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Our Ref: APP/L3055/V/09/2102006

26 May 2011

Dear Ms Redman,

**TOWN AND COUNTRY PLANNING ACT 1990 – SECTION 77.
APPLICATION BY VEOLIA ES NOTTINGHAMSHIRE LIMITED
LAND AT FORMER RUFFORD COLLIERY, RAINWORTH, NOTTINGHAMSHIRE
NG21 0ET. APPLICATION REF: 3/07/01793/CMW**

1. I am directed by the Secretary of State to say that consideration has been given to the report of the Inspector, R W N Grantham, BSc(Hons), MRSC, MCIWEM, who held a public local inquiry which closed on 26 October 2010 into your client's application for the construction and operation of a waste combustion/Energy Recovery Facility (ERF) together with ancillary infrastructure, including a waste bulking/transfer station, administration/visitor centre, landscaping and creation of new internal haul road, on land at the former Rufford Colliery, Rainworth, Nottinghamshire, NG21 0ET, in accordance with application reference 3/07/01793/CMW, dated 29 November 2007.

2. It was directed on 18 March 2009, in pursuance of Section 77 of the Town and Country Planning Act 1990, that the application be referred to the Secretary of State instead of being dealt with by the relevant planning authority, Nottinghamshire County Council, because the proposal may conflict with national policies on important matters.

Inspector's recommendation and summary of the decision

3. The Inspector recommended that planning permission be refused. For the reasons given below, the Secretary of State agrees with his recommendation. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers, unless otherwise stated, are to that report.

Procedural matters

4. In reaching his decision, the Secretary of State has taken into account the Environmental Information which was submitted under the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (IR6, IR45-46, and IR1095). The Secretary of State considers that the

environmental information as a whole meets the requirements of these regulations and that sufficient information has been provided for him to assess the environmental impact of the application.

Matters arising following the close of the inquiry

5. Following the close of the inquiry, the Secretary of State received representations dated 15 April 2011 from Nottinghamshire County Council, and 12 May 2011 from Veolia Environmental Services and Harworth Estates (supported by a number of other organisations). The Secretary of State has given very careful consideration to the issues raised in these representations, and he is satisfied that there is no need for him to refer back to parties for representations prior to reaching his decision. Copies of the representations are not attached to this letter, but will be made available on request to the address at the foot of the first page of this letter.

Policy considerations

6. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise. In this case, the development plan includes the East Midlands Regional Plan (RSS) (2009), the extant policies of both the Nottinghamshire and Nottingham Waste Local Plan (WLP) (2002) and the Newark and Sherwood Local Plan (NSLP) (1999). The Secretary of State agrees with the Inspector that relevant policies are those listed in the statement of common ground (with the exception that LP policies DD1, DD4, NE7, NE9, NE11, NE12, NE13 and PU2 have been replaced with publication of the Core Strategy) - key policies of which are set out in IR34-37. Since the inquiry closed the Newark and Sherwood Core Strategy (CS) has been adopted and also forms part of the development plan. The Secretary of State notes that issues relating to the CS have been addressed in the Inspector's Report, and is satisfied that there have been no significant material changes to the document which would affect his decision or require him to refer back to parties prior to reaching a decision.

7. The Secretary of State agrees with the Inspector that the parties' comments on the implications of the Cala Homes judgement of 10 November 2010 ([2010] EWHC 2866 (Admin)) relating to the status of RSSs do not introduce any relevant new evidence (IR12, 17 and CD119). Like the Inspector, he considers that the Government's intention to revoke the RSS should be afforded limited weight given the stage of development it has reached in the Parliamentary process (IR1171).

8. Other material considerations include the national planning policy documents listed in section C of the IR documents list (see IR page 257), the waste strategy and legislation documents listed in sections D and F of the documents list, and documents relating to the Habitats and Birds Directives listed at IR54-56. Circular 11/95, *Use of Conditions in Planning Permission*, Circular 05/2005, *Planning Obligations*, and the Community Infrastructure Levy (CIL) Regulations 2010, are also material considerations.

9. The Secretary of State has also taken into account the update to Planning Policy Statement 10, which was published on 30 March 2011. He does not

consider that there has been any material change in those policies to the extent that it would affect his decision or require him to refer back to parties for further representations prior to reaching his decision.

10. Very little weight has been afforded to the Nottingham Waste Development Framework, and its Waste Core Strategy, for the reasons set out in IR38.

11. The Secretary of State has taken into account the principles set out in the documents referred to in IR54-90 in determining this application.

Main Issues

Nature conservation

12. The Secretary of State agrees with the Inspector's reasoning and conclusions on nature conservation as set out in IR1097-1156 and IR1288-1289. For the reasons set out by the Inspector at IR1105-1106, the Secretary of State agrees that, whilst the application site is within an area not currently identified as a Special Protection Area, there is merit in following a (Conservation of Habitats and Species) Regulation 61 approach towards considering the impact of the ERF scheme on the use of this area by the identified Annex 1 bird species (a "risk based approach") (IR1288). Having carefully considered the Inspector's assessment of the proposal on this basis (by way of a "shadow assessment"), the Secretary of State agrees that the effect of the mitigated scheme, in combination with other plans and projects, is likely to be significant, and he cannot be sure that the scheme would not harm the integrity of the area (IR1289). In common with the Inspector (IR1151), the Secretary of State considers that this would be in conflict with the aims of the RSS and with its policy 29. He is of the view that this conflict and the potential for harm to the integrity of habitat used by woodlark and nightjar weighs significantly against the proposal.

Landscape and visual impact

13. The Secretary of State agrees with the Inspector's reasoning and conclusions on landscape and visual impact as set out in IR1157-1166 (albeit he recognises that LP policy NE9 is no longer relevant following publication of the CS). He agrees that the ERF building would appear as an isolated, but prominent alien feature in the wider rural landscape, and that it would clearly intrude into the openness of the countryside (IR1164).

Development Plan

14. Setting aside LP policy NE9, the Secretary of State agrees with the Inspector's reasoning and conclusions on the development plan as set out in IR1167-1181 and IR1273-1276, although he does wish to make an observation on a point made by the Inspector about waste capacity at IR1180. On the matter of capacity the Secretary of State is mindful that PPS10 paragraph 10 states that, with regard to apportionment, "spurious precision should be avoided [and] annual rates are not intended to be a detailed forecast but to provide a benchmark". Also the PPS10 companion guide states that the demonstration of allocated land "is not intended as a rigid cap on the development of waste management capacity". Bearing this in

mind, the Secretary of State does not consider that exceedence of “capacity” *per se* in policy 38 is necessarily inconsistent. However, he does consider that where ERF facilities are proposed in areas which are not specifically identified for such use, as is the case here, then PPS10 paragraphs 24 and 25 come into play. In such respects it is necessary to be consistent with PPS10 – a matter addressed in paragraphs 16 and 17 below.

Alternative sites

15. For the reasons given in IR1182-1189 and IR1277, the Secretary of State agrees with the Inspector that the appraisal of alternative sites was not robust (IR1189).

PPS10: Planning for sustainable waste management

16. The Secretary of State agrees with the Inspector’s reasoning and conclusions on PPS10 as set out in IR1190-1220 and IR1278-1281, except with respect to the specific point identified below. He agrees with the Inspector that given that the proposal is not consistent with an up-to-date plan, considerations of need are not ruled out in this case (IR1279). He also agrees that the availability of landfill capacity does not add any urgency to this proposal (IR1280), although he recognises that local authorities are required to divert biodegradable municipal waste from landfill under the EU Landfill Directive.

17. As for whether the proposal should be deemed waste disposal rather than recovery, the Secretary of State has had regard to the lack of guidance in support of the definition of recovery operation R1 under Annex II of the EU Waste Framework Directive. He is content that, on the basis of the information available to him, including the amount of electricity that would be generated from the amount of waste feedstock, this particular proposal would generate energy from waste rather than be classified as a disposal operation in line with PPS10 (IR1197). He therefore concludes that the proposal would result in movement up the waste hierarchy and help divert waste from landfill, and that this is a factor in favour of the scheme.

Sustainable development under the terms of PPS1 and PPS7

18. The Secretary of State agrees with the Inspector’s reasoning and conclusions on sustainable development under the terms of PPS1 and PPS7 as set out in IR1221-1234 and IR1282-1286. He agrees that the proposal would not be a renewable energy scheme and it would not necessarily represent the best available waste management solution, but it would help to reduce carbon emissions (IR1282). He also agrees that it would be harmful to the landscape (IR1284).

Other matters

19. For the reasons given in IR1235-1238 the Secretary of State agrees with the Inspector that in the circumstances of this case the concerns of residents regarding health effects should not carry great weight in his determination of the application

(IR1238). He further agrees with the Inspector's analysis in relation to human rights at IR1292.

20. On the matter of persistent organic pollutants (IR1239), the Secretary of State has not been able to consider this matter in detail, given the limited evidence available. However, as he has decided not to grant planning permission for this proposal, for reasons unrelated to this matter, he has not found it necessary to conclude on this particular issue in order to determine this application.

Conditions and obligations

21. The Secretary of State agrees with the Inspector's reasoning and conclusions on conditions and obligations as set out in IR1241-1270. He agrees that the unilateral undertakings are relevant and reasonable and satisfy the tests set out in Circular 05/2005 (IR1244) and the statutory tests set out in the CIL Regulations. He is also satisfied that the proposed conditions meet the tests set out in Circular 11/95 (IR1245). However, he does not consider that they overcome the reasons for refusing the application.

Overall conclusions

22. There are a number of factors weighing against the proposal. These include; that the Secretary of State cannot be satisfied that it would not harm the integrity of the area; that it would appear as an alien feature and intrude on the openness of the countryside; and that the site is due to be restored to woodland and heathland and is not allocated for development.

23. Factors weighing in favour of the proposal include, that it would result in movement up the waste hierarchy, and would help to reduce carbon emissions.

24. Overall the Secretary of State considers that the proposal conflicts with the development plan and national plan policies in a number of respects, and though there are material considerations in favour of the proposal, these are not sufficient to outweigh the identified conflict.

Formal decision

25. Accordingly, for the reasons given above, the Secretary of State hereby refuses planning permission for the construction and operation of a waste combustion/Energy Recovery Facility together with ancillary infrastructure, including a waste bulking/transfer station, administration/visitor centre, landscaping and creation of new internal haul road, on land at the former Rufford Colliery, Rainworth, Nottinghamshire, NG21 0ET, in accordance with application reference 3/07/01793/CMW, dated 29 November 2007.

Right to challenge the decision

26. A separate note is attached setting out the circumstances in which the validity of the Secretary of State's decision may be challenged by making an application to the High Court within six weeks from the date of this letter.

27. A copy of this letter has been sent to Nottinghamshire County Council. A notification letter has been sent to other parties who asked to be informed of the decision.

Yours sincerely

Christine Symes

Authorised by Secretary of State to sign in that behalf

RIGHT TO CHALLENGE THE DECISION IN THE HIGH COURT

These notes are provided for guidance only and apply only to challenges under the legislation specified. If you require further advice on making any High Court challenge, or making an application for Judicial review, you should consult a solicitor or other advisor or contact the Crown Office at the Royal Courts of Justice, Queens Bench Division, Strand, London, WC2 2LL (0207 947 6000).

The attached decision is final unless it is successfully challenged in the Courts. The Secretary of State cannot amend or interpret the decision. It may be redetermined by the Secretary of State only if the decision is quashed by the Courts. However, if it is redetermined, it does not necessarily follow that the original decision will be reversed.

SECTION 1: PLANNING APPEALS AND CALLED-IN PLANNING APPLICATIONS;

The decision may be challenged by making an application to the High Court under Section 288 of the Town and Country Planning Act 1990 (the TCP Act).

Challenges under Section 288 of the TCP Act

Decisions on called-in applications under section 77 of the TCP Act (planning), appeals under section 78 (planning) may be challenged under this section. Any person aggrieved by the decision may question the validity of the decision on the grounds that it is not within the powers of the Act or that any of the relevant requirements have not been complied with in relation to the decision. An application under this section must be made within six weeks from the date of the decision.

SECTION 2: AWARDS OF COSTS

There is no statutory provision for challenging the decision on an application for an award of costs. The procedure is to make an application for Judicial Review.

SECTION 3: INSPECTION OF DOCUMENTS

Where an inquiry or hearing has been held any person who is entitled to be notified of the decision has a statutory right to view the documents, photographs and plans listed in the appendix to the report of the Inspector's report of the inquiry or hearing within 6 weeks of the date of the decision. If you are such a person and you wish to view the documents you should get in touch with the office at the address from which the decision was issued, as shown on the letterhead on the decision letter, quoting the reference number and stating the day and time you wish to visit. At least 3 days notice should be given, if possible.



Report to the Secretary of State for Communities and Local Government

by R W N Grantham BSc(Hons) MRSC MCIWEM

an Inspector appointed by the Secretary of State for Communities and Local Government

Date: 17 March 2011

Town and Country Planning Act 1990

Application by Veolia ES Nottinghamshire Ltd

Nottinghamshire County Council

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ABBREVIATIONS

AA – Appropriate Assessment
AD – Anaerobic Digestion
AOD – Above Ordnance Datum
BAFO – Best and Final Offer
BAT – Best Available Technology
BP – Business Park
BS4142 – British Standard (1997) Method for Rating Industrial Noise Affecting Mixed Residential and Industrial Areas.
CHP – Combined Heat and Power
C&I – Commercial and Industrial
CLA – County Landscape Architect
CLG – Community Liaison Group
CS – Core Strategy
DAS – Design and Access Statement
DCLG – Department for Communities and Local Government
DECC – Department of Energy and Climate Change
DEFRA – Department for Environment Food and Rural Affairs
DoE – Department of the Environment
DPD – Development Plan Document
EA – Environment Agency
ECJ – European Court of Justice
EfW – Energy from Waste
EIA – Environmental Impact Assessment
EiP – Examination in Public
ELR – Employment Land Review
EMRA – East Midlands Regional Assembly
EMRP – East Midlands Regional Plan
EN – English Nature
EP – Environmental Permit
ERF – Energy Recovery Facility
ES – Environmental Statement
FC – Forestry Commission
GB – Great Britain
GCP – Golf Course Plantation
GPDO – Town and Country Planning (General Permitted Development) Order 1995
ha - hectares
HOEP – Habitat Offsetting and Enhancement Plan
HGV – Heavy Goods Vehicle
HIA – Health Impact Assessment
HSE – Health and Safety Executive
HWRC – Household Waste Recycling Centre
IBA – Important Bird Area
ICA – Indicative Core Area
I-CA – In Combination Assessment
IPC – Infrastructure Planning Commission
IPPC – Integrated Pollution Prevention and Control
IR – Inspector's Report
IROPI – Imperative Reasons of Overriding Public Interest
ITN – Invitation to Negotiate

JNCC – Joint Nature Conservation Committee
ktpa – kilotonne per annum
LATS – Landfill Allowance Trading Scheme
LHV – Lower Heating Value
MARR – Mansfield Ashfield Regeneration Route
MBT – Mechanical and Biological Treatment
MLA - Mature Landscape Area
MRF – Materials Recovery Facility
MSW – Municipal Solid Waste
NCC – Nottinghamshire County Council
NE – Natural England
NPS – National Policy Statement
NSDC – Newark and Sherwood District Council
NSLP – Newark and Sherwood Local Plan 1999
NWT – Nottinghamshire Wildlife Trust
PAIN – People Against Incineration
PC – Parish Council
PFI – Private Finance Initiative
PIM – pre-inquiry meeting
PPC – Pollution Prevention and Control
PPS – Planning Policy Statement
PPS1 – Delivering Sustainable Development
PPS1(S) – Planning and Climate Change (Supplement to PPS1)
PPS4 – Planning for Sustainable Economic Growth
PPS7 – Sustainable Development in Rural Areas
PPS10 – Planning for Sustainable Waste Management
PPS22 – Renewable Energy
pSPA – potential Special Protection Area
RAIN – Residents Against Incineration
RBAFO – Revised Best and Final Offer
RDF – Refuse Derived Fuel
RES – Regional Economic Strategy
RSPB – Royal Society for the Protection of Birds
RSS – Regional Spatial Strategy
RWS – Regional Waste Strategy
SA – Sustainability Appraisal
SAC – Special Area of Conservation
SEI – Supplementary Environmental Information
SINC – Site of Interest for Nature Conservation
SLA – Special Landscape Area
SoS – Secretary of State
SPA – Special Protection Area
SPFP – Sherwood Pines Forest Park
SSSI – Site of Special Scientific Interest
T - tonnes
tpa – tonnes per annum
URBAFO – Updated Revised Best and Final Offer
VES – Veolia Environmental Services
WDA – Waste Disposal Authority
WFD – Waste Framework Directive
WLP – Nottinghamshire and Nottingham Waste Local Plan 2002
WPA – Waste Planning Authority

WRG – Waste Recycling Group
WS2007 – Waste Strategy for England 2007
XX – cross examination

File Ref: APP/L3055/V/09/2102006

Land at the former Rufford Colliery, Rainworth, Nottinghamshire NG21 0ET

The application was called in for decision by the Secretary of State by a direction, made under section 77 of the Town and Country Planning Act 1990, on 18 March 2009.

The application is made by Veolia ES Nottinghamshire Ltd to Nottingham County Council.

The application Ref 3/07/01793/CMW is dated 29 November 2007.

The development proposed is the construction and operation of a waste combustion/Energy Recovery Facility together with ancillary infrastructure, including a waste bulking/transfer station, administration/visitor centre, landscaping and creation of new internal haul road.

The reason given for making the direction was that the proposal may conflict with national policies on important matters.

On the information available at the time of making the direction, the following were the matters on which the Secretary of State particularly wished to be informed for the purpose of her consideration of the application:

Whether the proposed development accords with the development plan for the area, in this instance the East Midlands Regional Plan [Regional Spatial Strategy] March 2009, the saved policies of the Nottinghamshire and Nottingham Joint Structure Plan (JSP) (2006), the saved policies of the adopted Nottinghamshire Waste Local Plan (2002) and the saved policies of the adopted Newark and Sherwood Local Plan (NSLP 1999); in particular, the Secretary of State is interested in the degree of accordance or conflict with policies on provision of waste management facilities and on development in the countryside;

Whether the appraisal of alternative sites is robust;

The extent to which the proposed development is consistent with Government policies in PPS10: *Planning for sustainable Waste Management*, including the need for the proposal given that preparation of new waste development plan documents (DPDs) is at an early stage;

Whether the application would deliver a sustainable form of development, as outlined in PPS1: *Delivering Sustainable Development*, with particular regard to policy in the *Planning and Climate Change Supplement* to PPS1 on renewable and low-carbon energy generation, and on the approach to determining planning applications before DPDs have been prepared to reflect the Supplement;

The extent to which the proposed development is consistent with Government policies in PPS7: *Sustainable Development in Rural Areas*, including the principles at paragraph 1 (iv), (v) and (vi);

The form of any conditions that should be attached to any permission; and

Any other matters that the Inspector considers relevant.

The inquiry sat for 22 days on 6 and 8 October 2009, 13-16 and 20 April 2010, 28-30 September 2010, 1 October 2010, 5-8 October 2010, 12-15 October 2010, 19-20 and 26 October 2010.

Summary of Recommendation: that planning permission be refused

Procedural Matters

1. At the Inquiry an application for costs was made by PAIN against Veolia. This application is the subject of a separate Report.

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2. A (PIM) pre-inquiry meeting was held on 7 June 2009¹. At that meeting I explained that the inquiry would proceed on the basis that it would be for the recently issued (2 June 2009) environmental permit to regulate the incineration process and emissions from that process. The decision on whether to grant planning permission would hinge on whether the proposed development would be an acceptable use of the land, given the impact of that use.
3. I indicated my preliminary view of the main considerations on which the SoS is likely to base his decision as:
- The visual and landscape impact of the proposed development;
- The impact of the development on nature conservation interests and the scope for measures to mitigate or compensate for that impact;
- Whether the development would represent a sustainable form of waste management that would in no way prejudice movement up the waste hierarchy and, if not, whether the need for the development would outweigh any harm that it might cause; and
- Whether it has been robustly demonstrated that there is no reasonably available alternative technology or location for the recovery of energy from the waste that would be more efficient and/or less harmful than the proposed scheme.
4. In addressing those considerations, I said that I would want to hear evidence on the following matters:
- a) The need for an energy from waste facility of this capacity, given the importance of treating waste as close to its source as possible and bearing in mind the Secretary of State's recent (12 February 2009) decision to grant planning permission to Waste Recycling Group Ltd for an additional 100,000 tonne capacity at the Eastcroft combined heat and power plant in Nottingham. In this respect, I indicated that I would want to understand what opportunity exists to make greater use of the Eastcroft facility, given the Council's PFI contract with Veolia, and how this might affect the arrangements for managing residual waste that are set out in Table 3 of the officer's report to the 9 January 2009 meeting of the (NCC) Planning and Liaison Committee;
- b) Whether operation of the proposed facility would effectively discourage the reduction, re-use, recycling and composting of waste, or whether measures would be put in place to ensure that only residual waste would be burnt;
- c) Whether the proposed plant would be considered a recovery operation when judged against the formula set out in Annex II to the revised Waste Framework Directive. In particular, I indicated that I would want to understand why the Environment Agency believe that the plant could "potentially" be classified as a recovery facility and what factors this would depend on;

¹ CD63

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- d) How throughput rates would affect the efficiency and power output of the proposed facility;
- e) Whether this infrastructure provision would secure the highest viable resource and energy efficiency and reduction in emissions;
- f) The availability of sites where a combined heat and power plant might be provided;
- g) What weight the Secretary of State should give to the fact that this energy from waste plant would rely on incineration, rather than anaerobic digestion, gasification or pyrolysis;
- h) The scope of impacts that are to be controlled through the environmental permit;
- i) Whether there are good reasons for making a decision on the location of a strategic facility such as this in advance of consideration being given to it as part of the Waste Development Framework;
- j) Progress on the allocation of land at Rufford Colliery in the Newark and Sherwood Local Development Framework and the suggestion that, if this energy recovery facility were to be provided, the development brief for the wider Rufford Colliery site should include a requirement for future occupiers to use heat from the facility; and
- k) Why it is considered appropriate to consider these proposals now, rather than as part of the wider redevelopment scheme which is currently being developed by owners of the pit head site.
5. The inquiry opened on 6 October 2009 but, following the receipt both of legal submissions by NWT² and of the views of NE³, the inquiry was adjourned on 8 October 2009. This was so that Veolia could gather further evidence in relation to nature conservation interests, that might be affected by the proposed development, given the potential for this part of Sherwood Forest to be designated as a Special Protection Area (SPA). The purpose of that adjournment was to allow Veolia time to carry out a shadow appropriate assessment along the lines set out in Regulation 48 of The Conservation (Natural Habitats, &c.) Regulations 1994, and to consult with NE over the findings.
6. During the adjournment, Veolia provided a copy of their assessment⁴ as a supplement to the Environmental Statement⁵. Appended to this was a technical note which outlined a rationale for the way forward in response to the suggestion that the Sherwood Forest Region “should be” an SPA. The RSPB also submitted information on a possible SPA⁶ and NE provided a revised response⁷ to the Inspector’s (6 October) request for information.

