

Inspector's Response 5.3.12

Dear Mr Phillips,

Thank you for the three documents that you sent to me. These will now have to be placed on the web site as examination documents as will this reply. There is a lot here but I feel that Mr Crean has not been asked the correct question as is perhaps evident from paragraph 2 of his opinion. Dealing with matters in order:

Mr Crean's participation on 12 March

Who represents the County is a matter for you. The only point I would wish to make is that we are resuming session 7, not reopening session 5. You will therefore be explaining why the main modifications you are proposing are necessary to make the plan sound. If Mr Crean is able to help with that then clearly his attendance will be of benefit to me.

Matters on which I am now clear

As a result of reading the plan, the representations and the evidence it was not clear to me that the HRA process had been carried out in accordance with the regulations; I am now clear that it has. Let me set out a chronology which summarises my evolving view.

There are a number of steps in the HRA process. If screening reveals that it cannot be concluded that there is not likely to be a significant effect on a European site (this is shorthand), Appropriate Assessment must be carried out. It was not clear to me that it had been and I therefore was concerned that deferring it to the planning application stage was not legally compliant. The gist of this was set out in my initial letter to you and my Issues and Questions. The opinion that you then received from Mr Crean included reference to Feeney. My reading of that judgement was that there was never any dispute that Oxford had carried out the AA that was required. The issue there was that, still not being able to draw the required conclusion, further AA was deferred to the application stage. I fully appreciate that the court found nothing wrong with this. However, I thought that case capable of distinction from this plan because my concern was whether the necessary AA had in fact ever been carried out following screening. On the totality of the evidence given by the County during session 5, I now understand that the ERM report **does** amount to both screening and subsequent AA. I also understand that it may amount to an 'in combination' assessment of the Plan (but see below) with other plans and projects. In summary therefore my original concern has been addressed and is no longer what worries me.

Matters on which I remain unclear

During session 5, Mr Barrowcliffe revealed that he had not assessed the effects of the generic thermal treatment facility at all sites together but had assessed the effects from each site alone. I say 'revealed' because this was not obvious to me from reading the ERM report, was clearly not the understanding of Dr Pickering for Stroud District and Gloucestershire Green Parties and (although I could well be wrong on this) did not appear to be the understanding of the County's ecologist. However, the policies of the plan **would** allow a thermal treatment facility of any scale above 50,000tpa to be developed at each and every allocated site. Although for many reasons this is not likely,

there is nothing in the plan that rules this out. Reg 102 seems quite clear. It refers to a land use plan, the 'effects' that are discussed are the effects of **the plan** and it says that the plan-making authority **must** make an AA of the implications for the European site if **the plan** is likely to have a significant effect on a European site. As ERM has not been able to conclude that any site alone would not have that effect, it must follow (surely?) that the same conclusion must be true for **the plan**. The penultimate paragraph on page 3 of your note reinforces the point made by Mr Barrowcliffe during the session. The clear implication of this is that these are the reasons why the effect of all the allocated sites being developed together was not assessed. The implication is not, in my view, that such an assessment was carried out and the results were as presented. Rather it seems to me that what is said would be the **assumed** outcome and therefore the assessment was not undertaken. My question therefore is simply 'has **the plan** been assessed?' and can the County therefore show that Reg 102 has been complied with. This, I thought, was the point put in my informal email dated 6 January (which was provided to Mr Crean as enclosure 17) and then put formally at the opening of session 6. It does not however appear to have been included in the specific questions directed to Mr Crean in the County's instructions and I do not think therefore that he has dealt with it. It is not the same as an 'in combination' assessment which has a different contextual meaning. Mr Barrowcliffe's technical assessment goes to the robustness of the evidence base and thus the soundness of the plan (s20(5)(b) of the Act). This does not appear to have been challenged. The **approach** however goes to the compliance with the regulations and my responsibility under s20(5)(a) of the Act. I need to be clear about this before the end of the examination. I do not feel that amendments to the wording of policy WCS7 would address this point. Whilst that could provide mitigation for the outcomes, it cannot overcome a failure to carry out the Reg 102 test in the first place.

The Duty to Co-operate

It may be that nothing turns on this now given the way you propose to deal with it, but Mr Crean's opinion does not explain why he holds that view. As you will know from the article in Planning responding to the similar views of Ian Dove QC put at the same examination, lawyers for DCLG do not agree."