARs. The two CARs had recorded and scored breaches of the odour condition on the environmental permit granted to the claimant to operate the facility.
2. In its judgment, the court rejected the claimant's direct challenge to the CARs, finding no legal error in the Agency's assessment that the claimant was in breach of the odour condition on the two dates in question. However, the court upheld the claimant's challenge to the Agency's Stage 2A response. The court held that the Agency's approach of dealing with a challenge to a CAR as a complaint, rather than treating it as an appeal against a regulatory decision, was based on a misinterpretation of the Regulators' Code.
3. The Agency has a statutory duty to have regard to the Regulators' Code when developing its general policies (s. 22(2), Legislative and Regulatory Reform Act 2006). The Code states: "Regulators should provide an impartial and clearly explained route to appeal against a regulatory decision" (para. 2.3). The court considered various statements of policy and guidance by the Agency to the effect that it did not provide a route to appeal against a CAR because a CAR is not a "regulatory decision" in the sense of a decision that imposes a mandatory obligation on a person. In the absence of an appeal, the Agency's practice was to deal with challenges to CARs as complaints that are subject to the Agency's complaints procedure.
4. The court held that the meaning of "regulatory decision" in the Regulators' Code is not confined to a decision that imposes a mandatory obligation on the regulated person. Rather, a "regulatory decision" for the purposes of the Code means simply a decision, in the exercise of a regulatory function, which is adverse to a regulated person. In the court's judgment, a CAR is a decision, in the exercise of a regulatory function, that can be adverse to a regulated person. Accordingly, the court ordered the Agency to reconsider its approach of not providing a route to appeal against a CAR.
5. The Agency accepted the court's interpretation of the meaning of "regulatory decision" in the Regulators' Code and committed to a full review of its regulatory appeal procedure. It adopted an interim position on 16 January 2024 that it would treat a challenge to a CAR as an appeal against a regulatory decision which would therefore be subject to the Agency's procedure for regulatory appeals in place at the time. This was pending a full review of its procedures for appeals and complaints. This review has now concluded. The complaints procedure remains unchanged. The revised regulatory appeals procedure will be in effect from 3 December 2024. Details of the revised procedure are provided in Annex 1.

6. As part of its review, the Agency undertook an informal engagement exercise with regulated customers between July and September 2024 seeking feedback on the draft revised regulatory appeals process. Following consideration of this feedback, this revised regulatory appeals process has been finalised.
7. The revised regulatory appeals procedure comprises two stages. **Stage 1** provides an opportunity for the regulated customer to contact the person who made the original regulatory decision within 14 calendar days of receipt to make any quick corrections or for any misunderstandings to be resolved. Should the regulated customer remain dissatisfied after the Stage 1 discussion they can make a request, within 28 calendar days of receipt of the Stage 1 response, for a regulatory appeal which is **Stage 2** of the procedure. The process is detailed on GOV.UK explaining how to submit a request for a regulatory appeal, where the regulated customer will be asked to explain why they believe the decision to be wrong and provide any information and/or evidence in support. The regulatory appeal will be allocated to an impartial person for their determination.
8. Key changes to the Agency's regulatory appeals procedure, and the reasons for these changes, are set out below:
 - The updated regulatory appeals process will remove decisions that already have a statutory right of appeal from our regulatory appeal process, without affecting those statutory rights. Please see para. 9 below for the reason for this change.
 - There will be a revised level of sign-off for regulatory appeal outcomes: this person must be at least a Grade 5 officer and not be at a lower grade than the original decision-maker. This person will be impartial to the original decision and have the appropriate skills and experience to consider the appeal. This change has been made to enable a larger pool of people to consider regulatory appeals. This will assist the Agency to ensure that decision-makers are impartial and that the regulatory appeals process is appropriately resourced.
 - The introduction of Stage 1 as per paragraph 7 above. Stage 1 has been introduced to formalise initial reviews of regulatory decisions that have to date been undertaken outside of the appeals procedure. This promotes clarity and consistency.
 - Change in the timescale for requesting a regulatory appeal (Stage 2) from 14 calendar days under the current procedure to 28 calendar days. The number of days has been increased following feedback from regulated customers. This gives regulated customers additional time to consider the Stage 1 response and, if necessary, formulate their appeals and collate evidence, resulting in a more robust process. The timeframes for Stage 1 and Stage 2 ensure regulatory certainty giving clarity to both the Agency and regulated customers.
9. The Agency's reasons for excluding decisions that have a statutory right of appeal from the new regulatory appeals procedure are as follows:
 - The bodies responsible for administering and deciding statutory appeals (for example, the Planning Inspectorate or the First-tier Tribunal) are well-established and generally publish guidance and provide a good level of

assistance to those who seek to use their appeal procedures. These bodies do not require legal representation for appeals and generally do not charge fees.

- Excluding decisions that have a statutory right of appeal from the regulatory appeals procedure will provide a clear and more streamlined process for regulated customers to follow when considering an appeal. Appeals against regulatory decisions that have a statutory right of appeal will need to follow the statutory procedure, and all other regulatory decisions will be subject to the Agency's regulatory appeals procedure.
- The more streamlined process described above will enable appeal decisions to be issued more quickly than when customers use both the Agency's regulatory appeal procedure and the statutory appeal process. Reducing the time taken to issue appeal decisions increases regulatory certainty for all parties. It enables the Agency to regulate more effectively and allows customers to know earlier what is required of them so that they can take action accordingly.
- The more streamlined process should also make it less likely that the Agency will have to duplicate work across two potentially overlapping appeals processes. Duplicative work is not a sound use of public resources.