² WT2

³ NE1, NE2

⁴ CD83

⁵ CD1

⁶ CD90

⁷ NE3

7. A further PIM was held on 16 February 2010⁸ to review arrangements for the resumed inquiry, in the light of the new information.
8. The inquiry resumed on 13 April 2010, but was adjourned again on 20 April, at the request of Veolia. That request, which was broadly supported by NWT and NCC⁹, followed the receipt of new evidence from NE¹⁰ which stated that *"Natural England would now advise the Competent Authority on the matter that the ERF development, in combination with other plans and projects, would be likely to have a significant effect on the qualifying interest features of breeding nightjar and woodlark by reason which the Sherwood Forest site may be considered to be a pSPA, and we would advise that an Appropriate Assessment of the implications for the site should be undertaken by that Competent Authority to ascertain whether there would be an adverse effect on the integrity of the Sherwood Forest site."*
9. The reason for requesting the adjournment was confirmed in writing¹¹. PAIN objected to the adjournment¹² and, on 28 April 2010, NE clarified their position¹³.
10. On 17 May 2010, Veolia confirmed their wish for the inquiry to remain adjourned until 28 September 2010 so that they could gather the detailed evidence needed to inform an (I-CA) assessment of the impact of the ERF (on the suggested SPA) in combination with other plans and projects¹⁴.
11. On 27 May, having found that Veolia were unable to agree (with NE and NWT) the list of projects and the methodologies to be used in the I-CA, the Inspector arranged a further PIM to be held on 7 June 2010. One purpose of the PIM was to consider the steps that needed to be taken so that the inquiry could close, before the end of October 2010, with sufficient evidence to enable the SoS to determine the application properly and lawfully. Another, was to consider the arrangements that would allow PAIN to submit further evidence to the inquiry if the Courts were to confirm that further details of the PFI contract should be released.
12. At the (7 June 2010) PIM¹⁵, Veolia accepted responsibility for producing all the information that the SoS would need to carry out an appropriate assessment. They agreed a timetable for production of their I-CA report and of a statement of common ground (SOCG) with NE and NWT which would indicate levels of agreement reached at each stage of the I-CA. Arrangements were also made to allow parties time to agree a SOCG¹⁶ on the implications of the government's announced intention to revoke regional strategies.
13. The inquiry resumed on 28 September. Members of the public presented evidence at an evening session held on 6 October. I closed the proceedings on 26 October 2010.

⁸ CD92

⁹ CC19

¹⁰ NE5.1 para 2.7

¹¹ VE59a

¹² PA80a

¹³ NE13

¹⁴ VE59b

¹⁵ CD117

¹⁶ SOCG11

14. I made an accompanied visit to the site and its surroundings on 6 October 2009 and to other locations in the area on 14 April 2010. I also made unaccompanied visits to identified vantage points and to various locations that had been referred to in SPA related evidence, including the Sherwood Pines Forest Park (SPFP), the Eakring Road and the Golf Course Plantation (GCP). On 2 November, after the inquiry had closed, I made an accompanied visit to Veolia's ERF in Basingstoke.
15. During the inquiry Veolia gave evidence on behalf of the Nottinghamshire County Council Waste Disposal Authority (WDA), but Mr Allen of the WDA answered questions put by me.
16. After the close of the inquiry, I received two completed planning obligations dated 6 January 2011. One of these unilateral undertakings¹⁷ makes provision for landscaping works at Sherwood House and for habitat restoration, monitoring and management works at the Rainworth Heath SSSI and the Spring Hill SINC. The other¹⁸ provides habitat offsetting and enhancement land at the Golf Course Plantation, together with measures designed to control public access into that land; it also makes provision for restoration of the application site to heathland, after the proposed development has ceased operating.
17. On 19 November 2010, the Planning Inspectorate wrote to the main parties, including all Rule 6 parties, inviting comments on the implications of the 10 November 2010 judgment in the case of *Cala Homes (South) Ltd v Secretary of State for Communities and Local Government*.¹⁹ Copies of the responses and subsequent comments on those responses are listed as inquiry documents.²⁰ In the light of those comments, I saw no need to extend that consultation process further.²¹
18. I have attached and listed all documents and plans submitted to the inquiry, including proofs of evidence. These proofs are as originally submitted, other than where annotations have been made to correct errors in the original drafting; however, they do not take account of how the evidence has been affected by cross-examination or by changes in circumstances that have occurred since the proofs were written. Changes in the way that information was provided, during the course of the inquiry, have resulted in there being no documents numbered CD64-69, VE13-16, CC2-3, WT8, WT14 or WT25.

The Site and Surroundings

19. The application site lies within land at the former Rufford Colliery, Rufford Colliery Lane, Rainworth. The colliery ceased production in 1993 and most of the infrastructure was removed in 1994/5.²² The former colliery extends across an area Veolia calculate at 68 hectares and is owned by UK Coal. Parts of the former colliery, including the former colliery tips, have been restored or are in the process of restoration. The site lies to the west of

¹⁷ VE62

¹⁸ VE63

¹⁹ CD118

²⁰ VE60- 61, CC24-25, DC29, WT37-38, PA81-82

²¹ CD119

²² CD1 Planning Statement 3.16

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- Colliery Lane and to the south of the colliery weighbridge and office areas. The site itself has not been restored and retains visible signs of the former mining activities. A lighting gantry is situated approximately 200 metres to the north of the site and is almost 50 metres²³ in height. The total site area is 5.4 ha, but the main development site is roughly rectangular in shape and has an area of approximately 4 ha.
20. The site is not previously developed land, under terms identified in PPS3, because provision has been made for its restoration. It is in the open countryside, for planning purposes, and is not allocated for waste management development.
 21. Access to the site is gained via a private internal access road which connects with Colliery Road to the south. Colliery Road is accessed via the A617 Rainworth Bypass. These access arrangements have been assessed as suitable for the proposed development by the highway authority.
 22. The nearest settlement is the town of Rainworth, which is located about a kilometre to the south of the site. Mansfield town centre is approximately 5.5 kilometres to the west. The closest residential properties are a pair of semi-detached houses and Sherwood House (a private specialist rehabilitation hospital) located on Colliery Road, approximately 550 metres to the south of the site. Woodland Caravan Park is located approximately 800 metres to the south west.
 23. The site has no rights of way running through it and is not subject to any statutory nature conservation designations. Approximately 150m to the south, there is the Rainworth Heath SSSI which is connected to the application site by an area of scrub and a strip of birch woodland that is designated as a site of interest for nature conservation (SINC). Rainworth Water, a local nature reserve, is some 250m to the south east. The site is located within the Sherwood Special Landscape Area (SLA) and the Green Wood Community Forest Area. The Rainworth Heath and Water Mature Landscape Area is located immediately to the south west of the site. The Birklands and Bilhaugh Special Area of conservation (SAC) lies approximately 8 km to the north.
 24. The site directly overlies the Permian Sherwood Sandstone Pebble Bed formation which is designated as a major aquifer with soils of high leaching potential. The Sherwood Sandstone in the East Midlands is heavily abstracted and the site is within a combined total catchment zone (Zone III) for Rainworth public water supply, approximately 1120m to the southwest.²⁴
 25. To the north of the site, land is used unlawfully for motocross activities at a location known locally as "the Desert".

Relevant Planning History of the Site

26. Unconditional Planning Permission (Reference: W/SL/389) was granted in 1958 for [the stocking and blending of coal]. This permission related to areas of the colliery to the north east of the site. In 1976 Planning Permission with reference 3/77/91/0766, was granted for [stocking and

²³ VE4.9 para 4.7

²⁴ SOCG3 p7

-
- blending of coal] in relation to the Spring Hills stocking area, within which the site is located. The permission expired on 1 September 2006.
27. In 1996 Planning Permission (Reference: 3/95/1289) was granted for the continuation of coal stocking, blending and distribution activities on land which includes the site. That Planning Permission contains conditions which require operations to cease by 2011 and for the site to be restored to woodland and heathland in accordance with a scheme to be submitted and agreed.
 28. The restoration scheme is to be submitted within 6 months of the expiration of the permission or the cessation of the use of any part of the site, whichever is sooner, and the approved restoration scheme is to be implemented within one year from its approval. On the grant of the 1996 permission (Reference: 3/95/1289²⁵) a discontinuance order was made in respect of the 1958 permission (Reference: W/SL/389).
 29. At the start of the inquiry, there had been no planning applications submitted for the redevelopment of the remainder of the former pit head or other former colliery land. On 13 June 2007, UK Coal Plc's agents (RPS) wrote to Newark and Sherwood District Council with a concept master plan²⁶ and accompanying statement. In their letter, they stated that "ultimately, we wish to promote the site within the appropriate and forthcoming Local Development Framework DPDs and ask that we are kept on the notification lists for these documents." The master plan set out a framework for future employment, recreational and educational opportunities for the future of a landholding of some 225 ha centred upon the former pit head area. The master plan is referred to within the Environmental Statement and the Planning Supporting Statement that accompanied the ERF planning application.
 30. In September 2008, Haworth Estates (the property division of UK Coal Plc) wrote to Newark and Sherwood District Council to request a scoping opinion (ref: 08/SCO/00002) on the information that should be supplied in an Environmental Statement setting out the findings of an Environmental Impact Assessment of their proposals for a (BP) business park (Class B1, B2 and B8 use) with a recreational motor vehicle venue. NSDC's formal opinion was made on 30 October 2008.
 31. On 16 February 2010, Haworth Estates confirmed that they wished to delete the motorcross facility from their proposals. On 31 March 2010 they submitted an outline planning application, with all matters reserved, for a BP redevelopment of 26.39ha of former Rufford Colliery land, immediately to the north of the proposed ERF²⁷. Access to the BP would be from the A617 Rainworth By-Pass, along Colliery Road.
 32. The BP application indicated that *"should the ERF make energy (in the form of heat and/or power) available to the future occupiers of the Business Park, provided that the energy was commercially beneficial and viable taking account of the infrastructure required to supply the site, the future occupiers*

²⁵ DC3

²⁶ DC5

²⁷ CD95

of the Business Park would have the opportunity to take a proportion or all of their energy supply from the ERF. This would be determined by market demand."

Planning Policy and Strategy

33. The development plan for the area includes the (RSS) (2009) East Midlands Regional Plan (EMRP)²⁸, as well as the (2002) Nottinghamshire and Nottingham Waste Local Plan (WLP)²⁹ and the (1999) Newark and Sherwood Local Plan (NSLP)³⁰. Relevant policies are listed in statements of common ground³¹.
34. The Rufford site is not allocated for development, but NSLP Policy E17 indicates that employment development will be permitted on the pit head areas of disused collieries provided, amongst other things, that this would not intrude into the openness of the countryside. The reasoned justification for this Policy refers to the severe impact that closure of the mines has had on settlements that were tied to the industry. It points out that loss of a pit results in significant job losses, but also leaves a scar on the landscape which acts as a constant reminder to the community of what it has lost. The Policy aims to provide new job opportunities and achieve restoration of the derelict land.
35. The site is in the Northern Sub-area of the East Midlands Region where, under the terms of EMRP Policy Northern SRS3, local planning authorities should consider allocating land for employment uses along the Mansfield Ashfield Regeneration Route (MARR). This regional plan notes that Sherwood Forest is being considered for designation as a Special Protection Area, because of the numbers of nightjar and woodlark found here.³² Policy Northern SRS5 encourages the creation of a Sherwood Forest Regional Park which would generate significant local and national benefits by protecting and enhancing the distinctive assets of the area and by developing its potential for recreation and tourism.
36. The EMRP assumes that growth, in all forms of controlled waste, will be zero by 2016; and, EMRP Policy 38 indicates that at least 50% of each waste disposal authority's municipal solid waste (MSW) should be recycled or composted by then. Subject to further research and analysis as part of the annual monitoring process, the waste management capacity that is needed should be based on the 2006 Regional Waste Strategy data, appended to the EMRP, which themselves date from 2003³³. The necessary infrastructure, in the Northern Sub-area, is to be provided by larger facilities on previously used land (including former colliery land) and by the expansion of existing facilities. The Policy also notes that the facilities should be sited to avoid the pollution or disturbance of designated nature conservation sites of international importance.

²⁸ CD7

²⁹ CD10

³⁰ CD13

³¹ SOCG1 and SOCG2

³² CD7 4.3.50

³³ CD7 3.3.58

37. As it stands, the EMRP expects the Nottingham and Nottinghamshire waste planning authorities together to make provision for the treatment and disposal of 710,000 tonnes of MSW in 2010, rising to 772,000 tonnes in 2015 through to 2020. Diversion from landfill, to treatment in facilities such as energy from waste incinerators or anaerobic digesters, is expected to increase from 128,000 tonnes (in 2010) to 162,000 tonnes (2015) and 214,000 tonnes (2020). Commercial and industrial (C&I) waste arisings are anticipated to fall from 1,261,000 tonnes in 2010 to 1,221,000 tonnes in 2020; recycling or composting is expected to account for 42% of this (C&I) waste, with the remainder going to landfill.
38. The Nottinghamshire and Nottingham Waste Development Framework is being prepared by the county and city councils. The Waste Core Strategy is expected to provide guidance on the broad locations where future development could take place. There have been consultations on issues and options³⁴, but the Waste Core Strategy is unlikely to be adopted before December 2012³⁵. As a result, Veolia, NCC and NSDC agree that it should carry very little weight in the determination of this application.
39. In July 2010, NSDC revised their timetable for preparation of a core strategy (CS) and, in doing so, anticipated that the publication CS would be tested for soundness at a hearing starting in November 2010³⁶. Veolia, NCC and NSDC agree that the publication CS³⁷ should attract only limited weight in the determination of this application. However, there is disagreement over the weight that should be attached to evidence contained in the (2008) employment land review, and its (2010) update, bearing in mind that these have yet to be tested by an Inspector at examination³⁸.

The Proposals

40. Key features of the development proposals include³⁹ an Energy Recovery Facility (ERF) designed to handle up to 180,000tpa of residual MSW; a 10,000tpa waste and recyclables transfer station/bulking facility; ancillary development including an administrative and education building; and, creation of a new internal haul road.
41. Waste that could be burned at the ERF would be limited to the types specified in Schedule 3 of the environmental permit. The facility would have two lines, each capable of handling 12 tonnes of waste per hour at 9200kJ kg⁻¹. The 180,000tpa overall throughput represents 85% of the theoretical maximum capacity, allowing for downtime and annual maintenance works. Otherwise, the ERF would be expected to operate for 24 hours a day, 7 days per week. Heat released from the combustion process would be recovered and used to generate about 15MW of electricity, of which some 13MW would be exported to the national grid via an underground cable; the remaining 2MW would be used to power the facility.

³⁴ CD17 and CD17a

³⁵ SOCG11 para 2.1.2.1

³⁶ SOCG11 para 2.1.3.1

³⁷ CD14a

³⁸ SOCG11 para 3.1.3

³⁹ SOCG1 and SOCG2

42. Approximately 25% of the input tonnage would be left as incinerator bottom ash (IBA). This would be transported off-site, but there is disagreement over whether processing would render it suitable for use in the construction industry⁴⁰. Some 7,200-8,400 tpa of flue gas treatment residues, all of which would be hazardous waste, would be transferred off-site for management elsewhere⁴¹.
43. There is an agreed list⁴² of plans and drawings which form part of the proposals. The main ERF building would be constructed from steel clad with non-reflective aluminium and translucent polycarbonate panels. The curved central part of this building would rise from a height of 24.7m to a maximum of 39.5m. Two 75m high chimneys, of about 1.36m diameter, would protrude. Surrounding this central part would be a skirt roof rising to 16.25m, below which vehicles would circulate and the tipping hall and residue output areas would be accommodated. The maximum length and width of the skirt would be some 133m and 98m.
44. Linked to the main building, by two elevated footways, would be a 11.95m high three-storey flat roofed administration and education building with a footprint of about 22m x 22m.

Environmental Statement

45. The application⁴³ is supported by an Environmental Statement⁴⁴ (ES), which includes a flood risk assessment⁴⁵, and two responses⁴⁶ to Regulation 19⁴⁷ requests for further information. Responses to consultation on these documents are provided⁴⁸ and summarised separately⁴⁹.
46. The ES also includes a supplement⁵⁰ which considers the impact of the ERF on populations of Woodlark and Nightjar. This was produced before Veolia produced (I-CA) information⁵¹ concerning the effects, on those populations, of the ERF in combination with other plans and projects. It also pre-dated the applicant's decision to provide land at the Golf Course Plantation to offset the effects. Details of the offsetting arrangements are provided in a planning obligation.⁵²

PFI contract

47. In June 2006, Nottinghamshire County Council signed a 26 year PFI waste management contract with Veolia. This provides a public-private partnership which enables the County Council to gain access to new or improved capital assets. Veolia are making a capital investment of £140m over the term of the contract in the phased development of new recycling, composting,

⁴⁰ SOCG3 and SOCG4

⁴¹ SOCG3 p4

⁴² SOCG1 para 2.4

⁴³ CD1

⁴⁴ CD1

⁴⁵ CD1 ES Appx 10.2

⁴⁶ CD2 and CD3

⁴⁷ Regulation 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999

⁴⁸ CD5 and CD6

⁴⁹ CD4 sections 4-6

⁵⁰ CD83

⁵¹ VE22

⁵² VE63

treatment and delivery facilities, as well as plant and equipment, to deliver the requirements of the PFI Contract.

48. The waste contract proposed the construction/improvement of a range of new facilities aimed at delivering an integrated solution to municipal waste management within Nottinghamshire and moving waste management to a higher point within the waste hierarchy. The new facilities include:

The construction of an energy recovery facility capable of incinerating 180,000 tonnes per annum of residual municipal solid waste, which cannot be recycled or composted economically, with the recovery of energy in the form of electricity from the process;

The provision of a materials recovery facility in Mansfield which would handle and sort around 85,000 tpa of recyclable waste such as paper, plastic and cans collected by District and Borough Councils;

The development of a new composting facility in Central Nottinghamshire and the use of other existing composting sites to handle a total of 100,000 tonnes of green waste per annum;

The development of a new Household Waste Recycling Centre (HWRC) to serve Worksop and upgrade/continued operation of the Council's network of existing HWRCs;

The development of a network of new transfer stations to receive and handle waste and recyclables from District and Borough Council collections, to serve Newark and Worksop, and the use of existing sites at Giltbrook and South Nottingham; and

The use of properly planned, constructed and licensed landfill sites to take waste which cannot be converted to energy, recycled or composted.

Other Agreed Facts

Waste arisings and management data

49. A statement of common ground⁵³ sets out details of the reduction in municipal solid waste (MSW) arisings and of the treatment of this waste stream in Nottinghamshire, Nottingham and the East Midlands region for years up to and including 2008/9. It also shows the national reduction in household waste arisings, and increase in domestic recycling, for the period 2000/01 to 2008/09.

Woodlark: habitat requirements and breeding territory

50. Habitat use of heathland by Woodlark is specifically focused upon pioneer and building heath, mature heath with gaps, bare or burnt areas. The species is very adaptable and opportunistic, readily moving from one area to another as suitability changes. The key quantitative descriptors of the features within heathland are a mosaic of well-drained bare ground patches <0.5ha within a mosaic of short (<50mm) to medium (100- 200mm)

⁵³ SOCG8

vegetation for feeding. Tussocks of vegetation or a sparse cover of bushes and trees with disturbed ground provide for nest sites.

51. In the last 25 years, it has become widely recognised that Woodlark also utilise forestry plantations, nesting on clear fell sites and in young plantations until the trees are around 6-7 years old⁵⁴.
52. In the winter, Woodlark aggregate into small flocks and rove around a range of habitats including arable fields. It can therefore be difficult to establish what area acts as a single ecological unit.

Nightjar: breeding habitat and behaviour

53. Nightjars breed principally on lowland heathland and within young conifer plantations where suitable habitat is generated as a consequence of the rotational clear-felling of the trees. Ideally this should support 10-20% bare ground patches of >2m² for nesting. The woodland-heathland interface and adjacent areas rich in flying insects are important for foraging.

Legal Principles in relation to Annex 1 Birds (Woodlark and Nightjar) and the Proposed ERF Development – as agreed by Veolia, NE and NWT

54. Relevant European legislation includes the Habitats Directive⁵⁵ and the Birds Directive⁵⁶.
55. Relevant domestic legislation includes the Conservation of Habitats and Species Regulations 2010.
56. Guidance on the application of the relevant legislation is found in:
- (1) PPS 9 (2005) Biodiversity and Geological Conservation;
 - (2) ODPM Circular 06/2005 (Defra Circular 01/2005) on Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System; and
 - (3) The (2010) consultation draft of a proposed revision of the 2005 Circular.

THE FACTUAL POSITION

57. No part of the application site is the subject of any nature conservation designation.
58. Woodlark and Nightjar are known to breed and feed in the Sherwood Forest area. Woodlark and Nightjar are Annex 1 species under the Birds Directive.
59. NWT contends that the site is a “should be” SPA and if not then a pSPA. Neither of these contentions is accepted by Veolia. NE does not accept that the site is a “should be” SPA, and is of the view that it would not be considered to be a pSPA in accordance with NE’s understanding of current

⁵⁴ SOCG9 para 2.1.4.2

⁵⁵ EC Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (Directive 92/43/EEC)

⁵⁶ EC Directive on the Conservation of Wild Birds (Directive 2009/147/EC)

practice relating to the recognition of sites as such. NE does however accept that there may be other ways in which a site may be accepted as a pSPA.

