

## ISSUE 4/ Gloucestershire Friends of the Earth Network and Forest of Dean Friends of the Earth

Forest of Dean Friends of the Earth (FODFOE) and Gloucestershire Friends of the Earth Network (GFOEN) object to and find unsound the strategy and content of the CD1.1 Draft Gloucestershire County Council Waste Core Strategy Dec 2010 and the accompanying CD5.1 Waste Core Strategy Regulations Assessment Final Report December 2010 for the following reasons:-

FODFOE and GFOEN believe that an Appropriate Assessment (AA) is required under the EC Habitats Directive (92/43/EEC) and in the UK under the Habitat Regulation 61.

**“61.—(1)** A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

- (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
- (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.

### HABITATS DIRECTIVE

In the judgement of the Court in the case of the Commission of the European Communities v United Kingdom and Northern Ireland Case C – 6/04 on land use plans 51 to 56 the judgement was against the UK Government,

– Land use plans

51. The Commission submits that United Kingdom legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive.

52. According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.

53. The United Kingdom accepts that land use plans can be considered to be 'plans and projects' for the purposes of Article 6(3) of the Habitats Directive, but it disputes that they can have a significant effect on sites protected pursuant to the directive. It submits that they do not in themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such sites. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.

54. As to those submissions, the Court has already held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the

site concerned (see, to this effect, Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging [2004] ECR I-7405, paragraphs 43 and 44).

55. As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.

56. It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.

FODFOE and GFOEN submit that this judgement makes it clear that an AA for the Draft Waste Core Strategy is a legal requirement by virtue of Article 6(3) and (4) as the CD5.1 HRA noted continuing significant effects arising from the Draft Waste Core Strategy.

The CD51.1 leaves the consideration of certain significant effects to the lower tier of planning, the Planning Application stage. In light of the ECJ judgement referred to above, this adopted approach appears to be contrary to the precautionary approach fundamental to the Habitats Directive, as the Waste Core Strategy will be the controlling influence for land use development with regard to waste management in the County. By making the decision to submit the Draft Waste Core Strategy as sound provides the document and the sites it contains undue weighting, particularly to strategic sites and thermal treatment facilities, which could potentially significantly effect European designated sites in the County and in turn is including sites thereby that are potentially undeliverable.

The Assessment of plans and projects significantly affecting Natura 2000 sites Methodological Guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC 2.6 page 13 states that “*projects or plan proponents should consider alternative solutions at the earliest stages of development and in practice be the first phase*” This emphasises the strategic nature of plan decision making with regard to protecting Natura 2000 sites.

To ensure that the assessment is objective, the assessment must consider the developments without mitigation, stating that “*Effective mitigation of Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported*” (1)

In the Waddenze judgement the European Court of Justice ruled that an Appropriate Assessment implies that ALL the aspects of the plan or project which can by themselves or in combination with other plans or projects, affect a site, must be identified in the light of the best scientific knowledge in the field. (2)

Natural England criticised omissions in CD 5.1 baseline “*which must include estuaries and fish*” and saltmarsh, whilst the Report admits a lack of baseline knowledge with regard to the violet click beetle. Of particular concern are the significant effects on the Cotswold Beechwoods SAC, Dixton Wood SAC and the Severn Estuary SPA. With the exception of lower tier resolution of significant effects, FODFOE and GFOEN in principle support all the criticisms made by Natural England

and that they be considered as written herein, particularly with regard to the “carrying over” of policies, lack of modelling for MBT and inaccuracies in data modelling. The Natural England states *“There are various areas of clarification required, gaps in the assessment and potential flaws in the methodology used for this screening assessment and therefore the ultimate conclusions regarding LSE are also potentially flawed. As a consequence, Natural England is currently unable to agree with the ultimate conclusions within this screening assessment.”* .(3)

Using the AEMOD modelling the CD5.1 HRA demonstrates that sites 1,2,3,4,5,6,8,9,10,12 and 13 *“cannot be concluded that there will be no likely significant effect”* (10.2.3) for thermal treatment facilities and thereby also rules out the four strategic sites as strategic sites for thermal treatment following the precautionary principle. Additionally, for site 12 and 13 is the risk of water pollution and site 12 potential bird disturbance. FODFOE and GFOEN would add that consideration should have been given to the in combination effect of planning permission for a 30,000tpa gasification plant at Moreton Valence, the potential of increased traffic on the motorway almost adjacent to all the strategic sites from proposed extensive housing development in Gloucestershire and potential additional water pollution and bird disturbance from the planning permission for 1800 dwellings near site 12 and 13.

The aim of the Habitat Directive is to maintain at the present level or restore degraded areas to favourable conservation status, whereas little scientific evidence has been presented to show that mitigation measures for the use of thermal treatment facilities, particularly strategic facilities, will not continue to significantly effect the European sites, contrary to the Habitats Directive and Habitat Regulations, together with other EU and UK legislation to protect important species.

