Gloucestershire Waste Core Strategy – Examination in Public

Issue 4: Habitats Regulations Assessment

Additional Statement from the Environment Agency - 31 January 2012

1. Introduction

1.1. In March 2011 the Environment Agency (EA) provided a review [CD6.1]. of the ERM modelling report [CD5.1] The Inspector raised queries about the Habitats Regulations Assessment (HRA) in his letter to Gloucestershire County Council (GCC) [CD.13.1]. At the Pre-Examination meeting, the Inspector requested that the Environment Agency attend the Examination in Public (EiP) to assist him in dealing with the issues of detailed air quality matters.

1.2. Since then we have been considering in detail how best to support the Inspector in this request against a backdrop of our proper role and remit for HRA, recent case law, and some organisational changes.

1.3. Unfortunately we have only recently been in a position to conclude that it would not be appropriate for our Air Quality Specialist to attend the EiP. We regret that this has caused inconvenience to the Inspector. Nevertheless we are fully committed to assisting in the EiP within the context of our role and remit for HRA. Thus we have produced this Additional Statement to assist the Inspector. An EA Representative (Ms Ruth Clare) will also be attending the Session for Issue 4 so as to represent the EA and provide further assistance if needed and where possible within our role and remit.

2. Environment Agency's comments to date

2.1. Firstly, It may assist if we clarify certain points about the Environment Agency's response and consequently the extent to which we feel we can properly assist at the Examination in Public.

2.2. The overall purpose of the Environment Agency's review [CD6.1] of the ERM modelling report [CD5.1] was to provide some high-level comments to the Waste Planning Authority (WPA) relevant to the context of any application that the Environment Agency might receive under the Environmental Permitting Regulations 2010 (EPR) for a permit for a waste management facility.

2.3. We did this as a result of a request from Natural England to review the ERM modelling report given our in-house air quality technical expertise (AQMAU - our Air Quality Modelling and Assessment Unit).

2.4. Whilst we try to provide helpful comments, it is not the Environment Agency's role to provide a technical appraisal of the modelling at the spatial planning stage of HRA in sufficient detail to enable decisions to be made on specific planning applications, or land use allocations on planning grounds (which in any event are wider than simply air quality issues). Furthermore, we are not the Competent Authority under the Habitats Regulations for the planning process and neither are we a statutory consultee. As such our comments to the WPA were merely to provide some technical appraisal of the air quality modelling report produced.

2.5. Accordingly, when sending our response to the WPA and copied to Natural England, we advised in our covering email dated 25 March 2011: "As per your role as the lead competent Authority under the Habitats Regulations for planning, and with Natural England as the lead Statutory consultee at the planning stage, I do not wish to draw conclusions from the report and leave that to your consideration. Suffice to say this was a 'high level review' and I would only wish to note that we would expect more detailed air quality assessment at the site-specific stage for applications for Environmental Permits. I also take this opportunity to note that wherever possible for complex waste proposals, we encourage developers to twin-track planning applications with Permit applications."

2.6. Furthermore, we advised in Paragraph 2.5 of our response that *'The comments in this report should not be considered to prejudice or pre-empt any decisions this Agency takes if determining an application for the proposed plant under the Environmental Permitting Regulations'*. Again, our comments here were intended to be high-level only.

2.7. In this context we advised that several aspects of the assessment were inconsistent with our expectations for Environmental Permitting. As such the Habitats Regulations Assessment (HRA) does not necessarily rule out significant impact at habitats sites arising from Energy from Waste (EfW) developments at the proposed locations as far as an Environmental Permitting application might be concerned.

2.8. This does not mean that we are suggesting the strategy in its current form cannot be used for planning purposes. Given the high-level and generic nature of the modelling and assessment methodologies used, the Waste Core Strategy does not – and we would recognise cannot - necessarily rule out any of the proposed locations as unsatisfactory in terms of Environmental Impact without considerably more information about the precise design and operating techniques for the plant.

2.9. Conversely, the findings would not necessarily mean there would be significant impacts should such a proposal be constructed (having

first been granted planning permission and an Environmental Permit). Again, this is because more detailed information about the facility's precise design and operating techniques for the plant would only be known at the site-specific proposal stage, including site-specific mitigation measures. Such information might only be available at a panning application or Environmental Permit application stage.