60. It is however agreed (between Veolia, NE and NWT) that these are contentions which the SoS will have to consider in determining Veolia's application.

61. The law, so far as agreed, is set out by reference to the questions posed in paragraph 4 of Document WT-2, which in turn underlie NWT's submissions in that document. Accordingly, the following main headings are used:

Law relevant to the "should be" SPA issue;

Law and policy relevant to the potential SPA issue; and

Law relevant to the second sentence of Article 4.4 of the Birds Directive

LAW RELEVANT TO THE "SHOULD BE" SPA ISSUE

62. Article 3 of the Habitats Directive provides:

1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

63. Under Article 4.1 of the Birds Directive the species mentioned in Annex 1 shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. Article 4.1 also provides that:

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.

64. When the UK Government classifies a site as an SPA, it is acting pursuant to its duty under Article 4(1) of the Birds Directive itself, and not by virtue of any domestic legislation.

65. The Habitats Directive introduced a new regime of protection. This new regime was extended by Article 7 to classified SPAs as detailed below.

66. The following principles can be derived from the European cases with respect to the approach to classification of an SPA:-

(1) In deciding what sites, within what boundaries, to classify, Member States should have regard only to ornithological criteria: see *Santoña Marshes*⁵⁷ at paragraphs 26 and 27 and *ECJ Case C-44/95 R v The*

⁵⁷ WT2 Ref 2

Secretary of State for the Environment ex parte RSPB [1997] Env L R 442 ("Lappel Bank"⁵⁸) at paragraphs 26 and 39-42 of the judgment.

(2) Classification under Article 4(1) and (2) of the Birds Directive is an obligation for Member States. This was established in *Santoña Marshes* paragraphs 24 to 32, and applied in *ECJ Case C-3/96 Commission v Netherlands 19/5/98*⁵⁹ at paragraphs 61 and 62.

(3) Under article 4 of the Birds Directive the obligation is to classify all the sites which, in accordance with the ornithological criteria, appear to be the most suitable for the conservation of the species in question: see *Commission v Netherlands*⁶⁰ paragraph 62 and *ECJ Case C-418/04 Commission v Ireland*⁶¹ paragraphs 37 and 53.

(4) *Santoña Marshes* also established that the protective regime under Article 4(4) of the Birds Directive applies to areas that have not been classified as SPAs, but should have been so classified. This conclusion was concisely expressed in paragraphs 20 to 22 of the judgment, and has been consistently applied by the ECJ.

(5) This last principle applies both in the case of a failure to classify altogether (as for example in *Santoña Marshes*), and a failure to classify a sufficient area (as for example in *ECJ Case C-96/98 Commission v France 25/11/99 ("the Marais Poitevin"*⁶²).

(6) A Member State cannot excuse failure to classify, in due time, a site which should have been classified, by reference to its own internal rules or procedures. See for instance *ECJ Case C-235/04 Commission v Spain*⁶³ paragraph 55:

Although the Spanish Government submits that there were internal difficulties in the classification of certain SPAs, it must be recalled that, according to the Court's settled case-law, a Member State cannot plead provisions, practices or situations prevailing in the domestic legal order to justify failure to observe obligations and time-limits laid down by a directive

The context within which these principles were established can be seen by reference to the decisions cited, and their application in any particular case, including Veolia's current application, will depend on the facts and circumstances of that case.

67. European and UK legislation does not provide any specific criteria for the selection of an area as a SPA. In the UK, an administrative procedure is in place to identify SPA sites for selection. This involves a 2 stage process⁶⁴:

The selection of SPAs in the UK involves two stages and the selection guidelines for SPAs are available on the Joint Nature Conservation

⁵⁸ WT2 Ref 3

⁵⁹ WT2 Ref 4

⁶⁰ WT2 Ref 4

⁶¹ WT2 Ref 5

⁶² WT2 Ref 6

⁶³ WT2 Ref 7

⁶⁴ NE3 p2

Committee (JNCC)'s website (www.jncc.gov.uk/page-2643). The first stage of this process is intended to identify those areas most likely to qualify for SPA status, including those areas used regularly by 1% or more of the Great Britain (or in Northern Ireland, the all-Ireland) population of a species listed in Annex I of the Birds Directive (79/409/EEC as amended) in any season (criterion 1.1). Stage 2 of the selection process then considers and evaluates these areas further using an additional seven criteria, such as species geographic range, population density, number of qualifying species and site naturalness, to select the most suitable areas in number and size for SPA classification.

In the light of the principle stated at (6) above, in relation to European law, NWT does not accept that this administrative procedure is directly applicable in determining whether a Sherwood site should already have been classified as an SPA, nor that it is fully consistent with the obligation to classify, as stated at (3) above.

68. In relation to this “Law relevant to the “should be” SPA issue”, NE also agree those parts of NWT’s legal submissions that are set out in the paragraphs numbered 645-652, 656-661, 672-673 and 675-676.

LAW AND POLICY RELEVANT TO THE POTENTIAL SPA ISSUE

69. PPS9 (2005) states, at paragraph 6, that:

..... The Habitats Regulations do not provide statutory protection for potential Special Protection Areas (pSPAs) For the purposes of considering development proposals affecting them, as a matter of policy, the Government wishes pSPAs to be considered in the same way as if they had already been classified

70. This policy is reflected in the 2005 Circular, paragraph 5, which states:

As a matter of policy, the Government has chosen to apply the procedures described below, unless otherwise specified, in respect of Ramsar sites and potential SPAs (pSPAs), even though these are not European sites as a matter of law. This will assist the UK Government in fully meeting its obligations under the Birds Directive and Ramsar Convention.

71. The decision whether to treat the Sherwood site as a pSPA is a matter for the SoS to consider in this case, in accordance with the application of the policy expressed in PPS9 and the 2005 Circular.
72. Some guidance can be derived from *Humber Sea Terminals*⁶⁵. The SoS for Transport made a Harbour Revision Order on the basis concisely recorded in paragraph H3 of the headnote to the case report. That involved the Minister in recognising an area of mudflats as being within a potential SPA, and applying the regime under Article 6 of the Birds Directive both to the pSPA (22 hectares of which would be lost) and to a nearby classified SPA, which would suffer an adverse impact.
73. The factual position on the classifications, and the Minister’s approach to it, is explained in paragraphs 14 to 18 of the judgment. The Humber Flats,

⁶⁵ WT2 Ref 10

- Marshes and Coast Phase 1 SPA had been classified in July 1994, but consultations on a proposed Phase 2, commenced in 1994, had seen changes in the contemplated area, notification of a SSSI which was withdrawn, and in January 2004 the submission of a brief to DEFRA for various extensions to the SPA, including an area within which the new harbour works were proposed. The extension then proposed, taken as a whole, qualified in respect of Annex 1 species and Annex 2 migratory birds.
74. The application for a Harbour Revision Order had been made in September 2001 (judgment paragraph 1) and the Minister authorised the making of the Order on 7th July 2004 (judgment paragraph 5).
75. The Minister approached that decision on the basis that the extended area under consideration for SPA status was a potential SPA, even though consultation procedures were incomplete, and, when the Order was authorised, the area of the pSPA was not within a confirmed SSSI.
76. However, should the SoS decide that the Sherwood Forest area is a potential SPA, it is agreed that the SoS's policy would be to apply the same approach as for a classified SPA, as summarised below.
77. The Habitats Directive introduced a new regime of protection:
- (1) Article 2 provides that:
- 1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.*
- 2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.*
- 3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.*
- (2) The new regime was extended by Article 7 to classified SPAs:
- Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.*
- (3) Article 6 provides:
- 1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.*

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

(4) Article 6(4) incorporates derogatory provisions in the Habitats Directive by providing:

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

It is agreed that there are no such priority habitat types or priority species in this case.

78. This regime of protection was transposed into domestic law by the Habitats Regulations, now consolidated by the Conservation Regulations. Regulations 61, 62 and 66 of the Conservation Regulations correspond to regs 48, 49 and 53 of the Habitats Regulations, and indicate a sequence of steps to be taken by the competent authority (here the SoS), in respect of a European site before deciding to authorise a project, namely:

Step 1 Under reg 61(1)(b), consider whether the project is directly connected with or necessary to the management of the sites? If not –

Step 2 Under reg 61(1)(a) consider whether the project is likely to have a significant effect on the site, either alone or in combination with other plans or projects (“the Significance Test”). If Yes –

Step 3 Under reg. 61(1), make an appropriate assessment of the implications for the site in view of its current conservation objectives. In so doing, it is mandatory under reg 61(3) to consult Natural England, and optional under reg 61(4) to take the opinion of the general public. Reg 61(2)

empowers the competent authority to require the applicant to provide information for the purposes of the appropriate assessment, or to enable the authority to determine whether such an assessment is required.

Step 4 Pursuant to reg 61(5) and (6), consider whether the project will adversely affect the integrity of the site, having regard to the manner in which it is proposed to be carried out, and any conditions or restrictions subject to which that authorisation might be given (“the Integrity Test”).

Step 5 In accordance with reg. 61(5), but subject to reg 62, reject the project unless, it is ascertained that the project will not adversely affect the integrity of the site.

Step 6 If the project fails the integrity test in respect of one or more sites, consider, in accordance with reg 62(1), whether one is satisfied that there is no alternative solution; if not so satisfied, reject the project; but if so satisfied, proceed to steps 7 and 8.

Step 7 Consider, in accordance with reg 62(1), but subject to Step 6, whether one is satisfied that the project must be carried out for imperative reasons of overriding public interest.

Step 8 Consider in accordance with reg 66 whether one can secure that compensatory measures are taken which would be necessary to secure that the overall coherence of Natura 2000 is protected.

These steps are set out in the form of a flowchart in Figure 1 of the 2005 Circular.

79. It is agreed that the proposed facility is unrelated to the management of a Sherwood pSPA.
80. The requirements of Arts 6(2) and (3) of the Habitats Directive were considered in detail by the ECJ in *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij C – 127/02* (“the Waddenzee case”⁶⁶) and paragraphs 31 to 70 of the judgment provide guidance about the interpretation and application of those articles, including the relationship between the Significance Test (in the first sentence of Art 6(3)) and the Integrity Test in the second sentence; covering Steps 2 to 5 above.
81. The issue of whether a project is likely to have a significant effect on an SAC (or SPA) is addressed in *Waddenzee* in paragraphs 39 to 45. The central reasoning is in paragraph 44, read together with paragraph 43. Paragraph 43 states that the requirement for appropriate assessment comes into play if there is a “probability or risk” that the project will have significant effects. Paragraph 44 goes on to explain what is meant by “risk” in this context. It refers to the precautionary principle enshrined in Article 174(2) EC, and states:-

such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site

⁶⁶ WT2 Ref 18

concerned. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in the case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised....

82. Article 6(3) as interpreted by the ECJ in *Waddenzee* requires appropriate assessment unless objective information positively establishes the absence of significant effect. In considering whether the project would be likely to have a significant effect on a European site the Competent Authority can take into account any mitigation proposals which are part of the project- see *R. (on the application of Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P. & C.R. 16, at paragraphs 54 to 76 of the judgment.

83. In *Waddenzee* the Court went on to consider what is meant by “significant effects” in paragraphs 46 to 49, and especially in paragraphs 47 and 48 of the judgment. These read:-

So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

“Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site.

84. If appropriate assessment is required applying the test established by *Waddenzee*, then the plan or project can only be permitted to proceed by the competent authority if that authority has the information necessary to meet the test in paragraphs 50 to 61 of the judgment. It refers to “having made sure that it will not affect the integrity of the site” (paragraph 55) and to the absence of reasonable scientific doubt as to the absence of such effects (paragraph 59). The passage is summarised in the following terms in paragraph 61:-

....The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. This is the case where no reasonable scientific doubt remains as to the absence of such effects.

85. The (potentially) two stage process is required to operate so as to:

ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site. (Waddenzee paragraph 34).

86. The purpose of protection is to safeguard a site from the possibility of any adverse effect on its integrity. Although the term “integrity” is not legally

defined, in either the Habitats Regulations or the Habitats Directive, the definition offered in paragraph 20 of the 2005 Circular, provides

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.

87. Accordingly, in the context of habitat protection, Article 1 of the Habitats Directive defines the favourable conservation status of a natural habitat as depending, amongst other criteria, on the favourable conservation status of its typical species. See in particular Article 1(e) and (i).
88. The Significance Test, and the Integrity Test, have to be applied both to the project in question alone, and also to that project in combination with other plans or projects. This requires the identification of other plans or projects which could adversely affect a relevant European site. Relevant “projects” include any which have actually been proposed, whether or not they have been already authorised.
89. In relation to this “Law and policy relevant to the potential SPA issue”, NE also agree those parts of NWT’s legal submissions that are set out in paragraphs numbered 703-704, 708-710 and 712-713.

LAW RELEVANT TO THE SECOND SENTENCE OF ARTICLE 4.4 OF THE BIRDS DIRECTIVE

90. NE agree those parts of NWT’s legal submissions that are set out in paragraphs numbered 719-720.

Conditions and Obligations

Conditions

91. A list of possible conditions was agreed between Veolia and NCC⁶⁷. Matters of substance, related to these controls, were discussed at a session held on the penultimate day of the inquiry. But it was agreed that I would consider the detailed wording against the advice in DoE Circular 11/95 on the Use of Conditions in Planning Permissions.

Obligations

92. Veolia, together with other parties, have entered into two unilateral undertakings.
93. One of these⁶⁸ makes provision for the translocation of common lizards and bee orchids from the application site to the Spring Hill SINC, which is land immediately to the south of the proposed ERF site. The undertaking also provides for habitat restoration and management works at the SINC and for monitoring the effectiveness of the translocation over a period of five years. In addition, it sets out arrangements for monitoring ecological conditions at the adjoining Rainworth Heath SSSI, over a period of 21 years, and for landscaping boundaries at Sherwood House.

⁶⁷ CD103c

⁶⁸ VE62

94. The other⁶⁹ is intended to deliver a habitat offsetting and enhancement plan (HOEP) which would provide an area of habitat suitable for breeding woodlark, together with deciduous woodland ecotone suitable for foraging nightjar and heathland habitat. Overall, this would amount to some 21.24ha of land and arrangements are made for its maintenance, during the lifetime of the ERF development, and for the monitoring of its woodlark and nightjar populations. Included within the provisions are a range of measures designed to control public access into this area. The undertaking also makes provision for the creation and maintenance of heathland habitat on the application site, after the ERF has ceased operation. An explanation of the undertaking's various mechanisms has been provided⁷⁰.

The Case for Veolia

Veolia agree with the case for the (NCC) Waste Planning Authority. The material points, additional to that case, are as follows.

95. The proposals are for a facility that is twin faceted. It would provide an important waste management facility. It would also provide enough electricity to power 15,000 houses, with the potential to provide CHP⁷¹.
96. Many of the concerns relied upon in relation to these proposals are in substance a direct challenge to existing Government policy. They are against incineration of waste in principle and that stance flies in the face of both the national and European approach. There is no basis for doing other than roundly rejecting such objections – this was the position of the Inspectors and Secretaries of State in the Eastcroft and Ince decisions⁷².
97. Any attempt by the objectors to profit from the hope that the Coalition Government might take a different approach to energy from waste facilities is snuffed out by the very recent Revised Draft of the Overarching NPS for Energy (EN-1) and for Renewable Infrastructure (EN-3)⁷³. Although drafts, these documents show the Government's current thinking on these matters. It is made clear within them that the NPSs are likely to be material to planning applications, as well as applications for development consent⁷⁴. The approach set out in those documents should be given significant weight as it is consistent with existing guidance in WSE 2007 and PPS10. Indeed in many ways the Revised Draft NPSs strengthen the role of energy from waste, which is clearly categorised and treated as renewable energy where it includes a biomass element⁷⁵. As is stated in paragraph 3.3.10 of EN-1 the Government is committed to dramatically increasing the amount of renewable generation and "...in the short to medium term, much of this new capacity is likely to be onshore and offshore wind, but increasingly it may include plant powered by the combustion of biomass and waste and the generation of electricity from wave and tidal power."⁷⁶ This is echoed in Revised Draft NPS EN-3⁷⁷.

⁶⁹ VE63

⁷⁰ VE38

⁷¹ Para. 1.2.23 on p. 1-8 of Chapter 1 of Volume 1 of the ES, CD1.

⁷² CD110A & B and CD61.

⁷³ CDs 85A & B published on 18 October 2010.

⁷⁴ Para. 1.2.1 of Revised Draft EN-1, CD85A, and para. 1.2.3 of Revised Draft EN-3, CD86A.

⁷⁵ See e.g. para. 3.4.3 on p.26 of Draft EN-3.

⁷⁶ CD85A.

⁷⁷ CD86A at para. 2.5.2.

THE PFI CONTRACT AND NATURE OF THE PROPOSALS

The Contract

98. The proposed ERF forms part of an integrated waste management service to be provided by Veolia to NCC under the terms of the Waste Management Project Agreement contracts A and B dated 26 June 2006.⁷⁸
99. There is nothing sinister or secret about that Agreement. Before it was agreed, the thorough public processes required by the EU Procurement rules were followed beginning with the notice of the proposed contract being advertised in 2002.⁷⁹ Inquiry documents include Veolia's⁸⁰ invitation to the County Council to negotiate ("ITN") in January 2004⁸¹, their best and final offer in January 2005,⁸² their revised best and final offer in May 2005⁸³ and their updated best and final offer in February 2006.⁸⁴
100. The Audit Commission investigated the PFI contract and concluded that there was "no reason to challenge the Council's approach in terms of partnership working"⁸⁵. Under the heading "Waste arising data and incentives to reduce waste" the Commission reported that the levels of waste projected by the contractor over the course of the contract were less than those forecast in the Regional Waste Strategy and could therefore be argued to be conservative estimates.⁸⁶ But they went on to recognise that "the audited figures over the last two years show that the amount of MSW produced was 7% less than expected at the time the contract was entered into in June 2006." They also acknowledged that the level of recycling and composting had exceeded the contractor's predicted levels.
101. The Commission found that there was bound to be a level of risk and unpredictability around the growth or reduction in levels of waste and recycling. Given that the contract runs for 26 years, they identified several factors which will affect levels of waste and the market for recycled materials. They gave as examples
- Volatility in both national and world economies;
- Population levels and numbers of households including the increasing number of smaller households; and
- The composition of waste.
102. The Commission went on to point out that the projected recycling and composting rates used in calculating the amounts of residual waste in the contract exceed the targets in both the Regional and National Waste Strategy and so by assuming higher levels of recycling the contract "provides challenging targets, recognises the benefits of the sustainability

⁷⁸ CD43

⁷⁹ SM VE1.1 section 3 #3.3

⁸⁰ Then of course known as Onyx Aurora Limited

⁸¹ CD 70,71

⁸² CD72,73

⁸³ CD 74,75

⁸⁴ CD 76,77 by then known as Veolia Environmental Services

⁸⁵ VE1.2 Tab 26 letter AC to S Downen 16th March 2009

⁸⁶ *ibid* p.3

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- agenda and should reduce the amount and cost of waste ultimately sent to landfill.”
103. They also expressly addressed the point, still raised by PAIN, that there might be reductions in residual waste for the ERF. They too pointed out (as has been pointed out in the evidence at the inquiry⁸⁷) that “any reduction in waste will lead to a direct reduction in costs to the Council. There is no requirement on the Council to meet any minimum tonnage requirement and, in the event that additional waste is taken from other sources, there is an income sharing arrangement which will further reduce costs to the Council.”
104. The Commission concluded that inherent difficulties in predicting future waste flows and market conditions mean that there will always be a risk that eventual outcomes may differ from initial assumptions, but that the allocations of risks in the contract are sufficient to deal with such variances so as not significantly to disadvantage the Council.⁸⁸ That is in essence approval of the flexibility of the contract.
105. DEFRA too have supervised and assessed the processes that led to the contract.⁸⁹ The outline business case for the contract submitted by the Council to the Government in 2003 was approved. Before the contract was finally awarded to Veolia, DEFRA evaluated the Final Business Case and approved that. In their letter of the 15 March 2010 to NCC, DEFRA expressly reported that they approved the project “on the basis that the proposed facilities were consistent with national policies.”
106. DEFRA noted and approved the following features of the project:
- The proposals seek to maximise diversion of waste from landfill and move waste up the waste hierarchy;
- The contract does not hinder the achievement of high levels of recycling;
- The proposed EFW facility seeks to recover energy from waste that is not recycled thereby contributing to national renewable energy targets and reducing reliance on fossil derived energy;
- The whole development (recycling and energy recovery) reduces greenhouse gas emissions that might otherwise occur by landfilling biodegradable waste; and
- The contract seeks to deliver proven, environmentally sound and economically viable technical solutions.
107. Those comments are all specific to this particular contract and address almost all of the points made again by PAIN at this inquiry and indeed made on behalf of RAIN at the Ince inquiry and roundly rejected there by the Inspector and the SoS. The DEFRA comments were made this year by the Government department charged with supervising waste infrastructure projects delivered through PFI contracts. The (October 2010) revised draft National Policy Statements show that the Coalition Government remains committed to these same goals to be achieved through the same means.