In line with the decision in the case of Cornwall Waste Forum v Secretary of State 13 October 2011 (4), FODFOE and GFOEN believe that they had a legitimate expectation that the County Council as the competent authority would undertake and complete a thorough scientifically based AA to accompany the Draft Waste Core Strategy by moving to AA Task 3 (Page 6 CD3.6 HRA Report January 2008) in considering alternative solutions such as amending policy to omit thermal treatments and undertaking the modelling of other technologies as a possible residual waste treatment scenario on small residual waste sites below 50,000tpa to meet the requirements of Natura 2000 guidelines (fig 4) and ODPM Circular 06/2005, particularly (fig1).

## Appendices

- (1) The Assessment of plans and projects significantly affecting Natura 2000 sites Methodological Guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC
- (2) ODPM Circular 06/2005
- (3) CD.1.14 Natural England
- (4) Cornwall Waste Forum v Secretary of State 13 October 2011

**ISSUE 4/ Gloucestershire Friends of the Earth Network  
and Forest of Dean Friends of the Earth**

# **APPENDIX**

## **CONTENT**

1. The Assessment of plans and projects significantly affecting Natura 2000 sites Methodological Guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC
2. ODPM Circular06/2005
3. CD.1.14 Natural England
4. Cornwall Waste Forum v Secretary of State 13 October 2011



European Commission

*Appendix 1*

# **Assessment of plans and projects significantly affecting Natura 2000 sites**

## **Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC**



M. O'Brain





## 2.5. 'In combination with other plans or projects'

MN2000 makes clear that the phrase 'in combination with other plans or projects' in Article 3(3) refers to cumulative effects caused by the projects or plans that are currently under consideration together with the effects of any existing or proposed projects or plans. When impacts are assessed in combination in this way, it can be established whether or not there may be, overall, an impact which may have significant effects on a Natura 2000 site or which may adversely affect the integrity of a site. For example, a proposed road will pass some distance from a Natura 2000 site and the disturbance it will generate (noise etc.) will not significantly affect bird species important to the integrity of the site. However, if there are other existing or proposed projects or plans (e.g. a road on the other side of the Natura 2000 site), then total noise levels from all these projects taken together may cause disturbance that is assessed as significant.

It should also be remembered that cumulative impacts could result where impacted areas interact. An example of this would be where a proposed project is likely to reduce water levels in a Natura 2000 site. While that resource reduction in itself may not be significant, where there are existing fertiliser and pesticide residues reaching the site from nearby intensive farming, the lower water levels may mean higher concentrations of pollutants when run-off occurs, to an extent that the combined effect becomes significant.

Important issues in carrying out cumulative impact assessments (7) should be noted, including:

- the setting of boundaries for the assessment — this may be complicated where projects and other sources of impacts which are to be assessed together are not located close together, or where species or other wildlife factors such as sources of food are dispersed, etc.;
- establishing responsibilities for carrying out assessments where projects or plans are proposed

(7) A generic guide on cumulative impact assessment has been produced by the Environment DG (Hyder Consulting, 1999).

by different proponents or controlled by different competent authorities;

- characterising of potential impacts in terms of causes, pathways and effects;
- where two or more sources of impacts act in combination to create a significant effect, taking particular care in assessing mitigation options and allocating responsibility for appropriate mitigation.

This guidance document suggests a step-by-step approach to cumulative impact assessment and these steps need to be followed for the screening and appropriate assessment stages (Stages One and Two) of this guidance. A table explaining the steps for completing a cumulative assessment is provided in Box 2 in Section 3.1.3 within the screening stage.

## 2.6. Alternative solutions and mitigation

This guidance has been designed for use by developers, landowners, site managers, competent authorities, prescribed consultation bodies, national authorities, NGOs and the European Commission. The guidance may also be of value to the general public as it explains the process and procedures required by the habitats directive when projects or plans are likely to have impacts upon Natura 2000 sites. The research underpinning this guidance suggests that there is a good deal of disagreement between various stakeholders as to the difference between 'alternatives' and 'mitigation' and at what stages in Article 6 they should be considered. MN2000 provides the key interpretations that should be used to distinguish between alternatives and mitigation. For alternative solutions, MN2000 suggests that 'they could involve alternative locations (routes in cases of linear developments), different scales or designs of development, or alternative processes. The "zero-option" should be considered too' (MN2000, paragraph 5.3.1).

Project or plan proponents should consider alternative solutions at the earliest stages of development. The examination of alternative solutions by project or plan proponents may, in practice, be the first

phase of the process, although procedurally it is the third phase in this methodology. However, to fulfil the requirements of the habitats directive, **it is for the competent authority to determine whether alternative solutions exist or not**, and this assessment should take place once the appropriate assessment stage has concluded that adverse effects are likely.

Competent authorities will at that stage consider a range of solutions. These may include those alternative solutions already considered by the proponent of a project or plan, but will also include other alternative solutions that may be suggested by other stakeholders. It must be recognised, therefore, that authorities may determine that further alternative solutions exist even where the proponent of a project or plan has demonstrated that a range of alternative solutions had been examined at the design stage. In reporting the assessment of alternative solutions, it will be important to record all alternative solutions considered as well as their relative impacts on a Natura 2000 site.

Mitigation is defined by MN2000 as 'measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion' (paragraph 4.5.2). The research for this guidance document suggests that mitigation measures should be considered in accordance with a hierarchy of preferred options as illustrated below.