3. The Environment Agency's role and remit for HRA of Spatial plans

3.1. As indicated above, we are not the Component Authority under the Habitats Regulations at the planning stage. Nor are we a Statutory Consultee. This is not to say we have no role for HRA as there are clearly links between the planning and Permitting stages, and we are the Competent Authority at the Permitting stage.

3.2. Nevertheless, where the Habitats Regulations are concerned, our statutory remit is as a consultee on certain planning applications and to determine permit applications made to us. We do not have a statutory obligation for HRA of spatial plans.

3.3. Whilst we will try and respond in a constructive way when being consulted on HRA of development plans we can only express an opinion on matters and it is for the Local Authority or other decision maker to make the actual decision as the Competent Authority.

3.4. We also need to take account of the fact that we may have Environmental Permit applications to determine in future and that we cannot do anything that could be considered to prejudge such an application on the limited information provided at the development plan stage. We can only provide generic comments based on whatever information is available at that time. We cannot give a detailed view on whether a particular site is definitely suitable or unsuitable as ultimately that depends on the specific details of any permit application such as proposed grate technology, proposed plant design including proposed abatement and detailed modelling reflecting all of that.

3.5. Whilst we provided a review of the Air Quality Modelling Report at the time, we are not necessarily best placed now to comment on the specifics of that modelling exercise. We cannot act as consultants for either the Planning Authority or the Planning Inspectorate in this regard. Therefore the Inspector may find assistance from ERM, the consultants who carried out the assessment, who we understand will be in attendance at the EiP and may wish to answer any detailed questions about their modelling. Furthermore the Planning Authority would be best placed to answer questions on their decision making process as per their role as Competent Authority.

3.6. At the time of making our review of the Air Quality Modelling Report, we discussed the context that any review we undertook would have with both the Planning Authority and Natural England. Whilst this context was clear at that time, it has nevertheless taken us some time to reach a conclusion about how best to assist the Inspector at the EiP due to a variety of factors.

3.7. Among these factors was a recent legal case (R oao Cornwall Waste Forum St Dennis Branch v SoS - the 'St Dennis Case' – a copy of the summary details and particulars of the case is enclosed at the end of this Statement), which has implications relating to our role and remit in HRA as it clearly distinguishes the role of the EA at Environmental Permitting stage from the role of the Planning Authority in the Planning process.

3.8. In addition, other factors have caused a delay in us reaching a decision over the extent of our involvement with the EiP. These included some organisational changes and associated discussions with DEFRA. Art of this related to resource issues and whether there were other Public Bodies who should more appropriately have dealt with this issue.

3.9. It is regrettable that we were not in a position to inform the Inspector of our decision earlier. Had we been able, we would have produced this Additional Statement as a Further Representation in accordance with the 05 January 2012 deadline for such. It is nevertheless intended that our comments contained within this Statement will assist the Inspector at the EiP, along with any help our EA representative is able to provide on the day.

4. Questions posed to EA on the HRA matter, and our answers within the context our role and remit for HRA

4.1. Notwithstanding the above comments, having been asked by the Inspector to assist in the Examination in Public (EiP), it was always our intention to give advice wherever possible within the context of our remit.

4.2. As a result of on-going and recent internal discussions, we were not able to confirm until very recently whether this would be in the form of our Air Quality Specialists attending the EiP, or further written comments.

4.3. In the event, we have decided it is not appropriate for our Air Quality Specialists to attend but we have provided in this statement the responses to the specific questions posed by the Inspector. It should be noted that had our Air Quality Specialists attended the EiP, they would not have been able to provide more detailed responses than those provided within this statement.

4.4. The questions and our responses to them are set out below:

4.5. Question 1: (From Agenda Item 3, question 1 of CD13.53.4)In its response (see CD6.1 pages 310-para 3.6 and 316-para 3.26) the EA comments on the use of AERMOD and ADMS for plan level assessment. Where, as in this case, the difference in outcomes appears to be significant, could the EA explain its comment in 3.26 and advise which model outcomes should, in its view be used for the assessment I am being asked to judge?

