Neutral Citation Number: [2006] IEHC 435

THE HIGH COURT
COMMERCIAL

[2004 No. 694 JR] [2004 /32COM]

BETWEEN

USK AND DISTRICT RESIDENTS ASSOCIATION LIMITED

APPLICANT

AND
THE ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

AND
GREENSTAR HOLDING RECYCLING LIMITED

NOTICE PARTY

Judgment of Mr. Justice Clarke delivered the 15th December, 2006

1. Introduction:
1.1 In these proceedings the applicant ("Usk") seeks to challenge the grant by the Respondent ("EPA") of a waste licence ("the licence") for the operation and development of an engineered landfill for non-hazardous waste at a quarry located at Usk, Dunlavin, Co. Kildare. The licence was granted by the EPA to the notice party ("Greenstar") on the 8th June, 2004.

1.2 In accordance with its statutory procedural obligations, Usk was required to seek leave to bring these judicial review proceedings on notice to both the EPA and Greenstar. That application for leave was heard by Finlay Geoghegan J. who gave leave to Usk to apply for judicial review for an order of certiorari to quash the decision to grant the licence. However, leave was not granted in respect of the majority of the grounds which had been advanced on behalf of Usk. As appears from the order of Finlay Geoghegan J. of 28th July, 2006, leave was limited to two grounds which were numbered E (9) and E (12). For the reasons set out in that judgment ground E(9) required to be amended so as to bring it into conformity with the basis on which it was considered appropriate that leave should be given. The amendments required are as set out in the Schedule to the order of Finlay Geoghegan J. As amended the grounds in respect of which leave was given are in the following terms:-

> "E(9) The said licence was granted in beach of the prohibition contained in Section 40(4) of the Waste Management Act, 1996, as amended which prohibits the Agency from granting a waste licence unless it is satisfied *inter alia* that the best available technology not entailing excessive cost (BATNEEC) will be used to prevent or eliminate or where that is not practicable to limit abate or reduce an emission from the activity concerned. BATNEEC is defined under Section 5(2) of the Waste Management Act, 1996, as amended as the provision and proper maintenance use operation and supervision of facilities which having regard to all the circumstances are the most suitable for the purposes. In defining BATNEEC for any particular waste disposal activity other than an established activity a relevant consideration is the requirements of environmental protection which includes *inter alia* the maintenance of a buffer zone between a landfill footprint and the nearest residence or dwellinghouse (occupied or unoccupied). The minimum distance which is specified under condition 3.12 does not constitute an adequate buffer zone for the purposes of environmental protection and/or BATNEEC. As a consequence, the said licence was granted in breach of the said prohibition contained in Section 40(4) of the Waste Management Act, 1996 and accordingly the said licence is invalid, void and of no legal effect.
>
> E(12) Further or in the alternative, in failing to determine what BATNEEC was for the purposes of the subject application, in particular, insofar as the same involved the application of measures to ensure a high standard of environmental protection, including the provision of a buffer zone, the respondent acted ultra vires in granting the said licence."

1.3 The application with which I am concerned is the substantive application on behalf of Usk seeking the order of certiorari concerned on those grounds. It will be seen that both of the grounds on which leave to challenge was given involve a consideration of the concept of the "best available technology not entailing excessive cost" ('BATNEEC') which derives of s. 40(4) of the Waste Management Act, 1996. Before turning to the issues raised in relation to the compliance or otherwise of the process before the EPA with the statutory obligations in respect of BATNEEC, it is necessary to turn to the statutory framework which requires that BATNEEC should be used.

2. BATNEEC
2.1 The origins of BATNEEC are to be found in Council Directive 84/360/EEC being a directive on the combating of air pollution from industrial plants. The concept of BATNEEC became BAT ("best available techniques") under Council Directive 96/61/EC with the element of "not entailing excessive costs" being encompassed within the techniques element of BAT. However, BATNEEC remained the primary requirement for waste licensing in this jurisdiction until the commencement of the Protection of the Environment Act, 2003, (which occurred on 12th July, 2004 and, therefore, post dated the decision of the EPA to grant the waste licence that is challenged in these proceedings). Therefore, BATNEEC remains the operative obligation in relation to the waste licence in question in these proceedings.