Approach to mitigation	Preference
Avoid impacts at source	Highest
Reduce impacts at source	
Abate impacts on site	
Abate impacts at receptor	Lowest

Project and plan proponents are often encouraged to design mitigation measures into their proposals at the outset. However, it is important to recognise that the screening assessment should be carried out in the absence of any consideration of mitigation measures that form part of a project or plan and are designed to avoid or reduce the impact of a project or plan on a Natura 2000 site. The proponents' notion of effective levels of mitigation may vary from that of the competent authority and other

stakeholders. To ensure the assessment is as objective as possible, the competent authority must first consider the project or plan in the absence of mitigation measures that are designed into a project. Effective mitigation of adverse effects on Natura 2000 sites can only take place once those effects have been fully recognised, assessed and reported. It will then be for the competent authority, on the basis of consultation, to determine what type and level of mitigation are appropriate.

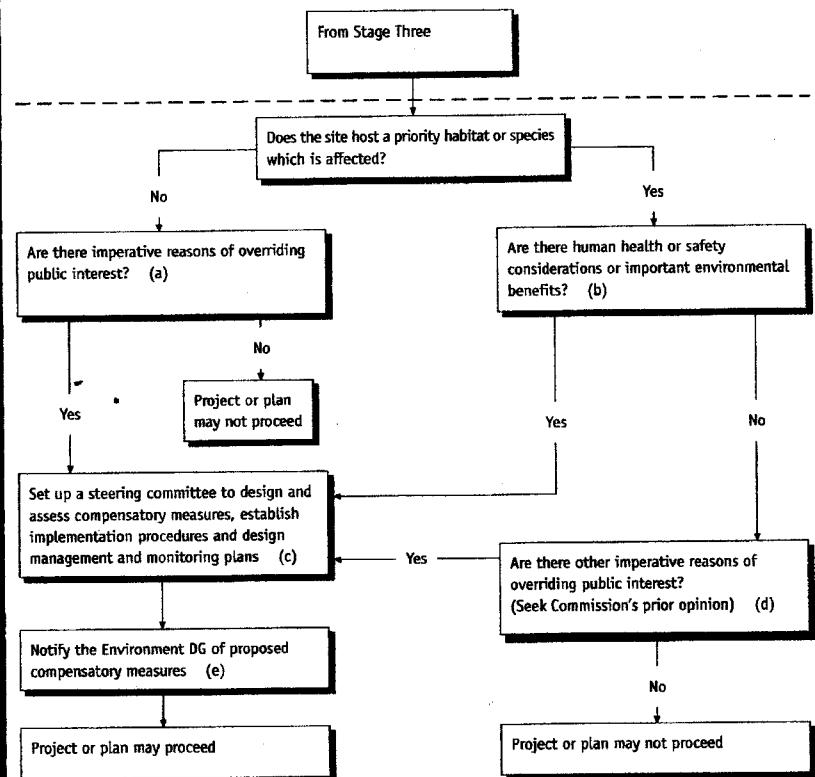
## 2.7. Imperative reasons of overriding public interest

Following the determination of whether alternative solutions exist, it is necessary under Article 6(4) to consider whether there are or are not imperative reasons of overriding public interest (IROPI). This guidance document does not deal with any methodologies for the assessment of imperative reasons of overriding public interest, as this will be largely for national authorities to determine. MN2000 has the following to say on the IROPI test (paragraph 5.3.2):

'Having regard to the structure of the provision, in the specific cases, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the abovementioned imperative reasons weighs in favour of the latter. This should be determined along the following considerations.

- (a) The public interest must be overriding: it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the directive (see, for example, its fourth recital stating "Community's natural heritage") (see Annex I, point 10).
- (b) In this context, it also seems reasonable to assume that the public interest can only be overriding if it is a long-term interest; short-term economic interests or other interests

**Stage Four: Assessment where no alternative solutions exist and where adverse impacts remain**



**Notes**

- (a) The IROPI concept is discussed in MN2000, paragraph 5.3.1.
- (b) For a discussion of human health and safety considerations, see MN2000, paragraph 5.5.2.
- (c) Compensatory measures are additional to normal practices and should provide compensation corresponding precisely to the loss to the Natura 2000 network (see Section 3.4.2 and Box 15).
- (d) The Commission will provide a prior opinion on the relevance of the IROPI which are being invoked (see MN2000, paragraph 5.5.3).
- (e) A relevant form is provided in MN2000, Annex IV.