⁸⁷ SM in chief and M Allen to Inspector

⁸⁸ VE 1.2 Tab 26 p.4

⁸⁹ VE1.7 Tab 6

108. DEFRA have approved a further 20 outline business cases submitted by Councils for their waste management PFI contracts all of which envisage an element of energy from waste technology – whether through direct combustion or via a pre-processing route. DEFRA considers that energy from waste has an important role to play in the delivery of long-term waste, energy and climate change objectives. They have said that that is particularly so (but therefore not exclusively so) when the heat generated can be used in a CHP scheme; the opportunity for which can be secured here by the kinds of conditions that the SoS has attached to the Ince and Helius permissions⁹⁰.
109. DEFRA conclude their March 2010 letter by saying that “the Nottinghamshire project continues to be consistent with Government policy.” That is a determination by a department of the Government through its Programme Director of the Waste Infrastructure Delivery Programme.
110. PAIN’s case is a challenge to Government policy of support for EfW. That support is evident from the DEFRA letter and the revised draft NPS’s make it clear that the Government policy of support continues.
111. The PFI contract of which this ERF is a part - albeit a fundamental part - has taken a long time to be concluded as can be expected given the careful processes it had to go through. It has been scrutinised since being entered into by the Audit Commission and by the Government department charged with its supervision and with the programme for the delivery of waste infrastructure and found to be robust, flexible and appropriate.
112. The contract is part of an integrated solution to waste management in Nottinghamshire. The overarching objectives set out in the Contract make that plain.⁹¹ The contract deals with green waste composting, household waste recycling centres, recycling generally as well as the MRF and the ERF.⁹² Contract A focuses on waste recycling and composting. It also allows for up to 60,000 tpa to be taken to the Eastcroft facility and, whilst it might be possible to renegotiate that figure, the process would take some time because it would also involve the contract between the Eastcroft operator (WRG) and the city and county council WDAs⁹³. Contract B addresses recovering energy from the residual waste remaining after the application of the facilities in Contract A; it runs for 26 years from the date of the SoS’s decision in relation to the proposed ERF⁹⁴. The contract expressly defines the residual waste which could go to the ERF as contract waste “which is not recycled or composted or reused”⁹⁵, but it places no limit on the amount or source of C&I waste that could be fed into the facility⁹⁶.
113. The County Council as WDA continues to support the contract and this ERF that forms an essential part of what the contract seeks to achieve.⁹⁷ The

⁹⁰ CD110D & VE41.

⁹¹ CD43 Contract A Schedule 2 p.2

⁹² CD43 Contract A Schedule 2 pp.21 to 27

⁹³ Mr Allen’s response to the Inspector’s questions

⁹⁴ Mr Mitchell in cross-examination by Mr Watson

⁹⁵ CD 43 Contract A p.51

⁹⁶ Mr Mitchell’s response to the Inspector’s questions

⁹⁷ M. Allen in evidence to Inspector.

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- County Council as WPA also continues to support the ERF subject only to the SoS being satisfied as to the concerns in relation to woodlark and nightjar.
114. It is wrong to suppose that NCC would be obliged to deliver waste to the ERF that could otherwise be recycled or composted. The contract provides that only residual waste would be sent to the ERF; this could include black bag waste, for example, as this is not recyclable in reality. In fact the contract imposes obligations on Veolia to recycle and compost at levels higher than national targets.
115. The Waste Strategy for England 2007 expects energy from waste to account for 25% of MSW by 2020 and it emphasises that the Government is using PFI to encourage a variety of energy recovery technologies.⁹⁸ This particular PFI contract is supported by DEFRA. The WDA has explained that, if the ERF is not built, the contract might have to be retendered; something that could take at least 2 years and more likely 4 years, based on the experience of this contract. The inevitable costs, uncertainties and delays in these times of financial austerity, that would result from planning permission being refused, should therefore be given great weight by the SoS. And all the time more and more waste would be going to landfill, contrary to Europe's and this country's aim of moving the management of waste up the hierarchy and using landfill only as a last resort.

The Nature of the Proposals

116. Given the two facets of the proposed facility, namely waste management and energy generation, it is important that both are taken into account, together with the relevant policy relating to both.
117. The 2008 Waste Framework Directive 2008/98/EC ("The WFD 2008"), which will be transposed into national legislation by the Waste (England and Wales) Regulations 2010 coming into force on 12 December 2010, alters the approach in European law and soon in domestic law as to whether an incinerator is considered to be a waste disposal or energy recovery facility. The Draft Revised NPS EN-3 refers to the recovery of energy from the combustion of waste where it is in accordance with the waste hierarchy set out in the WFD 2008⁹⁹. As in WSE 2007 that hierarchy places recovery, including energy recovery, above disposal by landfill. Incineration is classed as recovery in the WFD where the energy efficiency of the facility is above 0.65 (see Article 3.15 and R1 of Annex II, Recovery Operations)
118. In fact and law, and under existing national policy and under the WFD 2008 and the Regulations, the Rufford ERF is properly considered as a recovery facility¹⁰⁰:

⁹⁸ CD 40 p.15 of the Executive Summary

⁹⁹ CD86A # 2.5.2 and see also #5.14 of En-1, CD85A. The hierarchy is in fact set out in Article 4 of the WFD. It should be noted that the definition of recovery in Article 3.15 expressly draws attention to the fact the list of recovery operations in Annex II is "non-exhaustive" and the definition of recovery itself in Article 3.15 widens the potential categories of recovery operations by providing that " 'recovery' means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function in the plant or in the wider economy." The draft Regulations obviously follow this approach. Using waste as a fuel in place of fossil fuels clearly comes within that wider definition so that EfW could be recovery under that definition even without meeting the requisite level of energy efficiency but as the ERF here would meet that level it would be so classified in any event.

¹⁰⁰ See Inspector's considerations 2 & 3 on p. 3 of CD63.

(1) In PPS10 “using waste as a source of energy”¹⁰¹ and “energy recovery”¹⁰² are clearly separately classified as different from and above “disposal” in the waste hierarchy and the requirement in paragraph 25 to demonstrate that the envisaged facility will not prejudice the movement up the waste hierarchy applies only to waste disposal facilities, contrary to PAIN’s evidence but as accepted by Mr. Watson in xx. That position is confirmed by both the Eastcroft and Ince decisions where the EfW facility in each case was clearly seen as energy recovery and not a disposal facility.

(2) In WSE 2007 (as applied in the Eastcroft and Ince decisions) energy from waste is considered to be energy recovery. The fact that the Ince energy recovery facility related to RDF (Refuse Derived Fuel), as Mr Watson stressed (under xx by Veolia) makes no difference: indeed the Ince objectors (including Mr Watson acting for RAIN) stressed that the proposed facility was an incinerator and that is how it is referred to in the IR and also contended that the facility would reduce recycling and resource recovery¹⁰³. That argument did not persuade the Secretary of State or the Inspector, who concluded that it was directly countered by WSE 2007. Consistent with that, it is significant that no condition was imposed (or obligation entered into) that limited the type of waste to be used.

(3) In any event the position under the WFD 2008 as detailed by Mr Kirkman, who was not challenged on this by any of the parties, is that:

(a) The WFD classifies processes according to an energy balance formula.

(b) The efficiency will be in the range of 0.6-0.7 for incinerators.

(c) For Rufford the efficiency will be, depending upon the methodology adopted, 0.66 as endorsed by the EA who validated the calculation and concluded that Rufford could potentially be classified as a recovery operation¹⁰⁴.

(d) As Mr Kirkman concluded, it is not known what guidance will be applicable. However, on a worst case method of calculation the Rufford design will be above 0.65 and if something like the German guidance is adopted it would be upward of 0.93¹⁰⁵. Mr Kirkman told the Inspector that he would expect the final figure to end up somewhere between these two; thus well in excess of the 0.65.

(4) The EA was asked by the WPA to clarify its position on this. There is no uncertainty in their response¹⁰⁶. By the time they gave their view that this facility was capable of meeting the definition of a recovery facility in the WFD, it is clear from the emails that they had all the information they needed. Given Mr Kirkman’s clear and robust assessment¹⁰⁷, it would be very surprising if it was considered that there could be any doubt about this.

¹⁰¹ CD26 #1

¹⁰² Ibid Annex C

¹⁰³ CD110B at para. 11.116.

¹⁰⁴ See para. 13.40 on p. 95 of the WPA Planning and Licensing Committee Report, CD4.

¹⁰⁵ VE2.2 at para. 3.75 on p.24.

¹⁰⁶ Appendix CC10.

¹⁰⁷ VE2.2 at paras. 3.64-3.75.

119. In terms of the waste hierarchy, waste prevention, re-use, recycling and composting and energy recovery are all encouraged with disposal as a last resort if none of those offers an appropriate solution¹⁰⁸. Despite the strong impression to the contrary in much of its evidence and representations, Mr Kondakor on behalf of PAIN acknowledged under xx by the WPA that landfill was to be avoided if possible. This was the approach adopted by the Inspectors and Secretaries of State in both the Ince and Eastcroft decisions¹⁰⁹.
120. Consistent with this, PPS10 advises that it is only necessary for an applicant to demonstrate that the proposed facility will not undermine the waste planning strategy through prejudicing movement up the waste hierarchy in the case of disposal facilities¹¹⁰.
121. This approach is re-enforced in Revised Draft NPS EN-3 which states:

Energy from Waste – the principal purpose of the combustion of waste, or similar processes (for example pyrolysis or gasification) is to reduce the amount of waste going to landfill in accordance with the Waste Hierarchy and to recover energy from that waste as electricity or heat.....¹¹¹
122. WSE 2007 acknowledges that a vigorous energy from waste policy is compatible with high recycling rates¹¹². As Mr Mitchell stated (in re-ex) Germany and the Netherlands have high recycling and EfW and low landfill levels. As Mr Mitchell also pointed out (in re-ex), contrary to PAIN's assertion, there is no inconsistency between EfW and the transition to One Planet Living that WSE 2007 sees as a goal. Both the support for EfW and the goal of One Planet Living appear in the same policy document. The advice in WSE 2007 also refers to the need for flexible buildings (eg modular) and also flexible contracts which do not lock in fixed amounts of waste for treatment which may become obsolete. As Mr Kirkman explained¹¹³, the Rufford ERF could operate on only one of the two boilers and, contrary to PAIN's assertions as Mr Mitchell and Mr. Allen explained, there is flexibility in the PFI. As seen from Mr Kondakor's evidence (under xx by WPA) his assertion that the pricing regime (based on contracts elsewhere in Staffordshire and Shropshire) would discourage recycling was exposed as ill founded¹¹⁴. Mr. Allen explained to the Inspector and the contract terms here make clear that the recycling targets in the contract are minima which Veolia are already showing they can and do surpass at HWRCs and generally there is no requirement for a minimum amount of waste to be delivered to the ERF. If there is more recycling and if there is spare capacity at the Rufford ERF that capacity can be made available for third party waste that can be C&I waste or if needs be waste from other counties which would otherwise be destined for landfill. The market would be likely to ensure that

¹⁰⁸ See e.g. para. 21 on p.28 of WSE 2007, CD40.

¹⁰⁹ Eastcroft Inspector's Report, CD61 at paras. 342/3 (accepted by the SoS). Ince Inspector's report, CD110B at 11.116 (accepted by SoS, CD110A)

¹¹⁰ CD26 at para. 25.

¹¹¹ CD86A at para. 3.4.3 on p.26, which refers to the Waste Hierarchy as set out in Article 16 of WFD 2008.

¹¹² CD40 at para.23 on p.78.

¹¹³ In answer to the Inspector's questions

¹¹⁴ Even if Mr Kondakor was correct to use the Staffordshire Contract as analogous, there was still a £24 per tonne advantage in recycling. However, such an analogy is not correct as PAIN should know since all the contract provisions are available and before this inquiry save for commercially sensitive figures.

any such waste is derived from neighbouring counties because it would not otherwise be economic to transport it.

123. National policy (PPS10 and PPS1(S)) also acknowledges that EfW facilities will inevitably often be large facilities and it does not preclude the use of sites which are greenfield and/or in a countryside location. The Ince EfW facility, approved in August 2009 by the SoS for Energy & Climate Change under s.36 of the Electricity Act, is both. This facility was approved without any requirement that it be constructed and operated only in association with the Resource Recovery Park that was granted planning permission at the same time because the Inspector found that the policy support for the EfW alone justified its grant of permission¹¹⁵

124. Moreover, with regard to proposals for energy recovery facilities:

(1) There is no general requirement to demonstrate a need for the proposals¹¹⁶.

(a) Indeed it would be surprising to find such a requirement in policy given that such facilities are aimed at meeting the generally recognised need for sustainable waste and energy facilities. The whole tenor of the relevant national policy (WSE 2007, PPS10, PPS1(S) and now the Revised Draft NPSs EN-1 and EN-3) is that the facility proposed is of a type that is an essential element in the national strategy to meet that need.

(b) No such requirement is found in PPS10 and PPS1(S) advises that policies should be designed to promote and not restrict renewable low-carbon energy and supporting infrastructure (paragraph 19). In particular planning authorities should, amongst other things, not require applicants for energy development to demonstrate either the overall need for renewable energy and its distribution, nor question the energy justification for why a proposal for such development must be sited in a particular location. As seen above the Draft Revised NPS EN-3 recognises that the biomass element in the waste going to an EfW facility makes it a renewable energy facility, thus PPS1(S) applies. This was the approach adopted by the SoS and Inspector in the Eastcroft decision¹¹⁷.

The SoS was not persuaded to impose geographical restrictions on the origins of the waste in either Eastcroft or Ince¹¹⁸.

(2) An applicant does not have to justify the chosen technology¹¹⁹:

(i) The Ince Inspector concluded that in relation to arguments of need and alternative approaches to waste management:

*"Policy within Waste Strategy England and PPS10 identifies criteria, subject to which planning applications for waste management facilities should be considered favourably; it is not argued in either policy document that an optimal arrangement of facilities should be the key objective."*¹²⁰

¹¹⁵ CD110a IR11.168

¹¹⁶ See Inspector's consideration 1 on p.3 of CD63.

¹¹⁷ CD61 at para. 344 on p.58.

¹¹⁸ CD61 at para. 351; CD110B at para.11.125.

¹¹⁹ See Inspector's considerations 4, 5 and 7 on pp. 3 & 4 of CD63.

¹²⁰ CD110B at para.11.124 on p.152.

(ii) See 2.5.9 of Revised Draft NPS EN-3. This advises the IPC not to be concerned about the type of technology to be used¹²¹.

(3) The revised draft NPS EN-3 makes it clear that it is not necessary to demonstrate that the facility performs better than any other potential type of facility in terms of carbon emissions¹²².

MATTERS ABOUT WHICH THE SECRETARY OF STATE WISHES TO BE INFORMED

Whether the scheme would deliver a sustainable form of development, as outlined in PPS1 and in the supplement to that policy statement dealing with planning and climate change

125. The proposals would provide a well designed and sustainable waste management facility that also provides power. This would be in accordance with both PPS1 and its Supplement.
126. PPS1(S) gives specific support to the proposals as they would be categorized as both a low-carbon and (given there will be a biomass element) renewable source of energy. In particular as referred to above:
- (1) Para.19 advises that LDDs should encourage such development.
- (2) Para.20 advises that applicants for energy development should not be required to demonstrate either overall need for renewable energy nor should planning authorities question the energy justification for a particular location.
- (3) Para.20 also advises that any local approach to protecting landscape and townscape should be consistent with PPS22 and should not preclude the supply of any type of renewable energy other than in the most exceptional circumstances. PPS22 itself advises that local landscape designations should not be used in themselves to refuse planning permission for renewable energy development¹²³. This approach is maintained in Draft Revised NPS EN-1¹²⁴.
127. PPS1(S) cannot be interpreted as requiring each development proposal to secure the highest viable resource and energy efficiency and reduction in emissions. Paragraph 9 of PPS1(S) relates to spatial strategies. It is confirmed in the Draft Revised NPSs, as referred to above, that technology choice is for the applicant¹²⁵.

The extent of consistency with government (PPS10) policy for sustainable waste management, given the need for the development and the fact that the preparation of new waste development plan documents is at an early stage

¹²¹ CD86A at para. 2.5.9 on p.12.

¹²² CD86A 2.5.36

¹²³ CD33 at para. 15.

¹²⁴ CD85A at para. 5.9.13.

¹²⁵ That is also clear from p.12 of the PPS 10 Companion Guide, CD27, under Local Development Documents.

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128. As NSDC acknowledge, PPS10¹²⁶ is a key policy document relevant to this proposal. Assistance with understanding and applying the advice in PPS10 is to be found in the Companion Guide¹²⁷.
129. PPS10 is consistent with WSE 2007 in terms of the waste hierarchy and in advising that waste should only be disposed of as a last resort¹²⁸. It also emphasises the need for positive planning in delivering sustainable waste management¹²⁹.
130. The advice in paragraph 21 is particularly relevant to consideration of this application:

The extent to which the proposed development supports the policies in the PPS:

The proposals support the policies in the PPS in providing a sustainable waste facility that provides energy recovery and assists in diverting waste from disposal by landfill.

The physical and environmental constraints on development, including existing and proposed neighbouring land uses (see Annex E)

There is no conflict with this criterion, as NSDC accept¹³⁰. Therefore the landscape and visual concerns raised by NSDC do not breach PPS10 policy. This is because local landscape considerations are not, save in exceptional circumstances, considered to be overriding. Annex E, under item (c) entitled visual *intrusion*, refers only to the need to protect landscapes of national importance, which this landscape is not. It refers to the setting of the proposed location and to the potential for design-led solutions to produce acceptable development. This suggests that a development can be acceptable in a “non-national” landscape where the design is thoughtful and of good quality, as is the case here. Indeed the emphasis in PPS10 is on good design, as is clear from the Companion Guide. The Guide recognises that sustainable waste opportunities will be best secured through good design and layout¹³¹. The only party that takes any issue with the design is PAIN. NSDC accept that the ERF is well designed¹³² and, whilst they would prefer the development to be considered alongside the BP proposals, they do not suggest a better location for the ERF on the BP application site. Nor do NSDC demonstrate how approving the ERF ahead of the BP would prejudice either development.

The cumulative effect of previous waste disposal facilities

It is common ground that there is no conflict with this criterion.

The capacity of existing and potential transport infrastructure to support the suitable movement of waste, and products arising from resource

¹²⁶ CD26.

¹²⁷ CD27.

¹²⁸ Para. 1 of CD26.

¹²⁹ Para. 2 of CD26. See also para. 3, which sets out Key Planning Objectives.

¹³⁰ DC0, Mrs. Bland's original proof, at para. 6.52/3 (as confirmed under xx by VES).

¹³¹ CD27 at para. 8.31

¹³² DC0 at para. 6.55(vi).

recovery, seeking when practicable and beneficial to use modes other than road transport

The difficulties in providing non-road transport for this site via the railway line are obvious despite Network Rail's wish for a safeguarding condition. Nonetheless NSDC accept compliance with this criterion (as Mrs. Bland confirmed under xx by VES) since, as recorded in their Planning Committee report: "The proposed location of the ERF complies with guidance contained in Annex E of PPS10, PPG13...having a rural location with good access to the strategic road network and enabling waste to be dealt with sustainably in that it is in relatively close proximity to the major waste producing areas within its catchment area, thereby avoiding the need for waste to be transported over long distances..."¹³³

"Give priority to the re-use of previously-developed land, and redundant agricultural and forestry buildings and their curtilages"

NSDC rely on this criterion, on the basis that the site is not "technically" brownfield and therefore does not benefit from the priority given to such land. However, as Mrs. Bland did accept under xx by Veolia, that criterion does not require that only previously-developed land is used for such a facility. This was acknowledged by the Inspector and SoS in the Ince case¹³⁴. As the (PPS10) Companion Guide explains, the priority does not mean that greenfield allocations are ruled out or that all brownfield sites have to be developed before greenfield development would be acceptable. The concern is to avoid turning unnecessarily to greenfield locations¹³⁵.

131. The Waste DPD process is at a very early stage; the Core Strategy Further Issues and Options consultation document was published in September 2010¹³⁶. This does not preclude the approval of facilities which are consistent with the step-change in significant new investment in waste management facilities. Indeed, PPS10 confirms this as the correct approach, provided that the proposals are consistent with PPS10¹³⁷. Prematurity was dismissed as a ground for refusing planning permission at Eastcroft¹³⁸ and the waste development plan is little, if at all, advanced from then; the new issues and options paper has only recently been published.¹³⁹

Whether the appraisal of alternatives is robust

132. There is no general legal or policy requirement that alternative sites be taken into account (see Derbyshire Dales District Council, Peak District National Park Authority v Secretary of State for Communities and Local Government, Carsington Wind Energy Limited [2009] EWHC 1729 (Admin), Carnwath L.J.¹⁴⁰). Such an obligation may arise where there are clear planning objections. The weight to be given to this is likely to increase the stronger the planning objections.

¹³³ The comments of the Spatial Planning Team at 8.19.9 of appendix 12 to DC1.

¹³⁴ CD110B at para. 11.94 and 11.120 of Inspector's Report

¹³⁵ CD27 at para. 7.33. See also now Revised Draft NPS EN-1, CD85A, at para. 5.10.3.

¹³⁶ CD17A.

¹³⁷ CD26 at para. 23

¹³⁸ Paras. 340/1 of the Inspector's Report, CD61.

¹³⁹ CD17A. See Inspector's considerations 9, 10 & 11 on p.4 of CD63.

¹⁴⁰ VE53 paras 15, 35 and 36

133. The ES Regulations require simply that the ES outlines the main alternatives studied and provides an indication of the main reasons for the choice made, taking into account the environmental effects¹⁴¹. That was done here. The (2007) ES explains the three stage process by which 118 potential sites were identified and then reduced to four.¹⁴² The (2008) Regulation 19 response explains in more detail the assessment of those four.¹⁴³ The appraisal was then (2010) updated to take account of more recent policies and site availability; this concluded that only three of the four previously shortlisted sites were worthy of more detailed consideration.¹⁴⁴
134. In considering the issue of alternative sites in this case, it is worth noting:
- (1) The opposition that groups such as RAIN and PAIN and UK Without Incineration (UKWIN) generate against any incinerator proposals¹⁴⁵.
 - (2) Unlike those responsible for waste management and energy proposals of the type proposed, such groups just wish that such proposals never go ahead. That would of course frustrate the implementation of key government policy objectives.
 - (3) Thus such objectors will always claim that there are better alternatives. Then when those alternatives are pursued they will sympathise or actively support the objectors to those alternatives. If that were allowed to carry the day it would be a recipe for the failure of the Government's waste and energy policy. That should not be allowed to happen.
 - (4) At the very best rejection of these proposals would result in significant delay, additional cost and uncertainty for the WDA as was clear from both Mr Mitchell's and Mr Allen's evidence.
135. In any event, the alternative site assessment is transparent. It has been updated and set out clearly¹⁴⁶. The three-stage analysis resulted in 3 sites the application site, the Portland Industrial Estate, Ashfield and Old Newark Road, Mansfield being assessed for close consideration¹⁴⁷. The initial categorisation of the application site as greenfield land should not have led to its rejection in any event, given the application of policy E17 of the Local Plan to the site as we shall discuss later.
136. There can be differences about judgements made as part of an alternative site appraisal. Further, the nature of such an exercise has to be recognised. A developer cannot be expected to pursue even the "short listed" sites equally. Inevitably a developer will pursue a particular site based on its own requirements and the professional input of its consultants. Having a favoured site is inevitable and entirely appropriate. So the fact that Monsieur Mazaud was instructed to consider a design for Rufford before the alternative site appraisal is normal and entirely reasonable.