2.2 The initial domestic implementation of Directive 84/60/EEC was to be found in the Environmental Protection Agency Act, 1992, s. 5 of which defines BATNEEC in the following way:-

> "5(1) Subject to subs. (3), a reference in this Act to the use of the best available technology not entailing excessive costs to prevent or eliminate, or where that is not practicable, to limit, abate or reduce an emission from an activity, shall be construed as meaning the provision and proper maintenance, use, operation, and supervision of facilities which, having regard to all the circumstances, are the most suitable for the purposes."
>
> (2) For the purposes of *subsection* (1), regard should be had to-
>
> (a) in the case of an activity other than an established activity-
> (i) the current state of technical knowledge,
>
> (ii) the requirements of environmental protection, and
>
> (iii) the application of measures for these purposes, which do not entail excessive costs, having regard

to the risk of significant environmental pollution which, in the opinion of the Agency, or any other licensing authority in relation to section 111, exists;

(b) in any other case, in addition to the matters specified in *paragraph* (a)-
(i) the nature, extent and effect of the emission concerned,

(ii) the nature and age of the existing facilities connected with the activity and the period during which the facilities are likely to be used or to continue in operation, and

(iii) the costs which would be incurred in improving or replacing the facilities referred to in subparagraph (ii) in relation to the economic situation of activities of the class concerned.

2.3 That definition of BATNEEC is reproduced in s. 5(2) of the Waste Management Act, 1996, which is the operative definition insofar as the obligations of the EPA in respect of the grant of the waste licence in this case are concerned.

2.4 It is worth observing at this stage that the definition of the sort of matters which may be encompassed within BATNEEC is wide. BATNEEC can involve the provision of facilities and in addition can concern the maintenance, use, operation and supervision of those facilities. The relevant facilities, insofar as the issues in this case are concerned, relate to the provision of what is termed a "buffer zone" between the edge of the area in which waste will actually be deposited and neighbouring properties. It is accepted by all of the parties that the provision of a buffer zone comes within the compass of BATNEEC.

2.5 It is clear, however, that the type of matters which may be encompassed within BATNEEC may derive from a whole range of different types of process. At one end of the spectrum there will be cases where what might be termed a discrete item of technology in the form of a physical device may be available which may be designed to prevent or reduce emissions. In such cases it may well be that it will be possible, from the specification of the device concerned, to determine its capacity to prevent or reduce emissions. On that basis it may be possible to objectively evaluate any competing devices and determine which of them might be "best" having regard to the capacity of the device to prevent or reduce the sort of emissions which might otherwise be expected from the activity in question. In those circumstances the requirement to apply BATNEEC would necessarily require that the "best" such device must be used unless it could be said that the additional cost associated with using the "best" device would be excessive.

2.6 On the other hand, and at the other end of the spectrum, a form of facility such as a buffer zone with a defined distance or limit will not be similar to a discrete device but will always represent one point on a continuum of possible facilities that might be provided. There is a sense in which, from one point of view, it might always be possible to suggest that there may be a "better" facility if something such as a buffer zone were to be even a little larger. Therefore facilities such as a buffer zone which require the imposition of a cut-off point (in that case the minimum distance from relevant neighbouring properties) will necessarily represent a judgment as to the distance which, in the words of s. 5(2) of the 1996 Act, "are the most suitable for the purpose", "having regard to all the circumstances".