**Stage Four outputs: Compensatory measures assessment matrix (Figure 8)**

**Evidence of assessment matrix (compensatory measures) (Figure 9)**

**Summary of Article 6(3) and (4) assessments (Figure 10)**

*6th August 2005*

## OFFICE OF THE DEPUTY PRIME MINISTER

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ODPM Circular 06/2005

*Office of the Deputy Prime Minister*

*Eland House, Bressenden Place, London SW1E 5DU*

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Defra Circular 01/2005

*Department for Environment, Food and Rural Affairs*

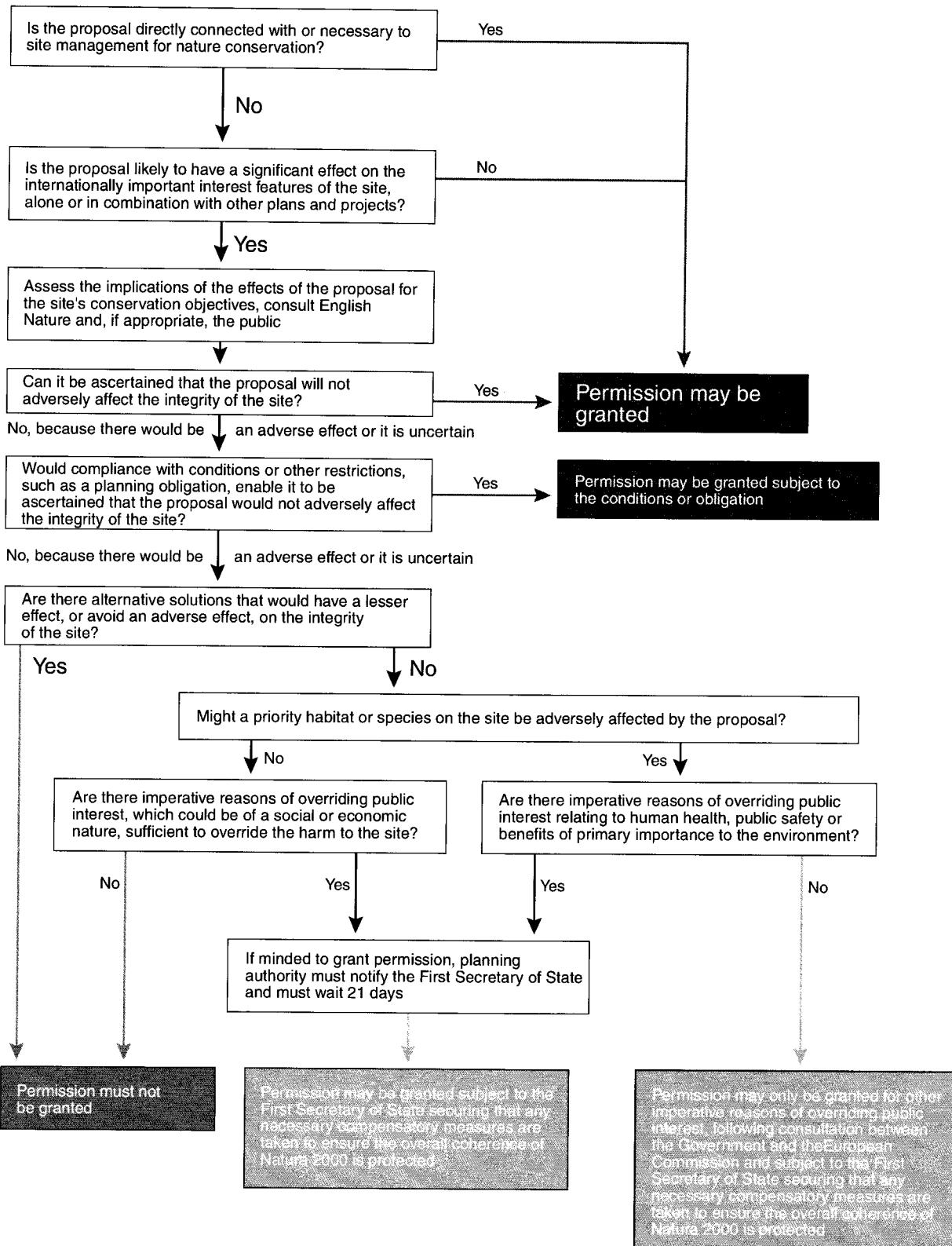
*Nobel House, 17 Smith Square, London SW1P 3JR*

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16 August 2005

# GOVERNMENT CIRCULAR: BIODIVERSITY AND GEOLOGICAL CONSERVATION – STATUTORY OBLIGATIONS AND THEIR IMPACT WITHIN THE PLANNING SYSTEM

Figure 1: Consideration of development proposals affecting Internationally Designated Nature Conservation Sites



## **The appropriate assessment**

17. If the decision-taker concludes that a proposed development (not directly connected with or necessary to the management of the site) is likely to significantly affect a European site, they must make an appropriate assessment of the implications of the proposal for the site in view of the site's conservation objectives<sup>20</sup>. These relate to each of the interest features for which the site was classified and will be provided in more detail by English Nature, which should be consulted for the purposes of the assessment<sup>21</sup>. The scope and content of an appropriate assessment will depend on the nature, location, duration and scale of the proposed project and the interest features of the relevant site. It is important that an appropriate assessment is made in respect of each interest feature for which the site is classified; and for each designation where a site is classified under more than one international obligation. English Nature will advise on a case-by-case basis. The decision-taker can require the applicant to provide such information as may reasonably be required to undertake the assessment<sup>22</sup>.
18. In the Waddenzee judgement<sup>23</sup>, the European Court of Justice ruled that an appropriate assessment implies that all the aspects of the plan or project which can, by themselves or in combination with other plans and projects, affect the site's conservation objectives must be identified in light of the best scientific knowledge in the field.
19. As part of the assessment process, the decision-taker may consult the general public<sup>24</sup>. It is for the decision-taker to decide whether publicity and consultation in addition to that required under the planning or other regulatory procedures should be undertaken and could consider consulting organisations that may have relevant information or expertise, such as the Environment Agency, County Wildlife Trusts, Herpetological Conservation Trust, Plantlife, RSPB or The Butterfly Conservation Society. Where a plan or project may affect sites which are close to, or which straddle local authority boundaries, the relevant local planning authorities should liaise with each other.

