

**Decision of Bryan Welch, Deputy Legal Director, on behalf of the Secretary of State for Business, Innovation and Skills on the appeal by Biffa Waste Services Ltd under regulation 66 of the Waste Electrical and Electronic Equipment Regulations 2006 (SI 2006/3289) against the decision of the Environment Agency to refuse Biffa's application to operate a producer compliance scheme ("Transform") for the years 2010-2012**

*Background*

1. On 27th August 2009 Biffa Waste Services Limited ("Biffa") submitted an application to the Environment Agency ("the EA") under regulation 41 of the Waste Electrical and Electronic Equipment Regulations 2006 (as amended) for approval to operate a producer compliance scheme for the years 2010, 2011 and 2012. Biffa had previously been approved to operate a producer compliance scheme for the years 2007, 2008 and 2009. It operates this scheme under the name "Transform".
2. Part 4 of Schedule 7 of the WEEE Regulations sets out the requirements for a producer compliance scheme ("PCS") to be approved and for continued approval of a scheme. Paragraph 4 requires that the operator of a proposed scheme has viable plans to collect an amount of WEEE that is equivalent to the amount of WEEE it will be responsible for financing under the Regulations.
3. In June 2009 the EA and the Scottish Environment Protection Agency (which is responsible for the approval of schemes in Scotland) jointly issued "Guidance note WMP8: Guidance on operational plans for WEEE compliance schemes". This contains guidance on the operational plans required in applications for approval of a PCS. Paragraph 4 of the guidance explains what the EA and SEPA require an applicant to include in its application in order to show that it has a "viable plan". Such plans "must demonstrate that significant over or under collection will be avoided" and "must be supported by documentation to demonstrate that the plans are 'viable' and not simply aspirations or good intentions." Where a plan relies on arrangements for the scheme seeking approval to collect WEEE on behalf of other schemes, or for other schemes to collect WEEE on its behalf, the plan must name the other schemes and show the estimated tonnages for each of them.
4. On 17th August, following an unsuccessful judicial review of the WEEE Regulations by Repic Limited, the Department for Business, Innovation and Skills, the EA and SEPA sent each PCS a joint statement with further guidance to applicants for approval of a PCS. Paragraph one sets out what information must be contained in an application for approval of a PCS where a scheme has agreed to collect WEEE on behalf of another scheme or have WEEE collected on its behalf by another scheme. Paragraph one includes the following—

"Details of such third party collection arrangements, including the amounts of WEEE per category and names of the relevant third party schemes involved, must be provided in schemes' operational plans. Schemes must also provide the relevant Agency [i.e. EA or SEPA] with written confirmation from the third party schemes they are collecting on behalf of / collecting on their behalf. These details and confirmation must be contained in schemes application for approval under the Regulations and any subsequent material changes to the details must be notified to the Agencies."
5. On 14th September the EA wrote to Biffa seeking more information about their application of 27th August for approval. Some of the information requested related to data contained in the viable plan. In accordance with the guidance referred to in paragraph 4 above the EA requested supporting documentation for arrangements

made by Biffa to collect WEEE on behalf of other schemes and for other schemes to collect WEEE on behalf of Biffa, and of commitment from the other schemes to these arrangements.

6. Following this request by EA for further information Biffa submitted an updated application dated 21st September 2009. EA and Biffa discussed some issues in respect of the viability of the plan and evidence for the commitment of another scheme by telephone between EA and Biffa on 25th and 28th September.

7. The deadline for the EA to determine the application was 1st October 2009. On that day the EA notified Biffa that its application had been refused. The particular ground for refusal was that the information provided did not demonstrate that Biffa had viable plans to collect an amount of WEEE that was equivalent to the amount of WEEE that it would be responsible for financing. The EA stated in its notification of refusal that arrangements set out in the viable plan with another scheme operator were not supported by the documents provided, leaving Biffa with a shortfall in the amount of WEEE it had a viable plan to collect.

#### *The appeal*

8. On 7th October 2009 Biffa submitted its appeal against the EA's refusal of its application to the Secretary of State for Business, Innovation and Skills under regulation 66(1) of the WEEE Regulations. An oral hearing of the appeal was arranged for 13th October 2009 before me. At the request of Biffa I had agreed that the hearing take place in private as provided by regulation 67(2).

9. At the appeal hearing the Agency agreed that had information provided by the Appellant in the course of the appeal been produced on or before 30 September 2009, it would have approved Biffa as a PCS under the Regulations on the basis that Biffa had a balanced viable plan at that date. It was accepted that in light of events subsequent to 30 September 2009 it was necessary for Biffa within 28 days to submit details of alterations to the agreed viable plan to reflect changes that have occurred since 1 October 2009.

#### *Decision*

10. As a result I determined on behalf of the Secretary of State that the decision of the EA should be altered so that Biffa was approved as a PCS (under the name "Transform") for the compliance periods 2010 to 2012.

Signed on behalf of the Secretary of State

*Bryan Welch*

Bryan Welch  
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Department for Business, Innovation and Skills

13 October 2009