2.7 It seems to me, therefore, that the section contemplates a judgment being made as to the appropriate cut-off point that should be applied in all the circumstances of a case in question, where the facility concerned is one of a type (such as a buffer zone) where, at least in theory, one could always suggest that a slightly more stringent requirement could be put in place. In these latter cases, in distinction to the sort of situation which I analysed earlier in relation to a discrete device, the definition necessarily requires the exercise of a judgment as to what is "most suitable" in all the circumstances, to a continuum, for the purposes of defining a threshold. One of those circumstances will, in most cases, be the cost associated with the limitations imposed by the threshold concerned. There will always be the possibility of suggesting that a threshold which is (say) five per cent greater may, in an appropriate case, provide better protection. In that sense it might, on one view, be argued that the lesser threshold could not be the "best" because the larger one would be better even if only by a small margin. However, that approach to the consideration of types of facilities which involve thresholds would not seem to me to be the approach mandated by s. 5(2). That definition requires the deciding body (the EPA in this case) to be satisfied that the threshold which it proposes to adopt for the purposes of the case is the most suitable for the purpose of eliminating or abating emissions in all the circumstances of the case under consideration. Provided that the identified threshold is "most suitable" in all the circumstances it will be BATNEEC even though there might be a possibility to argue for a more stringent threshold.

2.8 Against the background of that analysis of the definition of BATNEEC it is also necessary to refer to the specific requirements of the 1996 Act which arise in these proceedings.

Section 40(4) of the 1996 Act provides as follows:

"(4) The Agency shall not grant a waste licence unless it is satisfied that –

(a) any emissions from the recovery or disposal activity in question ('the activity concerned') will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any other enactment,

(b) the activity concerned, carried on in accordance with such conditions as may be attached to the licence, will not cause environmental pollution,

(c) the best available technology not entailing excessive costs will be used to prevent or eliminate or, where that is not practicable, to limit, abate or reduce an emission from the activity concerned,

(d) if the applicant is not a local authority, the corporation of a borough that is not a county borough, or the council of an urban district, subject to subsection (8), he or she is a fit and proper person to hold a waste licence,

(e) the applicant has complied with any requirements under section 53."

2.9 These proceedings, therefore, concern whether it can be said that the licence granted in this case should be quashed by reason of the contended for failure on the part of the EPA to properly apply s. 40(4)(c). Before turning to the legal issues which arise under that heading it is necessary to turn to those aspects of the facts of the case which are relevant to those legal issues.

3. The Facts

3.1 While lengthy affidavits were sworn on both sides of these proceedings, only a relatively small portion of the evidence as originally

filed is relevant to the BATNEEC issues which remain for decision. Except in relation to a small number of matters, to which I will turn in due course, the facts insofar as relevant to BATNEEC are not in controversy. As will have been seen, the BATNEEC issues that arise in this case concern the buffer zone. As ultimately specified in the licence, the provisions concerning a buffer zone are as set out at condition 3.12 in the following terms:

"3.12 Buffer zone
3.12.1 The licensee shall maintain a minimum distance of one hundred metres between the non hazardous landfill footprint and any dwellinghouse (occupied or unoccupied) present at the date of issue of licence. Waste deposition within the 100 metre zone between the quarry face and the non-hazardous landfill liner will be restricted to inert waste.

3.12.2 A zone in which no waste shall be landfilled shall be provided and maintained within the facility as shown on figure 5.2 Contours of Completed Site on the Environmental Impact Statement subject to the landscaping requirements of Condition 5."

3.2 The history of the original application, its consideration, and the evolution of the terms of condition 5.12 are of some relevance to the issues which I have to decide.

3.3 As is clear from condition 3.12, the original proposal by Greenstar was supported by an environmental impact statement ("EIS") which, in turn, contained a series of plans and drawings designed to show the facility in respect of which the licence was sought. Amongst those plans, as is referred to in condition 3.12, was figure 5.2 which set out the entirety of that part of the site upon which any landfill was proposed. It should also be noted that the proposal confines itself to non toxic landfill and there was never, at any stage in the process, a suggestion that any other form of landfill would be licensed.

3.4 In substance it is implicit in figure 5.2 that there was proposed a buffer zone in which no waste of any type was to be deposited between the boundaries set out in figure 5.2 and the edge of the site. The proposal came, in the ordinary way, to be first considered by an Inspector whose task was to make recommendations in relation to the application. On the question of a buffer zone the Inspector proposed a somewhat different condition than that ultimately determined on by the EPA. In his recommendation the Inspector proposed condition 3.13 in the following terms:-

"3.13 Buffer zone

> 3.13.1 A buffer zone in which no waste shall be landfilled shall be provided and maintained within the facility. The buffer zone shall be located as shown on figure 5.2 Contours of Completed Site of the Environmental Impact Statement subject to a minimum distance of 50 metres between the landfill footprint and the nearest property at the north eastern boundary and the landscaping requirements of Condition 5."