## **Ascertaining the effect on site integrity**

20. In the light of the conclusions of the assessment of the project's effects on the site's conservation objectives, the decision-taker must determine whether it can ascertain that the proposal will not adversely affect the integrity of the site(s)<sup>25</sup>. The integrity of a site is the coherence of its ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or the levels of populations of the species for which it was classified. It is not for the decision-taker to show that the proposal would harm the site, in order to refuse the application or appeal. It is for the decision-taker to consider the likely and reasonably foreseeable effects and to ascertain that the proposal will not have an adverse effect on the integrity of the site before it may grant permission. If the proposal would adversely affect integrity, or the effects on

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<sup>20</sup> Regulation 48(1) The Habitats Regulations 1994

<sup>21</sup> *ibid.* Regulation 48(3)

<sup>22</sup> *ibid.* Regulation 48(2)

<sup>23</sup> ECJ Case C-127/02

<sup>24</sup> Regulation 48(4) The Habitats Regulations 1994.

<sup>25</sup> *ibid.* Regulation 48(5)

integrity are uncertain but could be significant<sup>26</sup> the decision-taker should not grant permission, subject to the provisions of regulations 49 and 53 as described below.

21. In the Waddenzee judgment<sup>27</sup>, the European Court of Justice ruled that a plan or project may be authorised only if a competent authority has made **certain** that the plan or project will not adversely affect the integrity of the site. “*That is the case where no reasonable scientific doubt remains as to the absence of such effects*”. Competent national authorities must be “**convinced**” that there will not be an adverse affect and where doubt remains as to the absence of adverse affects, the plan or project must not be authorised, subject to the procedure outlined in Article 6(4) of the EC Habitats Directive regarding imperative reasons of overriding public interest<sup>28</sup>.

### **Considering conditions or other restrictions**

22. As part of the judgement on integrity, the decision-taker must consider the way in which it is proposed to carry out the project and whether conditions or other restrictions would help to ensure that site integrity was not adversely affected<sup>29</sup>. This is an important requirement of the Habitats Regulations and planning authorities should consider whether a consent could be issued in accordance with regulation 48 subject to conditions. In practice, this means that the planning authority should identify the potential risks so far as they may be reasonably foreseeable in light of such information as can reasonably be obtained, and put in place a legally enforceable framework with the aim of preventing the risks from materialising<sup>30</sup>. English Nature may suggest the scope of such conditions in its response to the consultation and can comment on the effectiveness of conditions proposed by the planning authority or the applicant. Regulation 54(4) of the Habitats Regulations prohibits the grant of outline planning permission unless the planning authority is satisfied, whether by reason of the conditions or limitations imposed on the permission, or otherwise, that no development likely to adversely affect the integrity of a European site could be carried out under the permission.

### **Alternative solutions**

23. If the decision-taker is unable to conclude that the proposed development will not adversely affect the integrity of the site, and this effect, or possible effect, will not be removed by conditions or other restrictions, they must not grant planning permission except in the following closely defined circumstances.
24. They must first be satisfied that there are no alternative solutions<sup>31</sup>. If there are alternative solutions that would have no (or a lesser) effect on the site's integrity then

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<sup>26</sup> See ADT Auctions Ltd v Secretary of State Environment, Transport and the Regions and Hart District Council (2000) JPL 1155 at p. 1171 where it was held that, it was implicit in the wording of regulation 48(5) that the adverse effect on the integrity of the site had to be a significant adverse effect

<sup>27</sup> ECJ Case C-127/02

<sup>28</sup> Regulation 49 and paragraphs 25-28 The Habitats Regulations 1994.

<sup>29</sup> Regulation 48(6) The Habitats Regulations 1994

<sup>30</sup> See WWF-UK Ltd and RSPB – v – Secretary of State for Scotland et al [1999] 1 C.M.L.R. 1021 [1999] Env. L.R. 632 opinion of Lord Nimmo-Smith

<sup>31</sup> Regulation 49(1) The Habitats Regulations 1994 and Dibden Bay decision (2004) ([http://www.dft.gov.uk/stellent/groups/dft\\_shipping/documents/page/dft\\_shipping\\_028330.hcsp](http://www.dft.gov.uk/stellent/groups/dft_shipping/documents/page/dft_shipping_028330.hcsp))



Date: 7<sup>th</sup> February 2011

Our Ref:

Your Ref:

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Waste Planning  
Gloucestershire County Council  
Shire Hall, Westgate Street  
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GL1 2TH

**Gloucestershire Waste Core Strategy, Habitats Regulations Assessment, Sustainability Appraisal and other associated documents.**

Dear Sir / Madam,

Thank you for consulting Natural England on the above documents. Natural England is the Government adviser on the natural environment, ensuring the conservation, enhancement and management of the natural environment for current and future generations.