4.6. Response 1: We commented in paragraph 3.26 of our response that as the modelling software types ADMS and AERMOD were used in the study, we would normally '*expect the higher or more conservative predictions to be used as a basis for a screening assessment*.' This comment should be read in the context of an Environmental Permitting application.

4.7. Our position on detailed modelling is that *'the Environment Agency does not favour or prescribe the use of any particular model and that it is for operators/applicants to justify their choice of models and that they are fit for purpose to us, based on established scientific principles and indeed that there is sufficient data used to demonstrate the conclusions drawn in the Assessment*.' (This is an from within our EA Guidance on choice of dispersion models available: http://www.environment-agency.gov.uk/business/regulation/38791.aspx)

4.8. We would expect the sensitivity to various aspects such as meteorological data, terrain as well as the models themselves (for cases with likely high uncertainties) to be taken into account by operators/applicants in order to try to understand those uncertainties and to inform EPR decision-making. For EP applications, we would expect, where uncertainties are high, for both models to be considered to help inform modelling uncertainties. In most cases, the higher value would be used for screening assessments without the need for more detailed considerations. Again this is in the context of what we would expect under EPR.

4.9. Our comments in Paragraphs 3.6 and 3.26 of our report were not on the "use of AERMOD and ADMS for plan level assessment". Our comments should be placed in the context of any prospective EP applications only. We do not know which criteria that Planning Authorities or the Planning Inspectorate would normally use for modelling impact assessments supporting planning applications or spatial plans. We assume however that although there is likely to be some considerable overlap between planning and EP regulation, it does not necessarily follow that the same principles would apply as we use for EP regulation.

4.10. Given the high-level nature of the assessment in the WCS it is difficult to make detailed judgements on screening other than to identify the locations that are more sensitive than others based on the generic cases set up in the modelling and the assessment criteria used.

4.11. We cannot at this stage anticipate or speculate on the details of EPR applications for particular sites, nor on that basis can we suggest it would be appropriate to rule any given site in or out. As we say in our written response, *'more detailed site-specific assessments will be needed on technical determination of any EPR applications '* (para 3.27) and *'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.'*(para 3.28).

4.12. Therefore we cannot advise or conclude on which modelling criteria should be used. This is a matter for the Competent Authority. Whilst the EA seeks to assist we are not the competent authority on adoption of the GCC WCS nor on individual planning decisions, but on environmental permitting decisions under the EPR, as our AQMAU response sets out. As is clear from the '*St Dennis* case', the EA is not the competent authority at the planning stage, though will be at the EPR stage and may need to consider the requirement for AA then.

4.13. Therefore we can only comment, conclusions being for the competent authority. Our comment at 3.26 is our view within the context of our role as competent authority under the EPR process. We cannot rule out, neither can we specifically favour, particular sites. In our view, ultimate suitability of any site could only be fully resolved at detailed application stage in EPR terms.

4.14. Question 2: (From Programme Officer's email of 27 Jan) The EA are participating at my invitation and I hope they will be able to explain the differences between the AERMOD and ADMS models; why they can give different outcomes; which would be the most appropriate to use for a plan-level assessment in this county given its terrain, climate and wind patterns; and whether on the basis of the AERMOD outcomes reported in Table 6.1 of CD5.1 and in the absence of AA a conclusion that none of the allocated sites can be identified as suitable for a recovery facility involving thermal treatment would be correct.

4.15. Response 2: As indicated above, the Environment Agency does not prescribe or promote any particular model for use in its regulatory functions. We expect applicants to justify their selection of dispersion models as well as their choice of input parameters.

4.16. There are differences between the two models due to slight differences in their dispersion algorithms and meteorological pre-processors. Both models mentioned are based on sound science and have validation documents freely available on the internet. Interrogation of these documents indicates that performance of these models are typically within a ratio of 1.5 for long-term predictions but higher for short-term.

4.17. On audit of EP applications, we would challenge the input parameters to understand these differences but only where impacts are high enough to merit doing so. For most applications and most pollutants the environmental impact will be deemed insignificant without the need for detailed consideration of any differences between software and are hence they would be considered to have "screened out" impacts.

4.18. In some cases, detailed sensitivity analysis is required for a range of input parameters and models. This is done using our experience and knowledge of many previous cases. Taking the highest of either model or reasonable sensitivities is a common approach to consider a worst case and thereby taking uncertainties into account by applying "bias".