¹⁴¹ Para. 2 of Part I to Schedule 4 to the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999

¹⁴² CD1 ES section 5.3 and Appendix 5.1

¹⁴³ CD2 section 11

¹⁴⁴ CD84

¹⁴⁵ VE43 & VE44.

¹⁴⁶ CD84 (as summarised in CD84a)

¹⁴⁷ Paras. 3.3 on p.13 and 4.27 on p.19 of CD84.

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137. NWT's suggestion that the alternative site appraisal was "a sham" is not based on evidence. The allegation displays a misunderstanding of the normal process of alternative site appraisal in a case of this nature. The name of the process explains its nature. It is to consider sites as alternatives to the site which is chosen by the applicant and which is being put forward in the application. It is in any event clear that assessment of potential sites was thoroughly carried out by the planning consultants then engaged and their work for the purposes of the PFI contract bid was reported¹⁴⁸ long before Monsieur Mazaud was engaged to prepare a design for the Rufford site.
138. NSDC accepts that an appropriate range of sites was assessed; and that the rationale and methodology for generating the range of sites was appropriate¹⁴⁹.
139. NSDC has however criticised the "overly high" weighting given to some specific criteria. These criticisms are largely based on downplaying the policy support for development at Rufford colliery¹⁵⁰. In fact, the development receives very significant support from E17 of the NSLP and from national policy, in particular PPS10 and PPS1(S).
140. NSDC also takes issue with the weighting given for energy utilisation. However, as Mr Standen said (in re-ex), it is easier to fit CHP into new development rather than to retrofit it. Mr Standen's scoring (B for each of the three sites) fairly reflects that.
141. Criticism is also made that Rufford was not screened out on the basis that it is greenfield as it was wrongly considered as previously developed land at that time. However, that criticism is of no consequence since PPS10 and the Companion Guide do not preclude greenfield sites. Also the Rufford site, although "technically" greenfield, has a long history of colliery use and most importantly policy E17 applies to it.
142. Much has been made of the possibility of sites at the Portland Industrial Estate and at Old Newark Road. However, the Old Newark Road site has developed in a way which would make an ERF incompatible. It seems to have developed a particular character of semi-residential and health use.
143. The site at the Portland Industrial Estate has the disadvantage of many residential properties in very close proximity and, whilst the concerns of local residents can properly be addressed, the strong likelihood of vociferous and prolonged opposition cannot be ruled out.
144. There are many residential properties which would be on the route of HGVs to the site at Portland Industrial Estate, whereas Rufford has excellent access from the MARR
145. In terms of visual impact, Ms Demmar's assessment demonstrates that the Portland Industrial Estate and Old Newark Road sites would come out significantly less favourably than Rufford Colliery¹⁵¹.

¹⁴⁸ CD70-77

¹⁴⁹ Para. 6.45 on p.18 of Mrs Bland's original proof, DC0.

¹⁵⁰ Para. 6.47 of Mrs Bland's proof, DC0.

¹⁵¹ Ms Demmar's Supplementary proof, VE4.9, paras. 7.9-7.11. See also LVSS3&4.

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146. This advantage of the Rufford site is further explored in Ms Demmar's Addendum to her Supplementary proof (VE 4.12). With regard to the Portland Industrial Estate it is stated that while the location is an industrial estate with substantial buildings within it, they are not of the same scale as an ERF would be. The ERF would be significantly taller than the adjacent industrial buildings and substantially larger than the surrounding domestic architecture, including those residences to the immediate east. Ms Demmar also points out that a building of this size in such a landscape breaks the skyline from all directions and blocks views from Summit Hill. In most views it is prominent and it dominates close views¹⁵².
147. Although criticism was made of the "design" used by Ms Demmar to explore the limitations of that site and location¹⁵³, the reality is that a genuine attempt has been made to give a realistic representation. Monsieur Mazaud was not able to say whether an appropriate design could be achieved on that site – he said (in answer to the Inspector's questions) that he would need much more time to consider that – that the work takes 2 years to say whether you can achieve an appropriate design for a site. The fact is that the relationship of the houses to the site would remain whatever the design and even if it were possible to sink the building into the ground to an extent.
148. Although there is the potential for a railway link at Portland it seems unlikely that it could be achieved, given the size and shape of the site, as explained by Mr Standen (under xx by NWT).
149. Rufford, as Mr Standen emphasised (under xx by NWT) and as is recognised by the County and in the Ove Arup ELR of 2008, has the significant benefit of good access to the MARR and the strategic road network. This access is superior to that of the Portland Estate, as Mr Standen explained.
150. Mr Standen was criticised for the weighting he gave Rufford in terms of the Planning Vision for the Area. NWT says that the site should be scored a C for this because of the ecological interests, particularly the Woodlark and Nightjar. However, that overlooks:
- (i) Rufford colliery is subject to policy E17. This is, in the circumstances in which it has been saved as we discuss later, for all practical purposes akin to a general allocation for employment development subject to the specific criteria.
 - (ii) The weight that can be given to this is increased, notwithstanding the emerging CS, as that publication draft DPD does not replace E17.
 - (iii) Rufford colliery fits firmly with the vision of the emerging CS, as it would assist the role of Rainworth as a focus for regeneration and the full exploitation of opportunities for regeneration and redevelopment in that particular one of the former mining communities.
 - (iv) NWT's contention that there are two "viable alternative" sites (i.e. Portland and Old Newark Road) that do not threaten the pSPA (as put to Mr Standen in xx) of course falls away if, as we believe the evidence strongly supports, the SoS agrees with Dr Buisson and Professor Wade that the

¹⁵² VE 4.12 at paras 6.5-6.8.

¹⁵³ VE 4.13

overall scheme, including the offsetting measures, would ensure no likely significant effect and no adverse effect on the integrity of the area. Indeed we believe it would provide distinct benefits in delivering a significant increase in heathland habitat, as the WT have been seeking to achieve in this area, and allow the coordination of a number of key parties to the overall benefit of nature conservation.

(v) When all relevant considerations are taken into account, it has not been demonstrated that the two alternative sites are clearly preferable to Rufford. So if the SoS is satisfied on the ecological aspects there is no legal or policy justification for rejecting the current proposals because of the possibility of those two other sites. In such a scenario, alternative sites are irrelevant in the context of the Conservation Regulations 2010. Alternative sites would only be relevant if it was concluded that there would be an adverse effect on integrity and imperative reasons of overriding public interest were being relied upon. The applicant relies on the evidence of Dr Buisson and Professor Wade and therefore does not need to and does not rely on such reasons. Mr. Standen's reference to such reasons pre-dated Dr Buisson's and Professor Wade's most recent and thorough consideration of these matters and so such reasons fall out of the picture.

151. It is not clear that those potential alternative sites could therefore deliver an ERF. That might please PAIN but it would not assist the WDA in delivering this key element of its sustainable waste strategy to be brought forward through the PFI contract.

Whether the proposals accord with the development plan

152. Following the revocation of the RSS, formally announced by the SoS on 6 July 2010, the development plan consisted of those saved parts of the Waste Local Plan 2002 and the (NSLP) Newark and Sherwood Local Plan 1999¹⁵⁴. Despite that revocation, the Revocation Guidance advised that Planning Authorities should continue to press ahead with their waste plans and provide enough land for waste management facilities to support the sustainable management of waste (including the move away from disposal of waste by landfill)¹⁵⁵. That Guidance also advised that data and information prepared by partners would continue to assist in this process and for the transitional period this would continue to be the data and information which has been collated by the local authority and industry and other public bodies who currently form the Regional Waste Technical Advisory Bodies.
153. Now that the High Court has quashed the SoS's decision to revoke, the EMRP once again forms part of the development plan. Whilst the SoS's continued intention to abolish Regional Strategies is noted¹⁵⁶, its materiality is subject to challenge and there is no certainty as to when any legal provision for abolition could be brought into force. Limited weight can therefore be given to the government's current intentions in this respect.¹⁵⁷

¹⁵⁴ See para. 2.1.1.5 – 2.1.1.15 of SoCG 11 on The Revocation of Regional Strategies.

¹⁵⁵ SoCG 11 at para. 2.1.1.9.

¹⁵⁶ Letter (10 November 2010) from Steve Quartermain to the Planning Inspectorate

¹⁵⁷ VE60

154. The (2009) EMRP is the most recent component of the development plan and it therefore has primacy over the older components, such as the NSLP. Its Policy 1 core objectives seek to minimise the adverse environmental impacts of new development and to secure adequate mitigation or compensation for any unavoidable damage, whilst Policy 2 encourages good design. As a matter of principle (Policy 26), any unavoidable damage should be justified by the need for the development in that location, which would outweigh the damage that would result.¹⁵⁸
155. Sherwood Forest is recognised as being an area that is particularly special to the people of the region, but whose distinctive character is under pressure. The EMRP also notes that significant areas of derelict land remain here, as a result of past mining activity, and it points to the need for large scale habitat creation; for enhancements to landscape character (something that is encouraged by Policy 31); and for opportunities for informal recreation.¹⁵⁹ Such benefits would be consistent with the Policy Northern SRS5 approach towards creation of a Sherwood Forest National Park which generates environmental, economic and social benefits of both local and national significance.¹⁶⁰
156. The (2002/3) Regional Environment Strategy, which forms part of the RSS¹⁶¹, highlights opportunities for the region to become a forerunner in the production of energy from renewable resources. It recognises the potential landscape impact of energy installations and indicates that energy from waste incineration should be on a scale that allows waste heat to be used.¹⁶²
157. Most significantly, the policies of the EMRP provide an up to date expression of the appropriate spatial strategy for the region and specifically for the Northern Sub-Area in which the application site lies. It is seen as crucial that this sub-area develops a viable new economic base to make up for the decline of the coal industry¹⁶³ and it is recognised that regeneration initiatives must address the smaller rural settlements like Rainworth that have also been affected by the decline of mining.¹⁶⁴
158. This Northern Sub-Area is a regional priority for regeneration because of its concentration of problems linked with the decline of the coal industry.¹⁶⁵ Redevelopment of former colliery sites is consistent with the conclusions of the Coalfields Task Force (1998); with the government's response¹⁶⁶; and, with the findings of the (2003) Northern Coalfields Environmental Study¹⁶⁷. Employment land reviews are seen as important to inform the allocations which will assist the development of sites in Priority Areas for Regeneration such as this.¹⁶⁸ Sites along the Mansfield Ashfield Regeneration Route (MARR) are to be a particular focus to assist with meeting the growth and

¹⁵⁸ VE4.2 3.35-39

¹⁵⁹ CD7 4.3.41

¹⁶⁰ VE4.2 3.46-3.50

¹⁶¹ Ms Demmar's response to the Inspector's question

¹⁶² VE4.2 3.51-64

¹⁶³ CD7 2.4.19

¹⁶⁴ CD7 2.4.21

¹⁶⁵ CD7 Policy 19

¹⁶⁶ CD7 2.4.24

¹⁶⁷ VE4.2 3.83-90

¹⁶⁸ CD7 Policy 20

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- regeneration objectives.¹⁶⁹ This is consistent with EMRP Policy 3, which is concerned with the distribution of development, and with Policy 7 which points out that regeneration of this particular sub-area should be achieved by providing jobs and services in and around other settlements that are accessible to a wider area or that service particular concentrations of need.
159. The former Rufford Colliery is the only site, within this particular Priority Area for Regeneration, that is identified in the (2008) employment land review which informed preparation of the EMRP. The 2010 update to this review pointed to the need for more employment land in future, but did not identify particular locations. The Rufford site is also located within the Sherwood Growth Zone Partnership area¹⁷⁰ and is accessed from the Rainworth bypass which connects to the (2004) MARR.¹⁷¹
160. The specific sub-area guidance for waste for this Northern Sub-Area promotes a centralised strategy of larger facilities for waste management on previously used land including former colliery land.¹⁷² As NCC point out, EMRP Policy 38 makes no distinction between land that has restoration requirements imposed on it and land which does not¹⁷³. As part of the RSS, this is recent government policy in relation to waste management specific to the area in which the application site lies.
161. The EMRP also sets out the context for waste management. In doing so, it is informed by the RWS which requires authorities to make positive provision for new waste management capacity and to give priority to safeguarding and expanding existing waste sites. It points out that thermal treatment of mixed waste for energy generation is a proven technology and that, whilst there are concerns that these plants may detract from other forms of recycling or recovery, they should be seen as part of an integrated approach that permits the highest level of recycling and recovery of materials. The RWS also sets an objective that thermal facilities should, where practicable, incorporate CHP.¹⁷⁴
162. The EMRP anticipates that in 2010, 6.2 million tonnes of waste will be landfilled overall, including some 3.6 million tonnes of C&I waste. (The projected landfill rates for C&I waste in Nottingham and Nottinghamshire are 759,000 tonnes in 2010, 754,000 tonnes in 2015 and 735,000 tonnes in 2020.¹⁷⁵) The Plan seeks to work towards zero waste growth by 2016; it aims for combined recycling and composting rates of 25% by 2005, 30% by 2010 and 50% by 2015, which exceeds government targets; and it takes a flexible approach to other forms of waste recovery, on the basis that technology in the area is developing very quickly and is difficult to predict. It recognises that some additional waste recovery capacity will be needed which may include energy from waste; that waste management capacity will need to more than double by 2020 in order to meet targets set out within the Regional Waste Strategy; and that, when identifying sites for

¹⁶⁹ CD7 Policy Northern SRS3

¹⁷⁰ VE10.2 4.38

¹⁷¹ VE10.2 5.26

¹⁷² CD7 3.3.70

¹⁷³ VE61 and CC24

¹⁷⁴ VE10.2 4.91-94

¹⁷⁵ CD7 Appendix 4

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- waste management facilities, waste planning authorities should consider synergies with existing land uses including redundant minerals workings.¹⁷⁶
163. The EMRP includes indicative regional targets for renewable energy, but notes that this would not include energy derived from the biomass element of municipal and commercial wastes.¹⁷⁷ Nevertheless, it encourages the use of CHP and low carbon sources of energy. It notes¹⁷⁸ that suitable locations for large-scale CHP developments are likely to be urban areas or associated with new developments which avoid negative effects on the landscape and it points out that some former colliery sites may be suitable for reuse for new forms of power generation¹⁷⁹. Indeed, Policy 40 encourages local planning authorities to consider safeguarding former colliery land for low carbon energy generation. This regional plan recognises that some additional waste recovery capacity will be needed, which may include energy from waste or technologies such as AD, and it suggests that waste management capacity (across the region) will need to more than double by 2020 in order to meet the targets set out within the regional waste strategy.¹⁸⁰
164. The Waste Local Plan, which long predates PPS10, contains little which is directly relevant to the proposed ERF as we discuss later, save (i) that there is recognition of the role of incineration in managing waste¹⁸¹ and (ii) that Policy W3.20 seeks the protection of heathland, but the reasoned justification makes it clear that it is existing established heathland and not heathland that might be achieved by restoration that is in mind. In any event the proposal to create 21ha of heathland at the GCP more than compensates for any potential loss at the application site.
165. With regard to the NSLP, the key policy is E17 which provides that planning permission will be granted for the redevelopment of the pit head area of disused collieries for employment development subject to four criteria. This Policy applies to both the ERF application site as well as that for the BP, as Mrs Bland agreed in xx by VES.
166. This Policy was saved by the SoS in September 2007. Despite not including it in the original proposed list of policies to be saved, NSDC changed its mind following representations by Mr Standen¹⁸². Further, NSDC does not intend to replace it with any of the policies in the CS¹⁸³. Thus Policy E17 will be part of the development plan even when the CS is adopted and will remain so until it is expressly replaced by a new policy (which can only be done by a policy contained within some future adopted DPD)¹⁸⁴.
167. PAIN contends that this Policy does not apply since there is a restoration condition attached to the site and it is thus a greenfield site. However, all the relevant collieries to which the policy could apply would appear to have such a condition, either expressly or by reason of Part 20 of the Town and

¹⁷⁶ CD7 3.3.56, 3.3.57, 3.3.62, 3.3.64, 3.3.66

¹⁷⁷ VE10.2 4.51

¹⁷⁸ CD7 3.3.83

¹⁷⁹ CD7 3.3.79-90

¹⁸⁰ CD7 3.3.62-64

¹⁸¹ CD10 #6.4-12 and 6.30-34

¹⁸² See xx notes of Mrs. Bland (by VES).

¹⁸³ See Appendix F to the Publication CS, CD14A, p.126.

¹⁸⁴ By reason of the Direction made by the SoS on 21 September 2007, Appendix 11 to DC1, under paragraph 1(3) of Schedule 8 to the Planning and Compulsory Purchase Act 2004.

Country Planning (General Permitted Development) Order 1995¹⁸⁵.

Moreover, as NSDC agreed (in xx by VES), neither in the Policy itself nor in the written justification does E17 limit the application of the Policy to brownfield land.

168. At the time of the saving of E17 in 2007, Mrs. Bland accepts (under xx by VES) that E17 could only have applied to Thoresby, Clipstone and Rufford collieries. Yet, Thoresby is active with good reserves and with no sign of closing; indeed, Mrs. Bland accepted (in xx by VES) that in practical terms the Policy is not currently relevant to that colliery. Clipstone colliery has been designated as within the settlement boundary since no later than 1999. Therefore the countryside policies (E1 including Policy E28 of the NSLP, which Mrs. Bland referred to in her evidence in-chief) would not be relevant. Further, E17 would not need to be relied upon to justify an employment development within the settlement. Employment development within the Clipstone settlement would be covered by NSLP Policy E15.
169. Therefore, at the time the Policy was saved the only colliery to which E17 could have had any meaningful application was Rufford and that is still the case. This is significant, when the substance of NSDC's position is considered. As seen from the written justification, Policy E17 was originally adopted to address the implications for the community of the closure of the pit, which had been at the heart of the community for very many decades¹⁸⁶. The implications of that remain today as is recognised within the publication draft CS. Lack of employment is still a significant problem for the community.
170. So there can be no sensible dispute that Policy E17 does and should apply to Rufford colliery. This is given further support by Mrs. Bland's e-mail to Mr Hankin in June 2008 in relation to the Rufford ERF planning application in which she stated, as officer comments, that¹⁸⁷ the colliery has good potential for employment development as it would comply with (amongst other policies no longer relevant) E17. She pointed out that other considerations would also need to be taken into account e.g. landscape and ecology. But in summary, she stated "we consider the principle of the ERF to be acceptable but would prefer to see the scheme as part of a comprehensive development". This position of course was in the knowledge, as Mrs. Bland accepted (in xx by VES) of the nature of the proposals and the local landscape policy (NE9 of the NSLP, SLA) that applied then as now (although the SLA is being replaced by the CS, as addressed below).
171. NSDC relies solely on the second criterion in Policy E17 which requires that "*The redevelopment would not intrude into the openness of the countryside*". That cannot of course sensibly be interpreted as precluding in principle any such development in the countryside (as Mrs. Bland's proof at some points wrongly appears to suggest¹⁸⁸). Nor can the general countryside restraint policies be relied upon to defeat an express policy exception to those policies. The proposals have to be considered against E17

¹⁸⁵ See J. Standen's proof, VE10.2, at para.4.15 on p.14. See para. 1.7 of the NSLP, CD13, as to the collieries, including Rainworth, which the policy could have applied to at the time of adoption. See also CC21.

¹⁸⁶ CD13 at para. 6.74.

¹⁸⁷ Appendix 15 to DC1.

¹⁸⁸ E.g. paras. 6.37 & 6.40 of Mrs Bland's original proof, DCO.

in relation to the effect the scheme would have on the open countryside. The impact on the countryside also has to be considered having regard to the advice in PPS10 (and in PPS1(S)), which indicates that such issues are unlikely to be overriding in an area such as this which has no national landscape or related designation¹⁸⁹.

172. PAIN has contended that there is conflict with criterion 4, of Policy E17, in terms of the amenities of neighbouring residents. Although NSDC had originally relied upon this as part of its objection to the WPA, this is quite rightly not now supported by NSDC¹⁹⁰. The site is away from residential properties. The Sherwood House nursing home is the only property relevant to this issue. That property lies adjacent to the access to the former colliery and Lafarge mineral site. It has proceeded with its planning application for a substantial extension notwithstanding the proposals for the colliery site. As demonstrated by Mr Humpheson for VES, appropriate conditions will ensure that no unacceptable impact would arise¹⁹¹. Thus this criterion would be complied with. In the light of criterion 2 which expressly addresses effects on the openness of the countryside it cannot sensibly be interpreted as further seeking to protect views of the countryside from afar in the village.
173. NSDC, as a consultee authority, has also confirmed (xx of Mrs. Bland by VES) that it is not relying upon prematurity of the proposals in advance of the Core Strategy (CS) or any Site Allocation DPD¹⁹². Indeed Mrs. Bland accepted (under xx by VES) that E17 was saved and therefore consistent with the publication CS¹⁹³. She further accepted that an allocation of Rufford colliery would be consistent with the strategy in that document and thus could be provided for in a site allocation DPD.
174. Indeed, consistent with their evidence, NSDC's solicitor confirmed that they are not opposed to development of the site in principle. The limited basis of their objection is that:
 - (a) The proposals were submitted without the benefit of a comprehensive redevelopment and restoration scheme; and
 - (b) There are insufficient benefits from the proposals to warrant approval of development within the countryside. However, the provision of 36 jobs was dismissed far too readily by Mrs Bland. Moreover, she acknowledged that she had not taken into account the waste management or energy generation benefits that would arise. Given the very significant policy support for both of these, NSDC's assessment of the planning balance is somewhat light on one side of that balance.