Approved on behalf of the Environment Agency by Jo Nettleton, Chief Regulator

A handwritten signature in black ink, appearing to be 'J. Nettleton', written over a faint horizontal line.

29th November 2024

Annex 1: How to appeal a regulatory decision from the Environment Agency or report when they have not followed the Regulators' Code.

When to use this procedure

You may use this procedure if you want to submit a regulatory appeal against a recent regulatory decision(s) that the Environment Agency has made, or a failure to act in accordance with the Regulators' Code.

What a regulatory decision is

A regulatory decision is a decision taken in the exercise of a regulatory function, which is adverse to a regulated person.

This can include taking a step that removes an operator from the regulated community, such as removing an operator from a register of exemptions. It also includes setting a charge for a site which is payable under a charging scheme and decisions on regulatory report forms (e.g. recording on a compliance assessment report that there has been non-compliance with a permit condition).

What is not a regulatory decision

A regulatory decision is not:

- advice and guidance
- a notice that the Environment Agency intends to do something
- where the Environment Agency tells you they are proposing to or minded to do something

The Environment Agency does not accept regulatory appeals for decisions to prosecute. That's because the Code for Crown Prosecutors, under which these decisions are made, requires a continuing process of review to be applied to all cases.

The Environment Agency does not consider that they make a regulatory decision when legislation gives them no discretion.

There's a different way to [complain about the standard of service](#) you receive from the Environment Agency.

Enforcement undertakings

The decision to reject an [enforcement undertaking offer](#) is a regulatory decision. However, the Environment Agency will not review a decision to reject if they receive the request within 28 calendar days of a prosecution court hearing. This is because there is not enough time available and it risks interfering with the court process.

If you have a 'statutory right of appeal'

Do not follow this process if you have a statutory right of appeal for a regulatory decision. Instead, follow the appeal process in the documents you received from the Environment Agency.

Stage 1: Discussion before a regulatory appeal

Raise your concerns with the officer or team which made the regulatory decision or took the action you think did not follow the [Regulators' Code](#).

You need to do this within 14 calendar days of the date of the regulatory decision, or if the regulatory decision is communicated directly to you in writing, within 14 calendar days of the date the regulatory decision is received by you. In respect of an alleged failure to act in accordance with the Regulators' Code, you must raise your concerns within 14 calendar days of the action.

If the regulatory decision is communicated directly to you in writing, then unless specified otherwise, the 14 calendar days start the day the Environment Agency email, deliver or hand the regulatory decision to you, or leave the regulatory decision at your address. If the regulatory decision is communicated to you by post, then unless specified otherwise, the Environment Agency will consider you to have received the regulatory decision 3 working days after it was posted.

This helps with quick corrections and to resolve misunderstandings.

The Environment Agency should respond to your concerns within 14 calendar days. If that is not possible, they will write to you and give a timeframe for their response.

Stage 2: Regulatory appeal

If the response you receive in Stage 1 does not resolve your issue, you can send a Stage 2 regulatory appeal.

You must send this within 28 calendar days of you receiving the Environment Agency's Stage 1 response.

If the Stage 1 response is communicated directly to you in writing, then unless specified otherwise, the 28 calendar days start the day the Environment Agency email, deliver or hand the Stage 1 response to you, or leave the Stage 1 response at your address. If the Stage 1 response is communicated to you by post, then unless specified otherwise, the Environment Agency will consider you to have received the Stage 1 response 3 working days after it was posted.

Send your appeal to enquiries@environment-agency.gov.uk and make sure you include:

- details of the decision or action, for example any reference numbers, such as permit numbers and report form reference
- the name of the officer or team you contacted during Stage 1
- why you believe the regulatory decision is wrong or how the action failed to meet the [Regulators' Code](#)
- any supporting documents

After you appeal

Initial review

The Environment Agency will look at your appeal to make sure that:

- it is about a regulatory decision or a failure to comply with the [Regulators' Code](#)
- a statutory right of appeal is not available

- you have had a stage 1 discussion
- you have sent the appeal within the required time

If they reject your appeal at this point, the Environment Agency will write to you to explain why.

Impartial review

After the initial review, an Environment Agency employee who was impartial to the original decision will review the appeal. They will be provided with a document that will include all relevant information. You will also be provided with a copy of this document.

The impartial person may ask for more information from you or the original decision maker during the appeal.

The impartial person will, as far as possible, stand in the shoes of the original decision-maker and consider all the relevant facts, law, policy or guidance related to the decision. They will consider the information that you submit and the information from the original decision-maker. The impartial person may, where they consider it appropriate, take account of new information and considerations since the original decision was made.

The impartial person may agree with (uphold) the original decision or change it.

If they change the decision, they will tell you what will happen next.

Outcome of your appeal

The Environment Agency should write to you with the outcome within 28 calendar days of your regulatory appeal.

If that is not possible, the Environment Agency will write to you and give a timeframe for their response.

Requesting a regulatory appeal does not suspend the regulatory decision or action unless the Environment Agency has written to you confirming that it does.

Following this process does not affect your right to:

- ask the courts to review a decision or action
- [make a complaint](#) to the ombudsman

If the Environment Agency receives a request for a regulatory appeal from someone who is not the regulated person, they will treat this as a [complaint](#).