3.5 It is clear from all of the maps and plans that there is a property at the north eastern boundary being an occupied house ("the Corrigan house") and that the proposal, as originally made by Greenstar, would have involved a small portion of the landfill site in the vicinity of that north eastern boundary being within 50 meters of the house concerned. The Corrigan house is 31.5 metres from the edge of the landfill footprint. The effect of the condition as proposed by the Inspector would have been to remove a small portion of the proposed landfill site so as to exclude an area in the north eastern portion of the site where the proposed landfill was within 50 meters of the Corrigan house.

3.6 The EPA considered the report of the Inspector and proposed an alteration in the relevant condition so as to provide for a larger buffer zone of 100 meters to the Corrigan house but permitting the deposit of what was described as "inert waste" within this buffer zone subject to the limits set out in the original Greenstar proposal as identified in figure 5.2.

3.7 It does not appear from a consideration of any of the plans and specifications that the difference between the view taken by the Inspector on the one hand and the EPA on the other hand had any materiality except in the area of the north west boundary. In that area the Inspectors recommendation, if implemented, would have meant bringing back the boundary of the area which was to be the subject of landfill by a relatively small distance (a maximum of 18.5 metres) so as to create a 50 meter buffer between that new boundary and the Corrigan house. The condition as ultimately determined upon by the EPA created what was, in effect, a gradated buffer zone in that region. It allowed the deposition of inert waste up to the boundary as originally proposed (which was, of course, less than 50 meters in places from the Corrigan house) but required a larger buffer zone in respect of non inert waste of 100 meters. The net effect of the alteration determined upon by the EPA was, therefore, to double the buffer zone in respect of non inert waste over that proposed by the Inspector but to allow the deposition of inert waste in a limited area which was somewhat closer to the Corrigan house than that recommended in the buffer zone proposed by the Inspector.

3.8 The EPA, having considered the matter, proposed the amended condition to all interested parties. Submissions on the proposed amended condition were received from both Usk and Greenstar. Usk suggested that the buffer zone should be extended to 150 meters while Greenstar suggested that the condition should refer only to occupied houses.

3.9 The Technical Committee of the EPA, considered all submissions and in respect of this aspect of the matter, suggested that it would be more appropriate to refer to the title of proposed condition 3.12 as "landfill are" rather than "buffer zone" on the basis of its view that the phrase "buffer zone" is more appropriately used in relation to an area in which no waste can be deposited. It was clear that, on the basis of the proposed condition, there would be inert waste in the area between 100 meters from the house in question and the boundary as original proposed as set out in figure 5.2. It would appear to have been the view of the technical committee that it was not appropriate to refer to that area (that is an area in which some waste, being inert waste, would be deposited) as a buffer zone. The technical committee also recommended that the condition should make an express reference to both occupied and unoccupied houses. Apart from this the technical committee did not propose any alteration in the substance of the condition. The matter then went back to the Board of the EPA for final decision.

3.10 The EPA, in that final decision, did not accept the proposed amendment to the title of condition 3.12, but did accept the technical committee's recommendation in relation to an express reference to both occupied and unoccupied houses.

3.11 One issue of fact arose at the hearing in relation to this sequence of events. On the basis of an interpretation of the original proposal (as set out in figure 5.2) counsel on behalf of Usk suggested that the original plan as proposed by Greenstar did not involve the deposition of waste right up to the edge of the footprint of the plan set out in that figure. He identified a dotted line which passes roughly parallel to the boundary, but some distance in from it, and which, it would appear, represents the point at which the pit into which waste is to be deposited, begins to rise in a tapered fashion towards the edge, as the boundary proposed for the actual deposition of waste. I am not satisfied as a fact that this is a correct interpretation of the original proposal. The legend on figure 5.2 makes it clear that the dotted line represents piping rather than any boundary. Furthermore the section plans set out in the EIS make

it clear that the intention was that waste would also be deposited in the area of the up slope towards the edge of the waste deposit area.