There is no policy or planning brief (or any current intention to prepare such a brief) that requires comprehensive development of the colliery. Significantly there is no such requirement in E17 or any mention of it in the written justification to that Policy. Nor was Mrs. Bland able to put forward any convincing argument that prejudice would result from permitting the

¹⁸⁹ PPS10 para. 22 and Annex E.

¹⁹⁰ Compare para.9.77 Of the Planning Committee Report, Appendix 1 to DC1, with para. 6.39 of Mrs Bland's original proof, DC0.

¹⁹¹ E.g. paras. 3.3 & 3.4 of Mr Humpheson's proof, VE11.2 and see proposed conditions.

¹⁹² See also para. 6.4 of Mrs Bland's original proof, DC0. See Inspector's considerations 9,10 & 11 on p.4 of CD63.

¹⁹³ CD14A.

ERF now. The issue of providing CHP to any future BP development can readily be dealt with by condition as the SoS has imposed for similar facilities (e.g. for Ince and Avonmouth¹⁹⁴). There can be no basis therefore for rejecting the ERF for this reason.

175. Indeed it seems that NSDC is in fact keen on the BP proposals. That would not be surprising given:

(a) The identification in the 2008 ELR of the colliery as a potential site for employment development¹⁹⁵. That document has been in the public arena for some time and there is no evidence before the inquiry of any challenge to its contents. It can thus be given significant weight as part of the evidence base.

(b) The identification within that study (and its 2010 update) of the need for employment development to counter out-commuting from the District¹⁹⁶.

(c) The recognition in the DC's Key Decisions document of the unemployment problem in the District; and the marked imbalance in the employment provision that would require considerable economic growth within the District to come nearer to equilibrium between the number of jobs in N&S and the size of its workforce¹⁹⁷.

(d) The Publication CS itself, as Mrs. Bland accepted in xx by VES:

(i) is founded on accommodating significant employment and housing growth, notwithstanding the revocation of the RSS¹⁹⁸.

(ii) identifies the Mansfield Fringe Area in policy MFAP 1 for "...the redevelopment of key regeneration sites ...to aid the redevelopment in the area". Policy MFA 01 provides "*To encourage the regeneration and redevelopment of the former mining communities of the area by **fully exploiting** the opportunities presented by Sherwood Forest regional park, the Sherwood Growth Zone and knowledge of the residents of the area*". The application site is within that Growth Zone¹⁹⁹ and, of course, the colliery was an important part of the local community.

(iii) expressly acknowledges the unemployment problem in this area, including in Rainworth itself²⁰⁰.

(iv) designates Rainworth as a Service Centre (the only other such centre in the MFA being Clipstone) and on the Key Diagram as a Focus for Regeneration.

Mrs Bland also accepted that the weight to be given to the guideline area of land required for new employment allocations in Spatial Policy 2 at this stage is limited – this matter is the subject of objection. In any event no allowance is made for waste facilities, as that is a matter for the WPA. Further, the allowance is based on existing allocations which have not yet

¹⁹⁴ CDs 110 and VE41. And see Inspector's consideration 6 on p.4 of CD63.

¹⁹⁵ CD16 table 40 on p. 77, table 41 on p. 78, para. 6.8.2.2 on p. 79, table 45 on p. 82

¹⁹⁶ CD16A at para. 2.1, p.6 para. 3.8

¹⁹⁷ DC9 at paras. 2.8-2.10 on p. 9.

¹⁹⁸ e.g. paras. 2.3 on p.9, 3.1 (Newark and Sherwood's Vision) on p.15 and 3.2 on p.16 of the Publication CS, CD14A.

¹⁹⁹ Paras 4.38 and 5.26 of Mr Standen's original proof, VE10.2

²⁰⁰ CD14A on p.12 and paras. 6.93/4 on p.98.

been reviewed to consider whether they are available, feasible and viable and this review can be expected to identify the need for a further contribution towards employment land.

176. In summary, the EMRP indicates that there is a need to more than double the regions's waste management capacity by 2020 and Policy 38 points out that large scale facilities may be provided on former colliery land. Indeed, the RSS identifies this part of the region as a priority for regeneration, with sites along the MARR providing a focus for investment. However, there are no particular policies in the WLP that are relevant to this proposal. That Waste Local Plan is of relatively little weight given the more relevant and up to date guidance in PPS22, PPS10, PPS1 and PPS1(S) and WSE 2007. The proposed ERF is in accordance with Policy E17 of the NSLP. Policy E17 is also supportive in principle of the BP proposals. The ERF is also consistent with the strategy in the Publication CS. That document, alongside the 2008 and 2010 Employment Land Report and Update, is clear that to achieve the objectives of fully exploiting the opportunities presented by the Regional Park for regeneration and redevelopment (MFA 02 of the Publication CS) and delivering Rainworth as a focus for regeneration, the Rufford Colliery site is likely to be an essential component. That that is so is perhaps reflected in NSDC's unconvincing objection to the ERF.

The extent of consistency with the government's (PPS7) policies for sustainable development in rural areas, including the principles set out in paragraphs 1(iv), (v) and (vi)

177. PPS7 has in part been replaced by PPS4²⁰¹, which maintains the general restraint on development in the countryside²⁰². However, it does not (and nor did PPS7) preclude all development in the countryside. That applies not just to development which is considered to be appropriate in the countryside but also to that which can be allowed exceptionally.
178. LP policy E17 (which allows employment development at disused collieries including and particularly those in the countryside subject to meeting the four criteria) was adopted at a time when PPG7 (1997) applied a similar general restraint on development in the countryside.
179. Para. 1(v) of PPS7 remains and, consistent with paragraph 21(ii) of PPS10, gives priority to the use of previously developed land. That issue is addressed above in relation to PPS10, but in summary that priority does not preclude the use of greenfield land for waste management facilities.
180. Para. 1(vi) of PPS7 also remains. This, again consistent with the approach in PPS10, requires that all development in rural areas should be well designed. The landscape and visual issues are dealt with below.
181. PPS7 cannot therefore be read and applied in isolation. In this case LP Policy E17 allows an exception for employment development. Further, development for waste facilities moving waste up the hierarchy and for energy development on greenfield sites in the countryside is expressly contemplated by PPS10 and PPS1(S).

²⁰¹ CD22A, Annex A.

²⁰² CD22A p. 12.

MAIN CONSIDERATIONS ON WHICH THE SECRETARY OF STATE IS LIKELY TO BASE HIS DECISION IDENTIFIED BY THE INSPECTOR:

The visual and landscape impact of the proposed development

182. The national policy approach to landscape and visual matters has been addressed above. In summary this recognises that any plant of this nature will often involve large buildings and have a visual and landscape impact²⁰³. That is reflected in the relevant planning policy guidance as detailed above (particularly PPS1(S), PPS10 and PPS22) as well as in the Revised Draft NPSs.
183. That advice makes clear that local landscape designations should not be a bar to a facility of this nature. It will usually be the case that the clear benefits of providing a recognised sustainable waste and energy facility will outweigh such concerns.
184. It cannot be said in this case that the WPA, in coming down in favour of the proposals, has not properly taken into account the landscape and visual impacts. In some respects the WPA (and its landscape officer) has considered the impacts to be greater than either NSDC or the applicant's advisers. But even then the WPA has not considered such impacts to be overriding. Given the policy framework, that judgment is entirely justified.
185. Even NSDC, which does to some degree rely upon landscape and visual impacts, does not suggest any conflict with national policy in this respect²⁰⁴.

The Impacts

186. The landscape and visual impacts are fully set out in the ES and in the applicant's evidence to the inquiry. This assessment has identified areas, up to 15km away to the north, south, east and west, from which the roof of the ERF would be visible²⁰⁵, and it has considered the impact from viewpoints within a 10km radius. It has been carried out transparently and in accordance with the Guidelines for Landscape and Visual Impact Assessment and is the only such comprehensive assessment that has been provided to the Inquiry. It concludes that there would be a slight adverse residual impact upon the landscape character and a slight to moderate adverse impact on the visual amenity of areas which include Rainworth and the Rainworth by-pass.²⁰⁶
187. No one has challenged the accuracy of the photomontages and no alternative photomontages or viewpoints have been put in by NWT or any other party. Also, many of the points relied upon by the County Landscape Architect (CLA) were not substantiated either. In particular:
- (a) The CLA was concerned about the height of the stacks rather than the building itself. However, as Ms Demmar pointed out, the impact is not unacceptable as e.g. the tops of the Listed Winding Towers at Clipstone would still be seen. Further, these elements would not be the only vertical elements visible in this landscape context.

²⁰³ E.g. para. 8.32 of the Companion Guide to PPS10, CD27.

²⁰⁴ As seen above in respect of NSDC's position on PPS10 para. 21 and Annex E.

²⁰⁵ CD1 fig 8.6

²⁰⁶ CD1 8.8.5 and Table 8.5

(b) The views from Eakring Road to the north of the site and from the PROW are impeded by considerable vegetation on both sides (see LV12 and 13). There is not a major adverse impact.

(c) With regard to LV14 there is considerable vegetation and Ms Demmar disagreed that there would be a moderate/significant impact. She agreed with NSDC's landscape officer that the impact here (the view from where people walked) would be slight.

188. There is no material dispute with NSDC on the following assessments:

(1) In terms of visual impact, based on the site as it currently exists, there is agreement with the ES that there would be "slight adverse impact" from the introduction of the building with a view which is essentially natural/wooded and includes very large features but at considerable distance and within a well-wooded context of sufficient scale to accommodate the development successfully²⁰⁷.

(2) In terms of the impact on landscape character, based on the site as it currently exists, there is agreement with the ES that the proposals would cause a "slight change" to the landscape character of the surrounding area.²⁰⁸

(3) As compared with the site as restored to heathland, with semi-mature trees²⁰⁹, the ES assessed the visual impact as slight/moderate adverse.²¹⁰

(4) As compared with the site as it currently is, the ES concludes that the landscape impact would increase from slight adverse to moderate/substantial.²¹¹

189. Permission has now been granted to extend the Sherwood House Hospital and provide landscaping to the north, which would screen views of the ERF.²¹² If that permission were not to be implemented, Veolia have undertaken to landscape the northern boundary.²¹³ Also, when viewed from the south, only the roofs of the Hospital buildings would be visible and there would be no significant cumulative effect with the ERF development.²¹⁴ With regard to the cumulative visual impact with the BP, Ms Demmar explained that, although the impact would of course be greater than for the ERF alone, it would still be in the same category of moderate.

190. NSDC referred to Natural England's concerns about the impact of the ERF. However, consistent with government policy, that body's remit is limited to national designations²¹⁵. NE did raise a specific concern over the plume although, for more than 95% of daylight hours, it would not appear to

²⁰⁷ Para. 6.61 of Mrs Bland's original proof, DC0. See also para. 9.75 of the DC's Planning Committee Report, Appendix 1 to DC1 (also CD5(d))

²⁰⁸ Para. 6.62 of Mrs Bland's original proof, DC0. See also para. 9.66 of the DC's Planning Committee Report, Appendix 1 to DC1 (also CD5(d))

²⁰⁹ CD2 appx 23 8.2.6

²¹⁰ Para. 6.63 of Mrs Bland's Original proof, DC0.

²¹¹ Para. 6.63 of Mrs Bland's Original proof, DC0.

²¹² VE4.9 section 8

²¹³ VE62 and VE4.2 para 5.38

²¹⁴ VE4.9 para 8.8 and Ms Demmar's answer to the Inspector's question

²¹⁵ Para. 6.64 of Mrs Bland's Original proof, DC0.

extend beyond the site boundary²¹⁶. The effects of the plume visibility would therefore be low, using the EA's criteria²¹⁷; this has not been disputed.

Context of those Impacts

191. In considering landscape and visual matters, in their committee report, NSDC rely on LP Policies E17, NE1, NE8 (Mature Landscape Areas) and NE9 (Special Landscape Areas)²¹⁸.
192. The existing character of the site is a redundant colliery, enclosed for the most part on three sides by woodland and tree belts. The site itself is at about 100m AOD, with reasonably open views to the south, but partly encircled to the north, east and west, by a wooded ridgeline which rises to 115m-130m AOD.²¹⁹ Public views close to the site are limited, but available from the mature landscape area to the south and public bridleway to the north²²⁰. The lack of development in the area of the colliery is also of relevance.
193. The capacity of this landscape to absorb large-scale developments has been acknowledged by NSDC (in relation to the Lindhurst Wind Farm scheme) and further acknowledged by the Inspector in the Stonish Hill Wind Farm appeal²²¹.
194. Policy E17 of the NSLP could perhaps be better worded but can readily be interpreted in a meaningful way. As detailed above, the written justification makes it clear that what is required is a matter of judgment as to the degree of intrusion into the countryside. On that basis, the approach of the WPA's Committee Report cannot be correct, where it states that the development is identified as having an impact on the landscape and therefore would intrude on the openness of the surrounding countryside, thus conflicting with criterion 2 of E17²²². The degree of impact is central to application of criterion (2).
195. Also as addressed above, Policy E17 contemplates employment development at disused collieries, whether the colliery is "technically" greenfield (as Mrs Bland put it) or brownfield²²³. The baseline for considering the impact on openness for the purpose of criterion 2 of E17 (intrusion into the openness of the countryside) must therefore logically be the existing position i.e. unrestored. The visual impact on that basis is agreed to be slight (indeed NSDC do not appear to dispute that it is also slight compared with the restored position). Therefore, the degree of impact on the openness of the countryside is slight in the context of criterion 2 to Policy E17; this should justify the view that the criterion is complied with and the requirements of the Policy are met.

²¹⁶ Ms Demmar's answer to the Inspector's question

²¹⁷ Para. 5.13 of Ms Demmar's Rebuttal proof, VE4.5.

²¹⁸ Para. 9.77 of the Planning Committee Report, Appendix 1 to DC1.

²¹⁹ CD1 8.4.19, 8.4.49 VE4.2 8.17

²²⁰ Original proof, VE4.2, at paras. 8.16 and 8.17.

²²¹ Para. 8.68 of Ms Demmar's Original, VE4.2, proof at 8.68 – see also e.g. para. 7.36 of Appendix 8 (VE4.3) and para. 29 of Appendix 7

²²² CD4 at para. 12.34 on p.83.

²²³ Paras. 6.9 and 6.54 of Mrs Bland's original proof, DC0.

196. As explained above, there can be no justification for treating Policy NE1 (which defines what is considered to be development appropriate in the countryside) as a separate hurdle to development in a case where Policy E17 applies; the latter Policy is an exception to NE1 and includes its own criterion to take into account countryside impacts in the planning assessment.
197. NSDC had also relied upon Policy NE8 Mature Landscape Areas, although the site is not located within such an area. The Rainworth Heath and Water MLA is located immediately to the south-west of the application site. However, Mrs Bland now agrees with Ms Demmar that there would be no detrimental impact on the MLA²²⁴.
198. With regard to NE9, Special Landscape Areas, it is of note that:
 - (1) This designation is based on a (1988) dated assessment which was not robust, as Ms Demmar explained²²⁵. This is contrary to the advice in paragraph 25 of PPS7 (which is not cancelled by PPS4).
 - (2) The special qualities and descriptions of the Sherwood Forest SLA are currently weak or absent in the area of the site. Indeed the 1988 assessment, which provides the most recent full description of the SLA, notes that whilst there are some smaller areas of high visual quality to be found in the Rufford area, there are substantial areas of poorer quality landscape associated with colliery sites, amongst other things²²⁶. The application site was designated as part of the SLA despite being in a degraded condition and the proposed development will improve the current condition²²⁷.
 - (3) The landscape assessment for the area has now been reviewed in accordance with the approach in Core Policy 13 of the draft Publication CS. That does not support the SLA designation for this site or area. Understandably both the MLA and SLA designations are to be replaced by the CS²²⁸.
 - (4) The updated character assessment work provides a more realistic assessment and exposes the weakness of the to-be-removed SLA designation. It is not obvious why Mrs Bland thought it assisted to put in documents DC27/27A/28 given this up-to-date, more comprehensive and realistic assessment. In particular:
 - (a) As Mrs Bland confirmed, the Policy Zone within which the ERF falls (the Vicar Water and Rainworth Heath Wooded Farmlands and Wooded Estatelands Policy Zone, SHO8) is assessed (in assessment sheet S PZ 8, p.21 of DC25) as being of poor character and low sensitivity²²⁹.
 - (b) That is confirmed on Figs. 3 & 4 in DC25 (see also Figure 4, Landscape Character Zones, in the Publication CS²³⁰). This low sensitivity is significant,

²²⁴ Original proof, DC0, at paras. 6.43 & 6.61

²²⁵ Ms Demmar original proof, VE4.2, from para. 8.23.

²²⁶ VE4.3 Appx 10 para 2.10

²²⁷ Ditto at para. 8.25.

²²⁸ CD14A, Appendix F at p.127.

²²⁹ Para. 3.17 of Mrs Bland's 2nd Supplementary proof, DC21.

²³⁰ After p.64 of CD14A.

as Ms Demmar stated: the Landscape Guidelines advise that small effects on highly sensitive sites can be more important than large effects on less sensitive sites²³¹.

(c) The Assessment Sheet S PZ 8 refers to concentrating new development around the existing settlements of Mansfield, Clipstone and Rainworth to conserve the “remote rural character of the landscape”. That description cannot however apply to the Rufford colliery, the formal allocation of which in a DPD would be consistent with the CS (as Mrs Bland accepted in xx by VES). In fact the survey sheet, which is the basis for S PZ 8, correctly refers to the area (including of course Rufford colliery and beyond) as being on the urban fringe²³².

(d) The Landscape actions in S PZ 8 include “create heathland habitats”. The proposal would include 2ha of that habitat on the application site²³³.

(e) The Assessment Sheet for the Golf Course Plantation (S PZ 6 – VE4.14) includes, as one of its suggested actions, “create opportunities for restoring heathland where appropriate”. The offsetting proposals would provide over 21 ha of heathland and some 2.4 kms of deciduous forestry edge within the GCP.

199. The SLA designation should therefore be given little weight as there is a current landscape assessment which shows, in accordance with paragraphs 24 and 25 of PPS7, that this local designation cannot be maintained. In any event there is no conflict with Policy NE9 as the purpose of the Policy, as the written justification explains, is to direct development away from sensitive locations²³⁴. This is not a sensitive part of the SLA as the current assessment demonstrates.
200. Mrs Bland has also referred to the Greenwood Community Forest (Policy NE23). That Policy does not preclude development – it talks about negotiating for new woodland planting. The aim is not to create continuous woodland²³⁵. There is no conflict between this general aim and the proposals. The proposals would include an additional 2ha of heathland on the application site and some 21 ha of heathland habitat on the GCP.
201. In her original proof Mrs Bland also alleged that the proposed ERF would not accord with the aims of the developing Sherwood Forest Regional Park²³⁶. That cannot be correct since:
 - (1) As Ms Demmar pointed out, the vision for the Park includes the core objectives of encouraging economic development and regeneration²³⁷.
 - (2) In her second Supplementary proof Mrs Bland herself pointed out that the Publication CS Policy MFAO1 encourages the regeneration and redevelopment of the former mining communities of the area by fully

²³¹ See para. 7.39 on p.92 of the Guidelines for Landscape and Visual Impact Assessment, Second Edition, CD104 (extract)

²³² VE4.15 on p.1 (under Vulnerability) and on p.22, 1st bullet point; and see accompanying plan showing the Sherwood Policy Zones and Landscaper Character Parcels.

²³³ VE4.9 4.3-4.6, VE4.11 fig LVSS1

²³⁴ CD13 at para. 8.58.

²³⁵ CD13 at para. 8.99.

²³⁶ DC0 at para. 6.63.

²³⁷ VE4.2 at para. 3.95.

exploiting the opportunities presented by Sherwood Forest Regional Park, the Sherwood Growth Zone and the skills and knowledge of the residents of the area²³⁸.

(3) This approach is re-enforced in the Sherwood Area Policies in the Publication CS (paragraphs 6.83, 6.84 and Policy ShAP1²³⁹). This makes NWT's reliance on the Regional Park Board's meeting (and the minutes provided later) of little substance²⁴⁰ - the reliance on this was surprising since, as Ms Demmar stated, Regional Parks have always involved Development Agencies.

(4) Further, the Green Infrastructure Strategy that Mrs Bland has referred to does not in any way preclude development. Moreover, the Strategy expressly acknowledges the role of the Regional Park as including improving the economy and includes the objective of "Economic Development and Regeneration"²⁴¹.

(5) The proposals would provide landscaping and habitat both on the application site and the GCP. There would be a tenfold net gain in heathland habitat as explained by Professor Wade and the proposals would thus comply with the aim of increasing habitat²⁴².

202. In these circumstances the key to acceptability is the design. NSDC accept that the proposals are well designed in accordance with paragraph 1(vi) of PPS7²⁴³. There is also thus compliance with the design guidance in PPS1. Although OPUN did have some suggestions to change the design, their overall conclusion provides significant support for the proposals. OPUN, clearly aware of the need and policy support for such facilities, concluded *"Generally a very good proposal and design which could act as an exemplar for buildings of a similar function, of which many can be expected to be planned in the future"*.

203. That commendation by this independent body is very significant. It is perhaps not surprising when one considers:

(1) The recognition by Monsieur Mazaud, the scheme architect, of the importance of the context of any individual site and scheme and thus the avoidance of a "one for all" standard solution²⁴⁴.

(2) The integrated approach to design solutions adopted by Monsieur Mazaud and his practice²⁴⁵.

(3) The recognition given to the excellence of Monsieur Mazaud's design of similar facilities e.g. at Portsmouth and Marchwood²⁴⁶.

²³⁸ DC21 at p.2 – see also paras. 3.4/5.

²³⁹ CD14A at pp.94-96.

²⁴⁰ WT23/24 – put to Ms Demmar in xx by NWT.

²⁴¹ VE4.16, to be read with DC26, which was extracts from the Green Infrastructure Strategy provided with Mrs Bland's 2nd Supplementary proof.

²⁴² See para. 4.20 of Mrs Bland's 2nd Supplementary proof.

²⁴³ Para. 6.53 of Mrs Bland's original proof, DC0.