This reply gives our advice on the Draft Waste Core Strategy (WCS), the Sustainability Appraisal, as required by the Planning and Compulsory Purchase Act 2004 and in accordance with the requirements of European Directive 2001/42/EC (known as the Strategic Environment Assessment, or SEA Directive) and the Habitats Regulation Assessment (HRA), as required by Regulation 61 of the Conservation of Habitats and Species Regulations 2010 (known as "the Habitats Regulations"). Each document will be considered separately and comments will be made, where possible, in sequence, for ease of comprehension.

244/9/GENERAL

The section on Amenity and Cumulative Impact (pg 69) raises some serious concerns;

*"Our current approach towards the protection of amenity is set out in Core Policy 37 of the Waste Local Plan (2004) – Proximity to Other Land Uses.*

*The policy is particularly relevant to waste management proposals that raise potential issues such as noise, dust and traffic movements.*

*It is our intention that this policy will continue to be used until it is updated through the preparation of a separate development management waste DPD to be prepared following adoption of the WCS."*

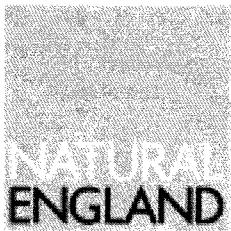
This practice of “carrying over” a policy from the Waste Local Plan (2004 – 2012) has some significant shortcomings, not least of which is that they are not considered in the assessment (SA, HRA, EIA etc) of the new document – and though it would be argued that they were already assessed as part of the adoption of the WCP, this does not hold water, as it is the efficacy of the new plan in its totality that needs to be assessed, not to mention that legislation has changed in the time since the previous assessment (such as the Habitats Regulations 2010 and possibly, considering the adoption date, the Planning and Compulsory Purchase Act 2004).

Also, given that there is an end date on the period of adoption (2004 – 2012) it could be argued that there is no legal basis for the consideration of these policies post 2012. As the adoption of specific DPD to replace some of these policies, as cited in the section on Amenity and Cumulative Impact is unlikely to happen before 2012/2013, this leaves a period when there is no policy regarding these areas.

Date: 7<sup>th</sup> February 2011

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244/11/GENERAL

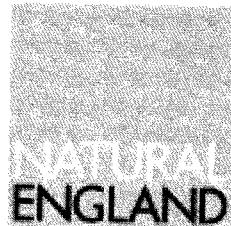
**Sustainability Appraisal**

Natural England has attempted to consider the Sustainability Assessment, but without the consideration of the 14 saved policies within the SA, consider the whole process to be flawed and have therefore to return to the whole document. To submit something at this time Natural England can only advise that, within its limited context it is a well written document, but that cannot consider the sustainability of the WCS to have been adequately Assessed. Natural England will be submitting further comment after the submission date.

Date: 7<sup>th</sup> February 2011

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244/12/GENERAL

**Habitats Regulation Assessment**

Regulation 61 requires your authority, before deciding to give any consent to a LDF Document which is (a) likely to have a significant effect on a European site (either alone or in combination with other plans or projects), and (b) not directly connected with or necessary to the management of the site, to make an appropriate assessment of the implications for the site in view of its conservation objectives.

In this case the proposal is not directly connected with or necessary to the management of a site. However, for Natural England to advise whether it is likely to have a significant effect on a European site the Waste Planning Authority (WPA) should consider the following points.

While not specifically an HRA requirement (but a requirement nonetheless under CRoW Act), All SSSIs within 2km of all the proposed facilities should have been/will need to be screened and if necessary, assessed. Reference to this process being undertaken should be made and the results confirmed even if it is thought that there are not any relevant sites/features in the 2km screening distance. However, this appears to not be the case, there are definitely SSSIs within 2km of some of the proposed locations e.g. Severn Estuary SSSI.

It should be noted that the Environment Agency (EA) are the statutory regulators on Air Quality (AQ), and the Competent Authority responsible for issuing of the PPC permits which will be required alongside planning permission for these developments to operate. Natural England are not in a position to comment on the appropriateness of some of the more detailed technical areas of the assessment such as model assumptions, model conditions etc. These comments are made without prejudice to the EA's PPC consultation process with Natural England or the specific and more detailed planning consultation when a formal planning application is submitted containing full details of the specific plan.

As has been acknowledged in the report, the HRA is limited by the high level nature of the WCS and the assessment is consequently based on a series of assumptions including facility design. The need for more detailed assessment at the development control stage due to the high level capability of this assessment is therefore mentioned as a requirement within the findings and recommendations. This is correct, this is a high level screening and Natural England's comments are made here without prejudice to more detailed consultations at the planning application/EP permit stages.

It should be noted that at the moment, NE do not recommend applying an NH3 critical Level (CLe) for the protection of saltmarsh due to tidal inundation and uncertainties in sensitivity. However, there is a Nutrient N critical load for saltmarsh provided on APIS.