4.19. We have not reviewed the details of the ERM modelling in this case. We have provided some high-level observations, but cannot comment on the precise reasons for the differences or the implications of those differences to impact assessment under the EP Regulations. In addition, we do not know which criteria are normally used for planning determinations. We anticipate that the model users ERM would be in a much better position to answer the Planning Inspector's questions in this respect.

5. EA's position and conclusions

5.1. It is hoped that our comments in this Additional Statement will assist the Inspector.

5.2. We would like to confirm that we have no 'soundness' or 'legal compliance' 'objections' to the plan. This was the case previously, and it is still the case now in light of the Inspector's queries in relation to Issue 4.

5.3. Furthermore the WPA produced the HRA Topic Paper in response to the Inspector's queries. We have reviewed this Paper and can confirm that there are no aspects in the paper that we would be at odds with.

5.4. As indicated above, we cannot specifically answer questions related to whether or not the modelling approach is appropriate for planning purposes as that is outside our remit. However, we can advise that

there are several aspects of the assessment that would be required if any of the proposed sites makes it to the EP application stage. Our observations are given in our AQMAU report. Due to the high-level nature of the assessment process, it is our view that the HRA can be used as a basis to determine the relative merits of each site given the constraints of the process and the assessment criteria used. A more thorough assessment would be expected on EP application that is based on the specific proposed plant engineering and site-specific matters relating to local meteorological conditions and terrain etc. comparing the impacts against all criteria expected for EP regulation.

5.5. We hope this Additional Statement clarifies our position with regard to detailed consideration of particular sites and our expectations - in the EPR context - of impact assessment. Whilst we intended our observations on the HRA Report to be of assistance, we would not purport to set out a full technical appraisal.

5.6. We will, of course, be represented at the Examination in Public, but practically our comments on the HRA and our role in dealing with EPR applications is, and will be, as set out above.

Enclosure:

R oao Cornwall Waste Forum St Dennis Branch v SoS - the 'St Dennis Case' - copy of the summary details and particulars of the case.

CORNWALL WASTE FORUM ST DENNIS BRANCH v (1) SECRETARY OF STATE FOR COMMUNITIES & LOCAL GOVERNMENT (2) SITA CORNWALL LTD (3) ENVIRONMENT AGENCY (4) CORNWALL COUNCIL (2011)

[2011] EWHC 2761 (Admin)
QBD (Admin) (Collins J) 13/10/2011
PLANNING - ADMINISTRATIVE LAW - ENVIRONMENT - LOCAL GOVERNMENT APPROPRIATE ASSESSMENTS : ENVIRONMENTAL IMPACT : INCINERATION : LEGITIMATE EXPECTATION : PLANNING CONTROL : SPECIAL AREAS OF CONSERVATION : DEVELOPMENT NEAR SPECIAL AREAS OF CONSERVATION : DETERMINATION OF NECESSITY OF APPROPRIATE ASSESSMENT OF EFFECT OF DEVELOPMENT : APPROPRIATE COMPETENT AUTHORITY TO MAKE DETERMINATION UNDER CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010 : DIRECTIVE 92/43 ON THE CONSERVATION OF NATURAL HABITATS AND OF WILD FAUNA AND FLORA 1992 : CONSERVATION (NATURAL HABITATS, &C.) REGULATIONS 1994 : CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010 : reg.61(1) CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010 : reg.65(3) CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010 : reg.61 CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010 : reg.64 CONSERVATION OF HABITATS AND SPECIES REGULATIONS 2010

A planning inspector had erred in considering that air quality issues pertaining to the construction of incinerators were matters for the Environment Agency in its capacity as competent authority under the Conservation of Habitats and Species Regulations 2010 such that he was not required under the Regulations to determine whether an assessment of the impact of the development on Special Areas of Conservation was

necessary. His conclusion was in breach of objectors' legitimate expectation that the Secretary of State for Communities and Local Government would act as the competent authority.