²⁴⁴ Para. 5.4 of VE3.2.

²⁴⁵ Paras. 1.4-1.7 of VE3.2.

²⁴⁶ Para. 1.8 and figure 1 of VE3.2.

204. The care taken to ensure that the design is appropriate for the site and its surroundings was made clear by Monsieur Mazaud. That was true with regard to the overall design concept as well as detailed design considerations such as the proposed materials, to which a great deal of attention was given²⁴⁷. The design objectives are clear, appropriate and have been achieved. There was no criticism of these or of the DAS. Indeed there was no criticism of the design at the Inquiry other than from PAIN.
205. One of PAIN's main challenges to Monsieur Mazaud (in xx) related to the lack of consultation after the planning application was submitted. That is a very unconvincing argument given the careful consultation and design changes that had taken place before the application was submitted²⁴⁸. The 12 Community Liaison Group meetings that have taken place also need to be taken into account²⁴⁹. Discussion from the CLG was, as Mr Mitchell told the Inquiry (under xx by AW) fed into the site selection process. Of course the reality of this criticism is that the only change that would have satisfied PAIN would have been the withdrawal of the application. So the criticism is hollow. It must be remembered that PAIN has been significantly assisted by members of MAIN (including of course Mr Downen) who successfully campaigned against the use of the Forest Green site in the Mansfield District.
206. PAIN referred also to Monsieur Mazaud's reference to the latest DEFRA guidance on the design of these facilities. PAIN argued that, contrary to his assertion, Monsieur Mazaud could not have relied upon this in developing the design for Rufford colliery ERF because the application was submitted before the Design Guide was published. Again this criticism is hollow as Monsieur Mazaud had a large input into that Guidance, which reflects and commends his own design approach. Further, the part of the DEFRA Guidance that was relied upon related solely to site selection and consultation and not to any substantive aspect of the design²⁵⁰.
207. In summary, there can be no overriding landscape or visual objection to the proposals:
- (1) The landscape is of a character that can accommodate such large structures;
 - (2) Neither the site nor any of the area has any national designation;
 - (3) The SLA is in any event out of date, not justified and about to be replaced;
 - (4) The location has the benefit of being currently industrial in nature being a former colliery;
 - (5) The visual impact is slight, as NSDC agree. Thus Policy E17 is complied with; and

²⁴⁷ Paras. 4.9-4.12 of VE3.2.

²⁴⁸ Paras 4.1-4.7 of VE3.2.

²⁴⁹ As explained by Mr Mitchell. This group will meet up again during both operation and construction, as Mr Mitchell further explained (in-chief) if permission is granted.

²⁵⁰ CD102, Extract from Designing Waste Facilities, a guide to modern design in waste. 2008 by ENVIROS on behalf of DEFRA.

(6) NSDC are thus right to accept that paragraph 21(i) of PPS10, which is critical to this matter, is complied with (and see now paragraphs 5.9.7/17 of Revised Draft NPS EN-1, CD85A).

The impact of the development on nature conservation interests and the scope for measures to mitigate or compensate for that impact

208. The position remains at the end of the inquiry that Natural England do not object to the grant of planning permission for this scheme. That was their final formal position when consulted on the application by the NCC as WPA.²⁵¹
209. It is not as though they gave the application only cursory examination. They did originally object on the basis that insufficient detail had been provided on the likely air pollution impacts from the proposed facility. They had particular concerns about nitrogen deposition on the Rainworth Heath and Strawberry Hill SSSI's and took the trouble to attend site visits with ecologists from RPS, the consultants engaged by Veolia, and to consider the report that was prepared by RPS following those visits.²⁵² The information that was thereby provided to them allowed them to withdraw their objection in their formal consultation response under S.28 of the Wildlife and Countryside Act 1981.²⁵³
210. Similarly, the Environment Agency fulfilled their statutory duty of considering the potential effects on interests of nature conservation value²⁵⁴ in their determination of the application for an Environmental Permit²⁵⁵. Their decision document sets out very comprehensively the consideration they gave to these matters.²⁵⁶ They also consulted Natural England²⁵⁷ and the Environment Agency also concluded "the emissions to air from the proposed facility would be unlikely to have a significant effect upon the health or condition of the assessed sites."²⁵⁸ They assessed all the sites of European, national and local designation.
211. The County Council also of course resolved to grant planning permission on the application and considered the internal advice of their NCC Conservation Group (Nature Conservation) who did not object and requested information in relation to common lizards, bee orchids and lighting and suggested conditions to deal with the timing of construction in relation to the bird nesting season, the species to be used in landscaping the site and monitoring of bryophyte and lichen communities on the SSSI which NE and the EA had already considered.
212. Ecology was considered over 40 paragraphs in the report to the NCC Planning and Licensing Committee²⁵⁹ and the conclusion was reached that

²⁵¹ CD5p

²⁵² VE9.8 Tab 4

²⁵³ VE9.8 Tab 5

²⁵⁴ CD 44 p.93 §D2, §D3 and p.95 §D.11

²⁵⁵ See Inspector's consideration 8 on p.4 of CD63.

²⁵⁶ CD44 p. 62 to 73

²⁵⁷ CD44 p.72 and p.169

²⁵⁸ CD44 p.72

²⁵⁹ CD 4 § 13.114 to 144

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- ecological impacts could be satisfactorily mitigated through planning conditions and obligations.²⁶⁰
213. Of course all these judgments were reached before the issue of the possibility of some part of the area being designated a Special Protection Area by reason of the populations of woodlark and nightjar was raised by the Wildlife Trust in its evidence submitted four weeks before the start of the inquiry. Veolia responded responsibly to that issue being raised by immediately contacting NE for their views.
214. It is right that, in their response to the consultation on the request for a scoping opinion in 2007, the NWT identified a number of matters to be addressed in the EIA and one of those matters was “implications for the proposed Sherwood nightjar SPA.” NE made no reference in their consultation response to any such possibility or proposal.
215. The ES did then indeed record the NWT’s response and addressed nightjar and breeding birds generally.²⁶¹ No consultation response on the ES referred to any possibility of an SPA. Neither the NWT nor NE mentioned any such possibility. In fact the applicants did further bird survey work in the response to the Regulation 19 request for further information and expressly reported nightjar and woodlark observations carried out by qualified ornithologists.
216. There was no further mention of any possibility of an SPA being classified until the NWT’s evidence was submitted on 8 September 2009. They had made no mention of the matter in their Statement of Case of May 2009.
217. The matter having been raised, the applicants contacted NE and sought and were granted an adjournment of the inquiry to enable the matter to be thoroughly investigated.
218. At the pre-inquiry meeting on 16 February 2010, after RPS had prepared and circulated the Supplementary Environmental Information²⁶², NE confirmed that the position remained that they had no objection in principle to the proposed development and they agreed to appear at the reconvened inquiry. They were of the view that there was the possibility of Sherwood Forest being recommended for future classification as a SPA on the basis of the evidence from the national surveys and the interpretation of those data. They were of the view that on the basis of the national surveys of 2004 and 2006 the application site does not fall within the Indicative Core Area for the birds²⁶³. They concluded that Sherwood Forest is not a “should be” SPA, nor yet a potential or pSPA afforded the same level of protection by reason of the Government’s policy in PPS9 as a classified site, but they recommended that the SoS should adopt a “risk-based approach”.
219. In evidence²⁶⁴ submitted on 16 March 2010, Mr. Clifton took into account the SEI and its conclusion and was able largely to agree. He reported: “The construction and operational impacts are both considered to generate a

²⁶⁰ CD4 §15.18

²⁶¹ CD1 §9.3.16-19, 9.4.3, 9.40, 9.6.42, 9.9.2, 9.9.3

²⁶² CD 83

²⁶³ NE3 p.4 a) and b)

²⁶⁴ NE5

slight adverse impact on breeding birds including woodlark and nightjar. Natural England would not disagree with this assessment regarding noise and light or the statements that nightjar would be unaffected because they are only active at night, but assuming from the supporting distributional data that no birds would be roosting or nesting during the day within the range of excessive noise and lighting. We would consider it is not unreasonable to conclude that birds could habituate to fairly predictable, constant noise at levels up to 40-50 dB. Although there is little specific information provided on the likely adverse effects caused by lighting of the facility, we would consider any light spillage would be minimised sufficiently using screening and shielding.”²⁶⁵

220. Mr Clifton then referred to the offsetting proposals and concluded that Natural England would maintain its position of no objection to this development providing the proposed measures to create and enhance habitat for breeding nightjar and woodlark and to facilitate its long-term conservation management were secure.²⁶⁶ He sought legally enforceable obligations, to ensure that the offsetting and enhancement provisions would be in place before the development began and to secure long-term management.
221. Mr Clifton went on to consider the position as if there were an assessment under the then Habitats Regulations (now Conservation Regulations 2010) and concluded that the development alone would be unlikely to have a significant effect on the birds or “the qualifying interest features”, but that there was currently insufficient information available to determine whether the development in combination with other plans and projects would be likely to have a significant effect on the qualifying interest features of breeding nightjar and woodlark.²⁶⁷ He particularly sought information on combined aerial emissions and noise.²⁶⁸
222. It was on this basis that Dr Buisson prepared his evidence VE 12.2. He assessed the potential effects on the birds during construction and operation of the development itself and came to the view that, on the application site, there would be a loss of part of a breeding territory for woodlark and the loss of foraging area for nightjar²⁶⁹. He assessed other potential effects namely loss of the potential to create heathland, potential degradation of habitats by air pollution and water pollution and potential disturbance by noise, light, human activity and by vehicle movements and the creation of an obstacle to bird movement. He concluded they would have no adverse effect on the populations of nightjar and woodlark.²⁷⁰
223. Dr Buisson proposed that the loss of part of a woodlark territory, and loss of the foraging area for nightjar, should be offset by the habitat creation and management programme agreed with the Forestry Commission in the Golf Course Plantation.²⁷¹ Dr Buisson judged that with the mitigation, offsetting and enhancement in place, the Rufford ERF would not have an overall

²⁶⁵ NE5§ 6.2-6.6

²⁶⁶ NE5§ 6.6

²⁶⁷ §7.5

²⁶⁸ §7.10

²⁶⁹ VE12.2 paras 3.28-3.33, 3.42, 4.67-4.74

²⁷⁰ VE 12.2 §4.124-136

²⁷¹ VE12.2 § 4.135

adverse effect on the populations of the birds.²⁷² His logical conclusion was and is that since the proposed ERF project as a whole gives rise to no adverse effects then there is no effect to add in combination with the effects of any other project. Nevertheless in order to address any concern there might be that a number of non-significant effects might be added together to give rise to a significant effect in combination he went on to give detailed consideration to a number of projects in the area that are proposed or permitted but not constructed and listed those projects. They are the proposed UK Coal Business Park, the proposed extension to the Lafarge sand quarry, the Lindhurst mixed use development, the Lindhurst wind farm, the extension to Sherwood House and the proposed commercial development at Breckfield Nursery. Daniel Smyth carried out an assessment of potential in combination air quality effects²⁷³ with Professor Wade²⁷⁴ assessing the potential ecological effects of the air quality assessment carried out by Mr. Smyth. Drawing on their combined expertise these three witnesses were able to conclude that there would not be an in combination adverse effect from the ERF and these other projects.

224. After this evidence had been exchanged and the inquiry had reconvened, NE produced a supplement to Mr. Clifton's evidence²⁷⁵ on the fourth sitting day of the reconvened inquiry in which they advised that a total of 21 plans and projects they listed may be considered in combination with the ERF to have a likely significant effect and they identified potential impacts of a far wider range than had been identified in Mr. Clifton's earlier evidence. They went on to advise that an Appropriate Assessment of the implications for the Sherwood Forest site should be undertaken to ascertain whether there would be an adverse effect on the integrity "of the Sherwood Forest site". It was to carry out that further work so as to ensure the SoS was fully informed therefore and would not need to reconvene the inquiry after receipt of the Inspector's report that the inquiry was adjourned again. That further work resulted in the In-Combination Assessment (I-CA) of those uncompleted plans and projects, within 5km of the ICA and IBA boundaries, where the details of the proposals are reasonably clear and the effects are likely to combine with the ERF to produce a significant effect on the birds or their habitat²⁷⁶. NE now agree that through the evidence and information submitted to the inquiry the SoS has sufficient information to enable an Appropriate Assessment to be carried out²⁷⁷.

225. The methodology of that Assessment is best explained at paragraphs 2.7 to 2.9 and 3.30 to 3.32 of the I-CA and as further explained by Dr Buisson in chief. It is based on the common sense view that what is being assessed is whether any effects from the proposed ERF could act in combination with any effects from other projects or plans so as to have an overall combined effect on the populations of nightjar and woodlark. So first of all the I-CA looked at an area judged by Dr Buisson and Professor Wade where there might be potential effects from the ERF and then considered areas which might experience effects from other projects or plans. Where there was an

²⁷² *ibid.* §4.142

²⁷³ VE5.9

²⁷⁴ VE9.7

²⁷⁵ NE5.1

²⁷⁶ VE22.

²⁷⁷ NE16 §9

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- overlap of those spheres of influence the witnesses looked at potential effects of all and any types that there might be on the same area, habitat or sub-population of nightjar and woodlark to assess whether they would combine together to add up to a likely significant effect directly on the birds or indirectly by affecting the extent or suitability of their habitat.
226. The witnesses went on to consider effects of the same type as might arise from the ERF such as noise or aerial emissions that might be caused by the other projects or plans in other parts of the Indicative Core Area or the Important Bird Area as defined by NE and the RSPB respectively²⁷⁸ that might add up to a likely significant effect on the populations of the birds by affecting the extent or suitability of their habitat.
227. Finally these witnesses looked at potential effects such as would not arise from the ERF (such as bird mortality from wind turbines) but which could arise from the other plans and projects in other areas of the ICA or IBA but which could combine together to add up to a likely significant effect on the populations of the birds either directly or indirectly by affecting the extent or suitability of their habitat.
228. It is only these situations that are relevant to the decision whether to grant planning permission for the ERF. If the ERF would make no difference to the populations of the birds by affecting the extent or suitability of their habitat even though other projects or plans might, by for example a wind turbine causing fatalities, then that is not relevant to the decision that is before this inquiry.
229. So far as plans or projects that have not yet been permitted or approved are concerned, the I-CA took the sensible approach that the decision makers have to be assumed to be rational. If they are not their decision can be subject to legal challenge. It would be absurd to make an assessment on the basis that decision makers would have no regard to interests of acknowledged importance.
230. The methodology employed in the I-CA is sound, logical and robust. The following paragraphs turn to the criticisms made of the bases for the assessments.
231. Noise: Dr Buisson explained that he had considered the research papers in his VE12.4 and that, whilst these do not enable noise limits to be derived for woodlark or nightjar, his synthesis of the data when taken in the round suggested that 55dBA would be a noise climate that would not affect woodlark and nightjar. That conclusion is consistent with the position of the EA in their decision document where they report in response to a concern addressed to them by NWT about breeding birds "EA guidance provides noise levels to be used as an indicator in assessments: where specific noise from an industry measured or modelled at the habitat/nest site is below 55LAeq dB it is considered unlikely that the installation will be having an adverse impact on bird species."²⁷⁹

²⁷⁸ See Plan at Fig 1 of the I-CA VE22

²⁷⁹ CD44 p.189-190 ref 34

232. VE11.5 Figure 2 shows that with standard operation of the ERF, including on-site HGV movements, the noise levels rapidly reduce with distance from the site so that noise levels are below 50dBA within a very short distance of the site boundary. The recorded nest sites for both species are within areas where the noise levels are below 40dBA - comparable to normal daytime rural sounds.²⁸⁰ It is clear from recent records that nightjar are content to nest within a high level of noise close to the A614²⁸¹ and have chosen to return to those nest sites over a number of years. The nest closest to the A614 has been just as productive of eggs and fledglings as the nest further away from the road near Strawberry Hill. VE11.5 addresses Dr Day's point about terrain and vegetation masking sounds to the nest close to the A614.
233. The nesting season for woodlark and nightjar runs from March through until August and whilst woodlark may also be found close to the ERF site, outside that period, they tend to be in flocks and content to cover a large area.²⁸² During construction, the proposed condition²⁸³ suggests an LAeq(1 hour) boundary limit of 85dB, when the birds are not nesting. In the breeding season, this could tighten to 78dB; however, contractors have advised that stricter limits might not be achievable and that even at this (78dB) level, the construction period might extend beyond the anticipated 3 years. VE11.8 explains that a continuous sound level of 78dB, at the boundary, would result in levels of 54dB or less at all nest sites that have been recorded in the past. Dr Buisson was able to explain in chief that these birds are not species that are unduly sensitive to sudden loud noises, unlike dogs and ducks who frighten each other.
234. The matter of frequency levels, of bird communication, is addressed in VE11.7. This shows that the sounds of nightjar and woodlark are unlikely to be masked by the relatively low frequency noise from the ERF and the associated traffic.
235. Air Quality: The initial concerns raised by Mrs Bradley²⁸⁴ about the methodology of air quality assessment carried out by Mr. Smyth were addressed fully by him in his rebuttal evidence VE5.6 and have not subsequently been pursued by NWT. Her suggestions that the use of critical loads and critical levels was not reliable, because papers produced at workshops in Peterborough and York, were not supported by the actual content of those papers and nor by the EA's Horizontal Guidance which was issued in April and updated in May of this year²⁸⁵; was agreed with Natural England²⁸⁶; is directly applicable to (SPA) habitat assessment; and, supports Mr Smyth's methodology. NE and EA agree with his approach. Mrs Bradley had simply misunderstood the approach of the I-CA in considering the cumulative effects of traffic emissions which had already taken into account all traffic from "committed developments", which expressly included the Business Park²⁸⁷, and which found that NOx concentrations in Rainworth

²⁸⁰ VE11.2 p.5

²⁸¹ See ES Ch 12 Fig 12.3 60-65 dBA contour and cf WT12 Maps 4,8,9,10,11 and WT19 App3

²⁸² Prof. Wade during conditions session

²⁸³ CD103(c) condition 15

²⁸⁴ WT 1

²⁸⁵ CD113

²⁸⁶ VE9.18

²⁸⁷ See start of her XX

Heath SSSI would be at least 6.7 ug.m^{-3} below the critical level²⁸⁸. There would have to be an unfeasibly large increase in traffic on Colliery Road to even reach levels of concern²⁸⁹.

236. Both NE and the EA were satisfied on the basis of Mr. Smyth's and, in the latter case, their own modelling that there would be no harmful effects on sites of nature conservation interest by reason of the very small quantities of additional nitrogen and acid depositions. Indeed, in deciding to grant the EP, the EA carried out an appropriate assessment of the potential impact of emissions on local habitat sites.²⁹⁰ This found that the predicted concentrations of substances of concern were dominated by the existing background concentrations. The EA concluded that the emissions were unlikely to have a significant effect on the health/condition of the assessed sites which included not only statutorily designated heathland SSSIs, such as those at Rainworth, Clipstone and Strawberry Hill, but also the Birklands and Bilhaugh Special Area of Conservation (SAC) and non-statutory conservation sites such as the Rufford Colliery SINC lowland heath. Like Mr. Smyth the EA drew attention to the ever improving and dramatically improving background levels of air quality and were reassured that the conservative basis of the assessment of nitrogen emissions being at the WID limits at all times and being emitted at those levels 100% of the time gave reassurance that no harm would be caused. The EA agreed to incorporate a monitoring condition in the permit to provide further reassurance pointing out that "conditions of the permit require the operator to monitor and review the operation of the facility on an ongoing basis to ensure that the installation remains BAT and environmental impact is minimised. The EA will also monitor and review the operation of the proposed facility based upon the monitoring data submitted to the Agency and the results of site visits and audits." This, together with the S.106 commitment²⁹¹ to monitor the ecology of Rainworth Heath SSSI over a period of 21 years, and of Spring Hill SINC over a period of 5 years, should provide all the reassurance on this issue that the SoS needs. It is clear that the heathland itself and the particularly sensitive vegetation within the SSSI such as the mosses and bryophytes will be protected.
237. Dr Buisson was able to explain that the tiny quantities of additional emissions and depositions will have no negative effect on the birds. Both species feed on invertebrates. Nightjar feed on moths and beetles at night. Dr Day agreed that any increased nitrogen deposition would have no effect on nightjar nesting²⁹². Woodlarks need sparse vegetation on the ground. In Dr. Buisson's expert judgment the additional deposition would not be sufficient to accelerate growth so as to change the structure of the vegetation to an extent that it would affect the birds. In fact the invertebrate populations might be enhanced.
238. Disturbance and Recreation: The first point stressed by Dr Buisson is that the ERF itself is not going to add to recreational pressures. Dr Day's studies are concerned with urban and especially housing development. The

²⁸⁸ VE22 footnote p33 and Table 5

²⁸⁹ CD116d para 109

²⁹⁰ CD44 C7.3.4

²⁹¹ VE62

²⁹² Orally in chief and in XX

- workforce at the ERF will be at work, subject to the regulations of their employment, and with no encouragement to wander off site. On the contrary there is no particular reason to do so and the security fencing proposed around the site will prevent ready access to adjacent habitats.²⁹³
239. Dr Buisson is satisfied from the evidence that it is the pattern of rotational felling which has resulted in nightjar movement southward to take advantage of the increase in suitable habitat and not recreational pressures.²⁹⁴ The Note and Table put to Dr Day in XX²⁹⁵ shows that the Forestry Commission has been successful in maintaining and indeed increasing the populations of the birds in the Sherwood Forest Pines Park even with the increase in visitors to the area.
240. We commend to the SoS the evidence of Dr Buisson and Professor Wade on the issue of the likelihood of significant effects on the populations of the birds. With the offsetting, mitigation and enhancement secured they are satisfied that there would be no likely significant effect. The views of NWT are by contrast overstated and unduly pessimistic.
241. NE's views as expressed in their letter of 24 September 2010²⁹⁶ concur with that of Dr Buisson and Professor Wade. They rightly identified and characterised the proposals in the Golf Course Plantation as "seeking to offset the accepted loss of breeding and feeding habitat and likely disturbance effects caused by the ERF by the creation of suitable permanent open habitat within an area of coniferous plantation woodland." They explained: "We believe that these proposals as outlined accord with the aims and objectives of a number of conservation strategies are ecologically sound and that the restoration of heathland habitat using the methodologies proposed can be successfully delivered." We commend those views in preference to the negative approach of Dr Day. Mrs. Bradley in XX accepted that the GCP had been heathland in the past and heathland could be recreated upon it. The 1920's map in Hopkinson's book²⁹⁷ clearly showed the GCP then as heathland as Mrs Bradley, but not Dr Day, accepted. The GCP Appraisal²⁹⁸ reported the soil as acidic and suitable for restoration to heathland and the Biodiversity Action Plan for conifer plantation states that such woodlands have often displaced more biodiverse habitat, such as heathland, and that there is potential for restoration to heathland²⁹⁹.
242. NE went on to express concerns about the habitat being created in the GCP "being subject to disturbance effects and this could limit the use and occupancy of this area by breeding and feeding nightjar and woodlark" and so they welcomed the proposals to manage access and recreational activity in the GCP.
243. So NE's position was that, in terms of the ICA and when judged against the provisional conservation objectives which they had provided³⁰⁰ (and which