3.12 In addition the liner proposed for the bottom of the landfill area clearly is designed to continue to the top of the up slope and, therefore, to the boundary as set out in figure 5.2. I am therefore satisfied as a fact that the original application involved a proposal by Greenstar to deposit waste whether inert or otherwise (but not in any event toxic) up to the edge of figure 5.2 in the EIS. On that basis I am satisfied that the ultimate determination of the EPA involved an amelioration from the point of view of Usk of that position in that it imposed a limitation on the deposition of non inert waste in an area between a boundary defined as 100 meters from the Corrigan house and the edge of the deposition area specified in figure 5.2. While that amelioration is different from that proposed by the Inspector the difference cuts both ways. There is a small area (that between 50 meters from the Corrigan house and the original boundary) in which Greenstar proposed deposition of any non toxic waste. Under the Inspectors proposal no waste at all could have been deposited in that area. Under the view ultimately taken by the EPA inert waste only can be deposited in that area.

3.13 There is, however, a larger area (i.e. that between 100 meters and 50 meters from the Corrigan house) in which, under the Inspectors proposals, any form of non toxic waste could have been deposited but in which, under the EPA condition as ultimately imposed, only inert waste can be deposited.

3.14 The other factual issue which arises in these proceedings concerns the considerations given by the EPA itself to the issues which gave rise to the imposition of the condition in question and, in particular, whether those considerations properly considered BATNEEC. These matters are inextricably linked with the legal issues between the parties concerning onus of proof and I propose addressing those factual questions later in the course of this judgment in that context.

3.15 In the light of the above facts it is necessary to turn to the precise nature of the challenge brought and to the legal principles applicable to a consideration of that challenge.

4. The Challenge

4.1 As pointed out at paragraph 1.2 above only two grounds of challenge were permitted to proceed beyond the leave stage. In substance the first ground concerns a contention that the activity licensed will not, in fact, comply with the requirements of BATNEEC. The second ground of challenge suggests that there is an obligation on the EPA, as part of the process of considering the grant or refusal of a license, to determine what is BATNEEC in each case. I deal with those two matters in turn.

4.2 As indicated above the Corrigan house is located 31.5 meters from the nearest edge of the landfill footprint. It is suggested that allowing the deposit of waste that close to the Corrigan house is not BATNEEC.

4.3 It is suggested that a number of standards concerning the extent of buffer zones, which are, it is said, "better" than that actually imposed should have been applied by the EPA. Reference was made to a publication of the Department of the Environment and Local Government, "Protection of new buildings and occupants from landfill gas", which is described as technical guidance to the building regulations contained in Statutory Instrument 497/1997. In that publication the set back recommended to provide protection from landfill gas migration at a controlled landfill is 50 meters for housing and 10 meters for gardens. Indeed this recommendation was relied on by the Inspector in forming the view that the buffer zone as originally proposed (i.e. between the edge of the landfill as appeared on figure 5.2 and the Corrigan house) was too narrow.

4.4 These and other similar matters are referred to in the affidavit of the expert tendered on behalf of Usk, Mr. O'Sullivan. On the basis of his evidence, and the materials to which he refers, it is suggested that this court should conclude that the license did not, in fact, comply with the BATNEEC requirement of s. 40(4)(c). Reference was also made to a draft guidance note for the waste sector issued by the EPA in 2003. While this note does make reference to a separation distance of 250 meters between a landfill area and sensitive occupied dwellings, it is also clear from that note that it is the view of the EPA that the extent of a buffer zone in any case must be considered on a site specific basis. That note also recognises that a buffer zone is but one element of possible BATNEEC solutions to potential environmental emissions from a particular licensed activity and that the different activities on a site can themselves be distinguished and dealt with separately in the context of the separation distance between such activities and adjacent residences.