The claimant (C) applied to quash a decision of the first defendant secretary of state to grant planning permission to the second defendant company for the construction of two energy-from-waste plants or incinerators. C was an unincorporated association comprised of three groups that were party to a public inquiry into the appropriateness of the construction of the incinerators. The proposed site of the incinerators was next to two Special Areas of Conservation (SAC) which were protected under Directive 92/43 as implemented by the Conservation (Natural Habitats, &c.) Regulations 1994. Those Regulations were applicable at the date of the inquiry but by the date of the instant hearing had been superseded by the Conservation of Habitats and Species Regulations 2010, which were identical in all relevant regulations. For the purposes of making decisions under the Regulations there were relevant and competent authorities and the secretary state was both of those authorities. In particular for the purposes of reg.61(1) of the 2010 Regulations the secretary of state was a competent authority for assessing the implication of development on an SAC. At the inquiry C objected to the construction of the incinerators. After the inquiry concluded the Environment Agency issued a pollution control permit that would allow the operation of the incinerators. Three months later the planning inspector granted planning permission for the development, relying on the issue of the permit as an indication that an appropriate assessment under the Regulations was unnecessary as the Environment Agency was a competent authority and it would not have issued a permit if an appropriate assessment had been necessary. C contended that it had a legitimate expectation that the secretary of state would act as a competent authority and decide before granting planning permission whether an appropriate assessment under the Regulations should be carried out but in breach of that legitimate expectation he had improperly abdicated his responsibility to the Environment Agency.

HELD: (1) In considering the impact of a development for the purposes of the Regulations there was a two-stage approach: first, consideration should be given to whether no adverse effects could possibly result. If that was not the case, an appropriate assessment had to be made. Whilst technically it was not a planning inspector who would make an appropriate assessment, in practice the planning inspector's recommendations would be persuasive. In the instant case both the secretary of state and the Environment Agency were competent authorities; their decision-making overlapped and it was not possible to say in any given case whether planning control should defer to control by means of a permit. Reg.65(3) of the 2010 Regulations stated that the appropriate authority might issue guidance to competent authorities for the purposes of reg.61 to reg.64 as to the circumstances in which a competent authority might or should adopt the reasoning or conclusions of another competent authority. It was apparent that no such guidance had been issued but that the closest to issued guidance was Planning Policy Statement 10: Planning for Sustainable Waste Management, which had been considered by the planning inspector. That guidance was about the implementation of planning strategies in waste management and not pollution control. There could be no doubt that air quality and air emissions were a matter of planning control; planning conditions could be imposed. The planning inspector had erred in considering that air quality issues that pertained to the construction of incinerators were matters for the Environment Agency as a competent authority under the 2010 Regulations such that he was not required to consider whether an assessment was necessary. Further, in light of various communications, C had a legitimate expectation that the secretary of state would act as the competent authority. It could not be said that the secretary of state should defer to the Environment Agency as he did not have its expertise as the secretary of state was fulfilling a quasi-judicial role and the discharge of that function required him to form a view relying on expert evidence. Whilst it was contended that the Environment Agency would not issue a permit for a development that would cause harm, that wholly missed the point that C had objected before the inquiry concluded to the evidence on which the Environment Agency had based the issue of its permit, and the planning inspector had failed to deal with the weight to be attached to that evidence. Further, C had been further prejudiced through being denied the opportunity of seeking judicial review of the Environment Agency's decision by the delay between the issue of the permit and the planning inspector reaching his decision. It was

inappropriate for the court to exercise its discretion and refuse C relief as, even recognising the defendants' submissions that delay to the construction of the incinerators might cost the relevant local authority £200 million, the Directive and the Regulations were the law and had to be obeyed, R (on the application of Nadarajah) v Secretary of State for the Home Department (2005) EWCA Civ 1363, Times, December 14, 2005 followed. Accordingly it was appropriate to quash the grant of planning permission (see paras 11-12, 17, 48-50, 57, 62, 71-74, 76, 79 of judgment). (2) Given the general importance of the case it was appropriate to grant the defendants permission to appeal to the Court of Appeal (para.137).

Application granted
Counsel:
For the claimant: David Wolfe
For the first defendant: Hereward Phillpot
For the second defendant: Mark Westmoreland Smith
For the third and fourth defendants: No appearance or representation

Solicitors:
For the claimant: Leigh Day
For the first defendant: Treasury Solicitor
For the second defendant: Bond Pearce LLP
LTL 13/10/2011