However, of greater concern is that there appears to be some confusion as to what constitutes a qualifying feature of the Severn Estuary SPA, Ramsar and SSSI. Pg19 fails to correctly identify the features of the Ramsar, which must include as a minimum estuaries and fish as well as birds. Also in the air pollution report Table B1.4 the Ramsar and SAC estuarine habitats and fish species and are not mentioned at all, not even the saltmarsh, although it seems to be covered by the assessment later on so there is some confusion, which requires clarifying. (assuming the assessment was made the data needs to be amended in Table B1.4)

There are several possible reasons for this, including the amendment of the Habitats Regulations pertaining to the Estuary since the publication of the Baseline Report.

Natural England has therefore included below the Reg 33 package for the European Marine Site. It is important to emphasise that if the qualifying features are not correctly identified at this stage it could affect the whole of the HRA process and outcome.

The section on air pollution from MBT (pg22) assumes no emissions from MBT facilities, due primarily to the lack of a point source rather than a consideration of other pollution instances. Natural England national air quality guidance on MBT facilities states that "The EA recognise that an MBT plant can generate significant amounts of ammonia, although emissions have not been quantified. The amount of ammonia produced largely depends on the type of waste (green or mixed), and the proportions of materials rich in nitrogen (the carbon:nitrogen (C:N) ratio)."

Therefore it is reasonable to expect that those proposed MBT sites close to designated sites where there are sensitive features, should be considered for potential NH3 emissions. Which means that the following assumption appears to be inappropriate.

*"Given that waste site 13 is the closest at 200 metres, when considering the above, it is considered unlikely that there would be any potential effects from air pollution arising from an MBT facility. Therefore air pollution impacts from non-combustion related waste facilities are ruled out of the assessment."*

As AERMOD and ADMS models have both been run and both sets of data are available, we would expect the more precautionary results of the two models to be used when undertaking any of the individual assessments whichever that may be on a case by case basis.

Where a range of Critical Loads/Levels is provided on APIS, applying the precautionary principle, we would expect judgements to be based on the lower (more stringent) end of the range to be used in all assessments.

Pg 39/40 Tables 6.2/6.3 The Assessment does not contain sufficient data to be able to confirm whether we would agree with the conclusions presented in this table.

Pg 42 The favourable condition table (FCT) targets are being used here to identify site sensitivity. This is okay as a starting point, but it should be understood that it is not just the attributes and measures outlined in the FCTs that need to be considered. It is not possible to monitor everything that underpins the integrity of designated sites to report on site condition and the FCTs are not designed to specifically detect AQ impacts. So, lower plants may not be monitored on a site but may still be considered as underpinning the integrity of the site.

Conversely, just because there are lower plants present, it does not follow that we would necessarily argue that the lower NH3 CLe should be applied. NE would need to be consulted on a site specific basis on the

appropriate CLes that apply, meaning Natural England are reluctant to agree to screening out of any specific proposal at this stage on this basis. Site specific consultation with Natural England is essential at the more detailed planning stages so appropriate CLe/CLs can be agreed for the site likely to be affected.

Natural England does not consider the detail regarding whether or not the direct toxic effect of NH3 on woodland/grassland to have been appropriately considered in Table 6.4 (pg 44); The issue is not just N deposition but also the concentration of NH3 in the air i.e. its CLe.

Water Quality (WQ) issues seem to be ruled out on the basis that standard mitigation measures would be employed and that they would need a consent from the EA (abstraction, discharge etc). It does not necessarily follow therefore that there would be no LSE from WQ issues.

On point of clarity, Natural England would contest that the application of mitigation measures does not necessarily mean that a conclusion of no LSE can be concluded (pg 74). Survey work may be required to ensure that this is the case.

Pg 63 IN Combination – all other known plans and projects would need to be included in the in combination assessment that have not been included in calculations for existing PECs.

#### Annex B

The assessment made in Table B1.5 and Table 1.3 (pg13) seem to have screened LSE for acid deposition using one single acid deposition critical load. NE/EA are not signed up to this methodology nationally. According to national specialists, EA/NE would expect two critical loads to be used (minCLmaxN and minCLmaxS) for assessing likely significant effect of acid deposition and both Nitrogen & Sulphur sources separately assessed where critical load functions are available on APIS, which is the case in all N2K sites.

In Table B1.6 it would appear a CLe of 1 ug/m<sup>3</sup> for NH3 has been applied for woodlands, but lower plants underpin site integrity on sites other than woodlands e.g. certain grasslands etc.

Table 1.4 (pg 32) When crosschecking the CLs used with those provided on APIS using the site specific N deposition critical loads rather than the generic woodland habitat ones for N Deposition Critical Loads there appear to be some inconsistencies;

For example, on Dixton Wood SAC the N deposition CL given on APIS for the most sensitive feature, ground flora is 10-15 Kg N/ha/yr. The assessment has used 15 but the lower end of the site specific CL should be used. Same for Bredon Hill SAC, the assessment has used 15-25 Kg N/ha/yr for protection of Calcareous Grassland but APIS recommends using a CL of 10-15 Kg N/ha/yr for the protection of temperate and boreal

ground flora. Not sure if this is an area/SSSI specific approach that has been adopted or an error. Cotswold Beechwoods 15-25 Kg N/ha/yr calcareous grassland but most sensitive feature beech woodlands is 10-15 Kg N/ha/yr so appropriate CL is 10 Kg/ha/yr so the correct most sensitive CL has been applied here.