4.5 It seems to me that the definition of BATNEEC to which I have referred above encompasses each of the material elements required to be put in place for the purposes of preventing or minimising emissions. It does not seem to me that it necessarily follows that each separate aspect of those elements must be considered separately. The overall purpose of BATNEEC is to ensure the elimination of emissions or, where that is not possible, their minimization. Depending on the nature of the case under consideration this can be achieved by one or more separate measures. Where more than one measure is involved the EPA is required to consider whether the cumulative effect of all of the measures amounts to BATNEEC. The fact that it might be possible to identify a "better" way of dealing with one aspect of a package of measures cannot be seen in isolation from the cumulative effect of the entirety of the package of measures put forward. In those circumstances it seems to me that counsel for the EPA and counsel for Greenstar are correct when they state that it is not appropriate to focus on the buffer zone as a stand alone measure and to form a view as to whether there ought to be a larger buffer zone without reference to the balance of the measures adopted to meet environmental requirements.

4.6 The buffer zone has to be seen as one of a series of combined measures which are designed to achieve BATNEEC. All of the evidence points to the fact that the other measures, inherent in the proposal as identified in the EIS, or as imposed by condition in the license, are to a high standard and designed to minimise the risk of emission. The extent of the required buffer zone needs to be seen in the light of those other measures and cannot be looked at as a stand alone requirement. In those circumstances I am more than satisfied that there was ample evidence which would have allowed the EPA to conclude that the package of measures encompassed within the license would meet the requirement for BATNEEC. It is clear, therefore, that if I were to apply the "reasonableness" test identified in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, I would be constrained to take the view that there was ample material to allow the EPA to come to the decision which it did.

4.7 However, counsel for Usk argues that this is not a case in respect of which the *O'Keeffe* test should be applied. In suggesting that the court should not adopt that test reliance is placed on *Keogh v. Galway County Borough Corporation* (No. 2) [1995] 2 I.R.L.M 312. In those proceedings a challenge was brought to a decision of Galway Corporation to adopt a variation to the provisions of the Galway County Borough Development Plan, relating to the provision of halting sites for travellers, on the grounds that an amendment to the variation originally proposed had not, in fact, been put on display so that interested parties could comment on the alteration. Morris J. found that there was no evidence in the minutes of the Corporation that the question of "material alteration" had been considered and that, consequently, he was entitled to consider the matter *de novo*. The relevant legislative provision required that if the variation was a "material alteration", it required to be put on display. Therefore, in the absence of a decision that the variation

was not a "material alteration", it followed that the applicants in that case had been denied an appropriate opportunity to make further submissions.

4.8 It seems to me that this point is inextricably linked to the second issue raised on behalf of Usk to the effect that, it is said, the decision of the EPA is defective by reason of the fact that there is no recorded express decision determining what BATNEEC is on the facts of this case. Subject to that point, to which I will shortly turn, there is evidence that the EPA did in fact consider what was BATNEEC for the purposes of this case. The replying affidavit filed on the part of the EPA, sworn by Mr. Nolan, is stated to have been approved by the Board of the EPA in draft form prior to its swearing. It, therefore, amounts to an authorised sworn statement on the part of the EPA. That affidavit makes it clear that the Board of the EPA was ultimately satisfied that the proposal, modified in accordance with the conditions, was satisfactory. Mr. Nolan stated that "in this particular instance, the Agency was satisfied that, having regard to the design of the new cells (full containment with gas extraction) adequate protection from the risks of landfill gas are provided for in the licence with its associated conditions. Thus, in this instance, the Agency considered that a distance of 100 metres satisfied the site issues and risks associated with the activity".

As pointed out earlier, the EPA had to be satisfied that the combined measures to be put in place would be the most suitable for preventing or limiting emissions. It is clear from the above averment that the EPA considered all of the measures and took the view that that these measures, including the buffer zone, "satisfied" any issues or risks associated with the landfill activity. On that basis it seems to me that it must be inferred that the EPA was satisfied that the measures to be put in place in accordance with the licence would be BATNEEC.

