

**GLOUCESTERSHIRE COUNTY COUNCIL**

**IN THE MATTER OF GLOUCESTERSHIRE'S WASTE CORE STRATEGY**

---

**INSTRUCTIONS TO LEADING COUNSEL**

---

Nigel Roberts  
Director of Law and Administration  
Gloucestershire County Council  
Quayside House  
Gloucester  
GP/44216

Enclosures:

Enclosure Number	Date	Document	Detail
1.	August 2009	CD9.3	
2.	December 2010	Waste Core Strategy Habitats Regulations Assessment CD 5.1	
3.	December 2010	Waste Core Strategy	
4.	June 2011	Focussed Changes	
5	15 <sup>th</sup> November 2011	CD 13.10 Issue 1	Legal requirements, evidence base & relationship to plans and strategies
6	January 2012	CD 13.12 Issue 2	Whether the statistical basis for the CS is robust and justifies the vision and the strategic objectives
7	January 2012	CD 13.13 Issue 3	Whether the Core Strategy is consistent with National Policy
8	January 2012	CD 13.14 Issue 4	Habitats Regulation Assessment
9	January 2012	CD 13.15 Issue 5	Specific Sites
10	January 2012	CD 13.16 Issue 6	Monitoring and Implementation
11	January 2012	CD 13.17 Issue 7	Other Matters and Closing Remarks
12	December 2010	CD 1.1	Waste Core Strategy
13	June 2011	CD 1.3	Schedule of Focused Changes
14	January 2012	Issue 4:	Inspector's Agenda and Supplementary Questions
15	February 2012	Note to the Inspector	Note on advice from Anthony Crean QC
16	February 2012	A. Short Note version for EiP session B. Long Note version which is a GCC DRAFT POSITION  Notes are by Gary Kennison (Ecologist)	On HRA and Air Quality

17	6 <sup>th</sup> February 2012	Email from Inspector	On HRA at EiP
18	February 2012	A. Advice from Mr Crean QC B. County Council Note	Duty to Co-Operate Notes on S110 & 112 of Localism Act

Leading Counsel is instructed by Nigel Roberts, Director of Law and Administration, Gloucestershire County Council, Quayside House, Gloucester on behalf of the Waste Planning Authority. Instructing Solicitor is Gillian Parkinson, Principal Lawyer, and her contact telephone number is 01452 425212.

## **1. Summary**

Leading Counsel has previously advised the County Council regarding the application of the case of *Feeney v Oxford City Council and Secretary of State for Communities and Local Government* [2011] EWHC 2699 Admin in relation to the Waste Core Strategy and the Examination in Public which opened on 31 January 2012 concerning Habitat Regulations Assessment issues. Before the examination, the Inspector had raised a series of questions about the assessments which the County Council had undertaken regarding the application of the Council Directive 92/43/EEC and the Conservation of Habitats and Species Regulations 2010 ('the Habitats Directive and Regulations') in the WCS. During the course of the examination Instructing Solicitor provided the Inspector with a note of the advice given by Leading Counsel in relation to the *Feeney* case. However, the Inspector would like further clarification regarding certain issues, particularly in the context of the assessments which the County Council undertook to comply with the Habitats Regulations and Directive.

## **2. Habitats Directive and Regulations**

2.1 On 3 February the Inspector held a session at the EiP concerning the Habitats Directive. Before the EiP started, the Inspector set out the Agenda and Supplementary Questions which he wanted to consider in relation to the Habitats Regulation Assessment. A copy of the Agenda may be found at

Enclosure 14. In advance of the session, Instructing Solicitor forwarded a copy of the note of the advice which Leading Counsel provided to the County Council on 27 January 2012. A copy of the note may be found at Enclosure 15.

- 2.2 During the session on the Habitats Assessment, the County Council's Ecologist explained the process which the County Council had undertaken in assessing the impact which the Strategy would have in the context of the Habitats Directive and Regulations. Copies of the County Ecologist's note of the process are attached as Enclosures 16A and 16B, would leading Counsel please note that Enclosure 16A is the note of information given at the EIP and Enclosure 16B is purely the County Ecologist's summation and views. Whilst the County Ecologist explained the process verbally during the EIP (Enclosure 16A), the note has not yet been provided to the EIP.
- 2.3 The Inspector explained during the session, that he felt the County Council was not in a similar position to the Feeney case because it had not carried out an appropriate assessment in accordance with the Habitats Regulations and Assessment. The County Council explained during the EIP that it would be proposing a modification to the Strategy in line with the Feeney case. The proposed wording would be as follows:

The Council is proposing a new criteria text insertion into WCS4. This spells out clearly, for the avoidance of doubt, that there is a special requirement that development at strategic sites will have to meet:

*Proposals are supported by sufficient information for the purposes of an appropriate assessment of the implications of the proposal, alone or in combination with other plans and projects, for any Special Area of Conservation (SAC), Special Protection Area (SPA) and Ramsar site. The conclusions of the assessment, in accordance with Council Directive 92/42 EEC and the Conservation of Habitats and Species Regulations 2010, must show that a proposal can be delivered without adverse effect on the integrity of any SAC, SPA or Ramsar site.*

- 2.4 Despite this approach the Inspector has now raised questions about Regulations 61 and 102 which refers to the need to carry out an appropriate assessment where the plan or project is likely to have a significant effect on a European site ' . . . (either alone or in combination with other plans and projects)

...'. The Inspector raised questions during the EiP about whether the evidence base demonstrates an assessment of the 'in combination' effects of the WCS. This was particularly focussed on the County Council's approach within the HRA which considers the impacts on the European sites in the context of a hypothetical development of a thermal treatment facility. The Air Modelling expert explained during the EiP that whilst the current Environment Agency Guidance for permitting applies a 1% threshold to assess whether there is any significant harm to the European sites, the EA does not provide similar guidance for proposals which come forward in combination. The example which was referred to during the EiP was a reference to an existing planning consent for the development of a oxidisation plant at Moreton Valence (for the purpose commercial municipal waste and non-viable recyclables which involves the construction of a stack in the region of 30m) which is situated to the west of the M5 and a proposal for a thermal treatment facility at Javelin Park which is on the east of the M5 and within 600m of the Moreton Valence site.

- 2.5 It should be noted that the WCS includes a policy on the cumulative effects of developments over the plan period which is set out in Policy WCS7. It is possible for further modifications to be proposed to the Inspector to WCS7 if the Inspector continues to have concerns about the 'in combination' effects of proposals submitted at the detailed stage. For example,  
In the text supporting WCS7 on cumulative impact the following text should be inserted (at end of paragraph 4.183)

*In relation to the Council Directive 92/42 EEC and the Conservation of Habitats and Species Regulations 2010 the WCS will only make provision for a level and location of residual waste management development where there will be no adverse effect on the integrity of any SAC, SPA or Ramsar site, even if this is below the indicative residual waste recovery capacity set out in this WCS.*

Finally a small insertion of the word 'ecology' is suggested for policy WCS7 as follows:

*Within these broad categories this will, subject to the scale and nature of the proposal, include an assessment of the following issues: noise, odour, traffic (including accessibility and sustainable transport considerations), dust, health, **ecology** and visual impacts.*

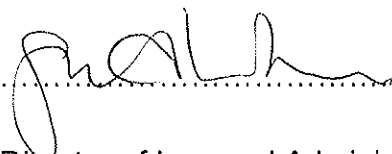
- 2.6 The Inspector has adjourned the EIP until 12 March to provide an opportunity for further formal advice to be sought from Leading Counsel. The email in respect of the Inspectors concerns in relation to this matter can be found at Enclosure 17. Whilst Instructing Solicitor does not think Leading Counsel will be required for the re-commencement of the EIP on 12 March, it would be helpful if either Leading Counsel or a suitable substitute could be placed on standby for that day in the event they are required. Perhaps Counsels Clerk could contact Instructing Solicitors offices to discuss this further?

3. Instructions to advise

Leading Counsel is requested to advise on the following points so that his advice may be placed before the Inspector:

- 3.1 Whether the evidential test for soundness in relation to the assessments undertaken to assess the impacts of the Habitats Directive and Regulations provide a robust and credible evidence base in line with PPS12 and the Planning and Compulsory Purchase Act?
- 3.2 If the County Council has undertaken the correct approach, will Leading Counsel please specifically point to the aspects of the assessment which provide details of meeting the evidential test?
- 3.3 Advise the County Council on the relevant tests which the Inspector has to apply in considering whether the evidential test of soundness has been met in the context of the assessments undertaken by the County Council to comply with the Habitats Regulations and Directive.
- 3.4 Whether the County Council is required to carry out any further HRA at this stage in the development of the Waste Core Strategy.
- 3.5 Is the County Council's approach to the duty to co-operate (s.110 and s.112 of the Localism Act) correct – see Enclosures 18A and 18B?

3.6 Generally.

A handwritten signature in black ink, appearing to be "J. M. Smith", written over a horizontal dotted line.

Director of Law and Administration

16 February 2012