There are a whole range of additional toxic chemicals emitted from EfW incinerators and other waste facilities that do not appear to have been assessed here (heavy metals etc). The entire range of all potential damaging air pollutants will have to be assessed in detail using the appropriate air dispersion modelling and screening methodology, as well as potential impacts from PM10 particles on birds and mammals, before final decisions are made about LSE/AEOI etc.

In conclusion, as is acknowledged in the assessment, "The need for more detailed assessment at the development control stage due to the high level capability of this assessment is therefore included within the findings and recommendations".

There are various areas of clarification required, gaps in the assessment and potential flaws in the methodology used for this screening assessment and therefore the ultimate conclusions regarding LSE are also potentially flawed. As a consequence, Natural England is currently unable to agree with the ultimate conclusions within this screening assessment.

HRA is an iterative process however, and Natural England would therefore expect any further analysis, whether a revised scoping assessment, or appropriate assessment of lower tier document (such as planning application) to include resolution of the clarifications and data gaps listed above.

CO/6088/2011

**Neutral Citation Number: [2011] EWHC 2761 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Thursday, 13 October 2011

**B e f o r e:**

**MR JUSTICE COLLINS**

**THE QUEEN ON THE APPLICATION OF CORNWALL WASTE FORUM,  
ST DENNIS BRANCH**

Claimant

v

**SECRETARY OF STATE FOR COMMUNITIES AND LOCAL  
GOVERNMENT**

First Defendant

**SITA CORNWALL LTD**

Second Defendant

**ENVIRONMENT AGENCY**

Third Defendant

**CORNWALL COUNCIL**

Fourth Defendant

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(Official Shorthand Writers to the Court)

**Mr David Wolfe** (instructed by Leigh Day) appeared on behalf of the Claimant, **Mr Rajendra Desai** appeared for latter part of judgment on 13 October 2011

**Mr Hereward Phillpot** (instructed by Treasury Solicitor) appeared on behalf of the First Defendant

**Mr Mark Westmoreland Smith** (instructed by Bond Pearce) appeared on behalf of the Second Defendant

The Third and Fourth Defendants were not represented, did not attend

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59 Whilst, of course, it was inconceivable that the EA would have issued a permit if it did not conclude as it did, that wholly misses the point being made by the objectors, namely that the Environment Agency got it wrong. There was evidence put before the inspector that the EA had got it wrong. But he did not, as a result of his approach, deal with or reach any decision on the evidence which had been produced to challenge the EA's view. No doubt, the EA issued the permit because it considered that no appropriate assessment was needed but there was material before the inspector which raised the question whether that was correct. The inspector found it unnecessary to form a view on this because he thought it was not a matter for the planning process.

60 In my judgment, he was wrong in that view.

61 In addition, it is said he was wrong not to have dealt with the issue since all parties had been led to believe that he would, and he had not at any stage disabused any of the parties of that expectation.

67 The conclusion which resulted from this is set out in paragraph 81 of the submissions. It is said:

"We therefore submit that it could be objectively concluded that the CERC is not likely to give rise to significant effects on the SAC. The council's objections are entirely misconceived. In the end the objection comes to nothing. The great irony is the fact that there seems to be little dispute that there is sufficient information before the inquiry for the Secretary of State to carry out an appropriate assessment in the event that contrary to the Environment Agency and Natural England position and our submissions the Secretary of State decides that an appropriate assessment is required."

73 Any judicial or quasi-judicial decision maker has to form judgments on matters in dispute even if those matters require expert consideration. He will rely upon the evidence of experts put before him by the parties who contend either way and will have to reach a decision on that basis. The same applies to the Secretary of State. He will not, of course, decide the issue without referring to expert evidence and that evidence can be put before him. So the view that it is wrong for the Secretary of State to decide without having the necessary expertise himself against the EA is one which I do not find in the least persuasive.

79 The problem, as I see it, that faces me is that the Habitats Directive and the Regulations are the law and must be obeyed. Although the second defendant submitted at the inquiry that the attack on the EA's conclusion was entirely

without substance, it is not suggested before me that the case put forward by the objectors can be disregarded as having no weight. There is an arguable issue. That being so, it would be a breach of the Habitats Regulations to fail properly to consider whether an appropriate assessment was needed. In those circumstances, as it seems to me, I cannot properly exercise the discretion which undoubtedly exists not to grant relief notwithstanding that I am satisfied that there was an error of law. In those circumstances although I recognise the adverse effects of any delay or of the need to find an alternative site if it turns out that this is wrong, nonetheless, in the light of the Habitats Directive and the requirements of the Directive and the Regulations, it is not in my view appropriate for me to fail to grant relief in the circumstances.

- 80 It may be that the sensible way ahead in order to save time and money would be for the Secretary of State to carry out an appropriate assessment as speedily as possible having regard to all the evidence that has been produced by the claimant and indeed by others. If the result of that exercise was to agree with the EA, planning permission would then no doubt be granted. If there was the likelihood of any significant adverse effect, consideration would have to be given to whether conditions could avoid such an effect. If that was not possible, the law requires that the development cannot take place, subject to the possibility, which has not been explored, of overriding the prohibition in special circumstances.
- 81 Accordingly, I quash the decision to grant planning permission.