This is not, therefore, a case where there is no evidence that the relevant statutory body did, in fact, consider the issue. On the contrary there is such evidence.

4.9 Whether the decision which the Statutory Authority in this case came to was necessarily correct is a different matter. It did come to a decision. It had, for the reasons which I have indicated, materials upon which it was open to it to come to that decision. In those circumstances I can see no basis for a departure from the principles annunciated in *O'Keeffe* as to the circumstances in which this court could review such a decision. Subject, therefore, to the question of whether there was an obligation on the EPA to make a specific finding as to what BATNEEC was on the facts of this case, I am satisfied that there is no basis for going behind the determination of the Board that the EPA considered that the package of measures put forward for the purposes of eliminating or reducing emissions in this case was, in all the circumstances, most suitable for purpose and thus BATNEEC. I therefore turn to the question of whether there is an obligation on the EPA to make a determination of what BATNEEC is in each case.

4.10 For the reasons which I set out in some detail earlier in the course of this judgment (paragraphs 2.5 – 2.7) the precise type of facilities that need to be considered in determining what may be BATNEEC for the purposes of an individual case can vary enormously. The spectrum may range from the type of case where what is under consideration is a single element or device designed to control emissions. At the other end of the spectrum the overall approach to control of emissions may involve a whole range of measures and at least some of those measures may involve the imposition of thresholds which necessarily, in turn, involve the nomination of what will, to an extent, be an arbitary point on a continuum. It seems clear that the buffer zone in this case formed part of a range of measures and is of the threshold variety. Whatever may be the case in relation to an individual single device which is, in substance, the only form of emission control suggested, I find it very difficult to see how, in practice, there would be any value in attempting an exercise of determining what might amount to BATNEEC as a theoretical exercise in a case towards the other end of the spectrum such as this case. It is inevitable that in such cases the EPA will be required to consider the cumulative effect of a number of measures. The strength or weakness of each of those measures has the potential to affect others. The greater protection that is afforded by some elements of the package, the less that may, in practice, be required of other elements of the package. It would be impossible in such a case, in my view, to set out, in any meaningful way, a determination as to what might, in theory be BATNEEC. BATNEEC in such cases will be so dependant on the facts of the case, the view taken in respect of the other measures forming part of a package, and other like factors that its determination can only arise as a result of a holistic consideration of all of the matters put forward.

4.11 In addition it does not seem to me that the terms of s. 40(4) require the determination argued for. The EPA is required to make a decision as to whether it grants a license and if so upon what conditions. In order to grant the license the EPA must be satisfied that BATNEEC will be used because it must be satisfied that that would be case in order that the requirements of s. 40(4)(c) will be met. It does not seem to me that s. 40(4)(c) requires a determination of what might constitute BATNEEC in respect of any particular activity. I am satisfied that the section requires the EPA to satisfy itself, in the context of the particular proposal (modified in accordance with any conditions which it considers applying) that BATNEEC will be used. As was pointed out by counsel for the EPA, the text of the section requires that the EPA be satisfied that BATNEEC will be used but does not, in express terms, require that the EPA determine what is BATNEEC in the context of any particular application.

5. Conclusions

5.1 I am not, therefore, satisfied that there is any separate and independent obligation on the EPA to determine what is BATNEEC on the facts of any individual case. Indeed, for the reasons which I have set out above, it would seem to me that in many cases (at least those where there are a range of measures forming a package under consideration) that such an exercise would be unproductive. I am, therefore, satisfied on the evidence that, in its overall consideration of whether it was appropriate to grant the license, the EPA did have regard to whether the license to be granted on the basis of the conditions intended to be imposed would give rise to a situation where BATNEEC would be applied. I am satisfied that there was material which would have allowed the EPA to come to the view that the proposal, as modified by the proposed conditions, would ensure that BATNEEC would be applied. In the circumstances it does not seem to me that there is any basis for quashing the decision of the EPA to grant the license concerned and I propose, therefore, to disallow the claim made by Usk in these proceedings.