²⁹³ VE12.2 §4.50-58

²⁹⁴ VE12.6

²⁹⁵ VE31

²⁹⁶ NE15

²⁹⁷ WT1 ref at p.10 footnote 3 and VE35

²⁹⁸ VE9.13

²⁹⁹ VE9.13 §5.5,5.6

³⁰⁰ NE14

- are accepted as being sound by Dr Buisson), “our position would be that NE accept the works as proposed in that the ERF does not result in the loss of extant habitat from the site (i.e. the ICA) and the offsetting measures will avoid a reduction in the population of woodlark and nightjar in the ICA subject to...” and they then set out the provisos which sought assurances as to (i) enforceability and timing (ii) (a) suitable access management and (b) monitoring; (iii) the availability of the new habitat before the development is begun; and (iv) a commitment to support for Operation Nebraska.
244. NE recognised that the project as a whole with the offsetting secured “will avoid a reduction in the population of nightjar and woodlark”.
245. That view was based on the ICA boundary, which does not include the application site. However, NE had already recognised in that same letter and had “agreed in principle that the provision of new habitat within the site (i.e. within the SPA or pSPA) is capable of mitigating for the loss of, or damage to, habitat or the disturbance of birds within an SPA albeit that in practice that may be difficult to deliver.” So NE accept the principle of the approach adopted and they further accept that the position with the A11 widening scheme is an example of that approach.³⁰¹ Certainly, in principle, it makes no difference whether the loss or damage is to an area within the pSPA or SPA. The good sense of that is that the precise boundary can make no difference to the birds in question. The quality and extent of the habitat in question does not depend on the line of the boundary. And as Dr Buisson explained there is no distinction in ecological terms whether the ERF site is within or outside the pSPA. What is important is whether the offsetting land is capable of supporting the birds. Dr Buisson and Professor Wade agree that it is and it appears from the NE letter that they too accept that in practical terms - subject to the mechanisms being in place to achieve it.
246. With regard to the A11 scheme, the position was that some 14.88ha of forestry plantation within the SPA would be directly lost. That loss had the potential to cause an adverse impact through loss of nightjar and woodlark territory.³⁰² It may not have currently supported the birds but it had the potential to do so when the trees were felled and it is probably that it was because it was this potential that was being lost that only some 6ha of existing plantation woodland within the SPA was going to be managed by felling to provide suitable habitat.³⁰³ Nevertheless whether it is habitat currently being used or habitat which would be used in the future by the birds the fact remains that this is an example of where a mitigation scheme was accepted by NE involving the creation of new habitat within an SPA to compensate for loss of an area also within the SPA which the birds would in the normal course of events use as habitat. The principle remains the same: the success of the practice is a matter for consideration of the evidence in a particular case.
247. In practical terms the ERF project, including the offsetting land, would result in the loss of part of a woodlark territory and part of a nightjar foraging area. Notwithstanding this, as Dr Buisson explained to the Inspector, it would be reasonable to assume that the application site would be suitable

³⁰¹ NE16§7

³⁰² CD98 see 5.2.1 Table 5.1 first row and Table 5.3 N1 and Table 5.4 W1, §6.1.1

³⁰³ CD98 §6.5.6 to 8 and 6.5.14

for nesting by both species, if it were to be restored to heathland under the terms of the extant planning permission; albeit that it might not realise its full potential if dogs were allowed to roam here. However, what would be created at the GCP would be three woodlark territories via the creation of some 21 hectares of heathland and nightjar foraging along 2.4 km of deciduous forestry edge³⁰⁴. As Dr Buisson explained in chief, the assumption is that this would be equivalent to two territories in addition to one that can be said to exist as a result of rotation; the conifer plantation that is the GCP is intermittently functional as habitat for the birds when the trees have been felled and before they grow to the extent that appropriate habitat is not available. The trees in the GCP were planted in 1995 so it is to be expected that whilst birds were observed there in 1998 they were not there by 2000, nor have they been since. The trees would not be felled in the normal course of events for many decades – Dr Buisson gave a range of 30 to 60 years – so that for that period the GCP would not be providing suitable habitat for the birds. With the offsetting arrangements in place the GCP would provide immediate permanent territories for three woodlark and extensive foraging for nightjar – as well as providing some 21 hectares of heathland exactly in keeping with the Vision for Sherwood which expressly looks for “all major opportunities for restoration (to heathland) identified including reversion from forestry...using best practice techniques.”³⁰⁵ It would help to fulfil Mrs Bradley’s dream of a walk from Oak Tree Heath SSSI to Rufford Country Park passing through or alongside heathland.³⁰⁶

248. Turning to the reservations that have been expressed about habitat creation and its maintenance on the GCP, firstly, the draft planning obligation now meets all the enforceability concerns expressed by NWT and NSDC. The obligations bind the interests in the GCP land. NE was satisfied as to that at the conditions and S.106 session of the inquiry.
249. The Habitat Offsetting and Enhancement Plan is to be agreed in consultation with NCC as WDA and as WPA, NE and the FC and it will be submitted to NSDC as enforcing authority. Its content is therefore under the control of the public authorities and it must be implemented before the development begins and its provisions have to continue to be carried out. That process will allow all concerns to be addressed, including such matters as the potential presence of goshawk.
250. Similarly the Public Access Strategy has to be agreed, implemented and maintained in place. It has been recognised by the WT that Operation Nebraska has already been a great success in controlling behaviour in the area³⁰⁷ and the planning obligation secures significant and continuing financial support for that and any successor initiatives, as NE sought. The area is not now a valued area for legitimate recreation as it has been a commercial plantation since 1995 and when the habitat has been created and the area made more open it will be a matter for the public authorities to determine the extent of any legitimate access through the terms of the Public Access Strategy. Even if the area were to become available for public access as heathland, under the Countryside and Rights of Way Act, there is

³⁰⁴ VE9.9 §3.4 and 4.1

³⁰⁵ WT10 1st Appendix 3rd page

³⁰⁶ See VE36

³⁰⁷ WT15 §2.1.12,13 and WT19 p.22 §6.11

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- provision within that Act for controlling access for the sake of nature conservation if that were thought appropriate³⁰⁸.
251. The haul road has not been used since 2003 and so there will have already been 7 years of leaching away of nitrogen and denitrification. The effects of the deposition of nitrogen from the vehicles that used to use the haul road is clearly limited to the sides of the road as can be seen in Figure 3 of the Ecological Appraisal of the GCP³⁰⁹. Professor Wade is confident that it can be appropriately restored.
252. Dr Buisson and Professor Wade firmly believe that the ERF project as a whole will not be likely to have a significant effect on the birds or the pSPA. They have provided sound and cogent expert evidence to support that judgement, which should therefore carry significant weight. They have gone further and provided the information necessary for an AA to be done. At the end of that process Dr Buisson has considered the position if there were found to be a significant effect and has looked to see whether the project as a whole (taking account of mitigation, offsetting and enhancement measures secured by the planning obligations) would adversely affect the integrity of any pSPA³¹⁰. In doing so, he took into account the definition of the integrity of the site in paragraph 20 of Circular 06/2005 and he applied that definition in reaching his conclusions both as regards the ICA and the IBA. He concluded that looking at the coherence of the ecological structures and functions across the whole of the pSPA areas and the ability of the areas to sustain the habitats, as well as the complex of habitats and the levels of populations of the birds, the ERF project would not lead to an adverse effect on the integrity of the site. NE accept that the information is available to make that judgement but they do not seek to do so themselves.
253. The remaining nature conservation interests, namely the common lizards, the bee orchids and the toads are properly addressed through the conditions and planning obligations.
254. In conclusion, on nature conservation, it is worthwhile to take a step back from the intricacies of European law and practice. The reality is that the application site now provides a limited part of a territory for woodlark and some foraging for nightjar. The application project in its totality will provide 3 woodlark territories and extensive foraging for nightjar and the restoration of an area that was in the 20's and probably up to the end of the Second World War heathland. All of those will be provided in an area subject to continued and supervised maintenance and control expressly managed for the benefit of the wildlife. On any common sense assessment that can only be an improvement for the wildlife of the area and common sense must have a part to play in these determinations. Fortunately common sense here does coincide with the European and domestic legal and policy framework. Assessed overall and fairly this project would not have a significant effect and would not adversely affect the integrity of any area of Sherwood Forest which has the potential to become an SPA.

³⁰⁸ s.26

³⁰⁹ VE9.13

³¹⁰ VE12.6 Chapter 7

Whether the development would represent a sustainable form of waste management that would in no way prejudice movement up the waste hierarchy and, if not, whether the need for the development would outweigh any harm that it might cause

255. The issue of prejudicing movement up the waste hierarchy is addressed above. Even so, the fundamental point is that PPS10 requires applicants to demonstrate that there will be no prejudice to movement up the waste hierarchy only “in the case of waste disposal facilities”³¹¹. In PPS10 terms, the facility proposed here is not a “waste disposal activity” because it “uses waste as a source of energy”³¹² and “generates energy from waste”³¹³. Furthermore, the EA are satisfied and Mr. Kirkman’s evidence makes clear that this facility is perfectly capable of achieving the efficiency level needed to show that the facility would be a recovery facility in terms of the WFD and the Regulations made to transpose its provision into domestic law. The Inspector at Ince was adamant that “the contention that increasing waste incineration will reduce recycling and resource recovery is not supported in national policy statements and is directly countered in paragraph 23 of Chapter 5 of Waste Strategy England.” The SoS agreed only 14 months ago and there have been no more recent pronouncements of Government policy. Indeed, the recently issued revised draft NPS’s are expressly supportive of EfW. There is no policy support for the view that EfW undermines recycling and no requirement in national or any other policy to demonstrate the point
256. In terms of need, the first question to be addressed is whether a quantitative need for the ERF project has to be shown.
257. PPS10 advises that where proposals are consistent with an up-to-date development plan, waste planning authorities should not require applicants for new or enhanced waste management facilities to demonstrate a quantitative or market need for their proposal³¹⁴.
258. The development plan here comprises the EMRP, the (WLP) Waste Local Plan (which is largely silent on EfW beyond identifying the Eastcroft facility for increased capacity³¹⁵) and the (NSLP) Newark and Sherwood Local Plan³¹⁶. The NSLP was adopted in 1999 but of course Policy E17 was saved by the SoS³¹⁷, in 2007, after the Council had expressly changed its mind and sought its saving. Furthermore, the Council do not propose the replacement of E17 in their emerging Core Strategy and so this Policy will remain part of the development plan after the CS has been adopted.
259. Therefore, it is right to characterise E17 as being a policy in an up to date development plan. If it is accepted that the proposals comply with E17, and specifically with the second criterion addressing the degree of intrusion into the openness of the countryside, then in accordance with the advice in PPS10 the applicants should not be required to demonstrate need.

³¹¹ PPS10 #25

³¹² PPS10 #1

³¹³ PPS10 Annex C

³¹⁴ CD26§ 22

³¹⁵ CD10 p.88 Policy W6.1

³¹⁶ CD13

³¹⁷ CD15

260. This is entirely consistent with the recognition in PPS10 that a step-change is needed in the way waste is handled and that there has to be significant new investment in waste management facilities³¹⁸. Furthermore, WS 2007 makes it clear that EfW is an important element of the wider energy policy context³¹⁹ and PPS1(S) stresses that applicants for energy development are not required to demonstrate overall need.³²⁰ The recent revised draft NPS clears up any doubt as to whether the government considers EfW to be low carbon and renewable energy: it clearly does³²¹. It expressly deals with energy from combustion of waste in the draft Statement entitled renewable energy.
261. It was as a result of PPS1(S) that the Inspector in the Eastcroft inquiry, dealing with in effect a merchant C&I waste extension to the incinerator there, concluded that the need argument raised before him was not relevant.³²² Furthermore the Inspector at Ince again dealing with a merchant C&I facility found that neither waste nor energy policy sought to place a rigid cap on waste management capacity³²³ and that need and alternative approaches to waste management were not “germane issues” given the policy support to EfW in WS 2007 and PPS10³²⁴. The SoS agreed with all the Inspector’s reasoning and conclusions³²⁵ noting that the Energy White Paper includes the view that a diverse mix of technologies, including energy from waste generation, will be required to combat climate change and provide secure, clean and affordable energy. He remarked that the market brings forward proposals to meet the needs of those policies which are then considered on their individual merits and expressly noted “neither waste nor energy policy places a rigid cap on the development of waste management facilities.”³²⁶ It would be inconsistent with that approach to require an applicant to prove a quantitative need for a facility when PPS10 recognises that the planning system is pivotal to the adequate and timely provision of the new waste facilities that will have to come forward to achieve the step change in waste management that PPS10 requires.
262. Furthermore, this inquiry has brought home how fraught with uncertainty is the process of considering and assessing waste statistics. We do not now have a waste local plan with up to date waste figures³²⁷ but the Government’s guidance is that, even if RSS is revoked, we can continue to rely on the background figures. Mr Kondakor was very dismissive of the degree of attention such figures received in the public examination of the RSS but the fact remains that they went through that process of public scrutiny for the purpose of determining their soundness and, having done so, were adopted as part of the statutory development plan only some 18 months ago. It cannot have been the Coalition Government’s intention that such figures on waste should simply be cast aside.

³¹⁸ CD26 §1

³¹⁹ CD40 p.76 §18

³²⁰ CD20 §20

³²¹ CD86A section 2.5

³²² CD 61 §344

³²³ CD110b § 11.101

³²⁴ IR11.124,125 and DL6.1

³²⁵ CD110C § 6.1

³²⁶ CD110c § 6.4

³²⁷ The WLP figures only ran to 2004: CD 10§1.23

263. If a quantitative approach is required, three elements need to be considered: (i) waste arisings and their growth or reduction; (ii) the rates of recycling and composting of that waste to leave a residual waste; and (iii) the availability and type of facilities to deal with that residual waste.
264. (i) Waste arisings: The RSS provided figures for MSW and C&I waste arisings on a Nottinghamshire and Nottingham City basis for the period from 2009/2010³²⁸ to 2019/20. These figures were derived from the RWS.³²⁹ It is correct that these figures had been derived from earlier 2003 figures³³⁰, but the fact is that when the RSS was adopted these were considered to be the most reliable figures on which to base policy requirements as to future waste capacity. The inherent uncertainty in these figures means that if the goal of moving waste up the hierarchy is to be achieved there must be comfort that sufficient capacity can be planned to achieve that. Undershooting means more landfill. That has been expressly recognised in the emerging joint Waste Core Strategy in which the (Nottinghamshire) County and (Nottingham) City³³¹ point out that underprovision would mean “remote waste disposal options.”
265. 1.7% growth per annum was assumed with zero growth assumed “from 2016”³³². It is these figures that Mr Standen used in his Table 6.1 and in his VE25 tables. He was right therefore and Mr. Kondakor was wrong to understand that growth should be zero from 2016/7 with 1.7% up to then.
266. It is true that growth has not been as high as has been assumed in these figures, but there has been the deepest recession since the Second World War. Again the draft Waste Core Strategy points out “we cannot rule out the possibility that growth will resume at recent historic rates when the economy recovers.”³³³ Many new homes are planned for the county, as NCC have pointed out. The EA’s “Waste Information 2009” makes the link between the “fall in economic activity with an associated reduction in waste generated.”³³⁴
267. Mr. Kondakor’s approach is to look at figures over a short time frame. This is unwise when there are so many uncertainties and when the need to move from landfill is pressing. DEFRA considered these very points when they wrote to the County Council approving the waste PFI contract. In essence they accepted that the recent figures showed a slowing in waste production, but they continue to endorse the approach of the PFI contract which seeks to have this ERF on line as soon as possible and which they recognised as being flexible enough to deal with these eventualities
268. An area of even greater uncertainty is C&I waste. There are figures in the RWS and the RSS, but relevant statistics are famously unreliable and short to come by. Mr. Kondakor again³³⁵ looks to one year’s landfilling to calculate back a C&I arisings figure on the assumption that 50% had been recycled.

³²⁸ CD7 p.82 §3.3.58 to 67 and Appendix 4 p.172

³²⁹ CD41 App 5

³³⁰ CD7 § 3.3.58

³³¹ CD17A p.34

³³² CD7 § 3.3.59

³³³ CD17A p.34

³³⁴ PA72 p.2

³³⁵ PA66

Figures from the North West survey³³⁶, and from the wider regional assessment based on that survey³³⁷, show that widely differing figures are arrived at for C&I arisings.

269. It is clear that Government policy is to secure better integration of treatment for municipal and non-municipal waste³³⁸. The emerging Waste CS recognises the difficulties of finding reliable statistics for C&I. It records that 450,000 tonnes of C&I were landfilled in the county in 2008 and contemplates that a significant amount may be being bulked up and exported for disposal.³³⁹ As Mr Allen explained to the Inspector, the third line at Eastcroft has been allocated for C&I and use of it is subject to open procurement. Even if the extra line at Eastcroft recovers energy from 100,000 tonnes of C&I, that leaves 350,000 tonnes being landfilled or being available for energy recovery at Rufford if the full capacity is not used for MSW.
270. It is also incorrect to assert that Rufford is not permitted to manage C&I waste. The EP in Schedule 3 on p.18 identifies "20 03 01 mixed municipal waste" as being permitted and appropriate feedstock. That categorisation is taken from the European Waste Catalogue ("EWC"), which in Chapter 20 addresses "Municipal Waste (Household waste and similar commercial, industrial and institutional wastes)". The EP decision document itself explains this³⁴⁰: "Schedule 3 of the Permit specifies the types of waste that can be burned at the facility. Non-hazardous municipal wastes of the types listed in Schedule 3 can include wastes from commercial, industrial and institutional premises as well as from private households. Such waste will be very similar in content to waste from private homes." So the Rufford ERF will be permitted to burn C&I waste in compliance with Government policy if there is the spare capacity to do so and then to the financial advantage of the County Council. Indeed, it would be unreasonable and unnecessary to restrict the feedstock to MSW alone or to limit the catchment area of C&I waste that could be delivered to the ERF³⁴¹.
271. The figures on arisings are indeed uncertain and a broad-brush approach is the only sensible one relying on figures that have been subject to public scrutiny. That is the approach adopted by VE25 and it shows a need for the ERF.
272. (ii) Recycling and composting: The figures in the RSS and RWS have proved to be underestimates of the rates achieved, but this is not to the disadvantage of the NCC or of the environment. The contract sets minimum recycling rates and Veolia have been successful in the HWRCs in exceeding targets³⁴². But as there are no minimum quantities to be taken for EfW and only residual waste as defined by the contract will be incinerated and energy recovered from it, no harm arises. It will be hard to achieve higher recycling figures because the easier and less costly gains have already been made as Mr. Mitchell explained in his evidence. That explains the tentative approach

³³⁶ PA61

³³⁷ CD114

³³⁸ WS2007 CD40 p.11 ix third bullet point

³³⁹ CD17A p.22-23

³⁴⁰ CD44 p.120 point 6

³⁴¹ Mr Mitchell under cross examination by Mr Watson

³⁴² PA69 but the difference in achieving 69% recycling of these HWRC wastes and 58% is only some 10,000 tonnes.

of the Veolia representative in addressing what he described as the “ambitious” Scottish targets, which Veolia could help to achieve.³⁴³ Financial austerity will make bigger gains more difficult.

273. (iii) Landfill capacity: All that needs to be known about the uncertainty of this topic is illustrated by the drop in landfill capacity in the county of 2,002,000 m³ between 2008 and 2009 when the document appears to show that just under 600,000 tonnes went to landfill in that year.³⁴⁴ It is perhaps surprising that Mr. Kondakor seemed to find some comfort from the explanation he said was given by the EA that some of the landfills had had their permits to receive waste withdrawn. If that is right then the landfill shortage is indeed acute. It is also consistent with the EA's document “Waste Information 2009” which indicates that “many older landfill sites that did not meet the stringent requirements of the Directive had to close by July 2009 at the latest.”³⁴⁵
274. It is evident from Mr. Brown's re-examination of Mr. Hankin that the landfill position in the county is significantly worse than Mr. Watson tried to portray it and Mr. Kondakor accepted in XX that landfill should only be a last resort to be avoided if other solutions are available. He accepted that the need to move away from landfill did not depend on the availability of landfill. It is relevant only to the degree of urgency of the need. In any event the sooner the move can be made the better. The ERF provides the opportunity to do that.
275. So if a specific need for this facility has to be shown and making all allowances for the great uncertainty in the figures, there is clearly a need for this facility to come forward.

Whether it has been robustly demonstrated that there is no reasonably available alternative technology or location for the recovery of energy from waste that would be more efficient and/or less harmful than the proposed scheme

Alternative Technologies

276. The policy approach is dealt with above. In summary there is no requirement to demonstrate that the technical choice is the best in energy or waste policy terms. The suggestion of the proposal being rejected because there might be a more efficient alternative therefore has no basis in law, policy or any decision by the SoS.
277. Again this was an issue aired at the Ince inquiry. RAIN argued:
- Because there is a clear emphasis given in Government policy documents such as WS 2007 that the Government favours anaerobic digestion over incineration as a superior energy form of waste technology³⁴⁶; and that
- Because of the “proven viability of alternative technologies such as anaerobic digestion, pyrolysis and gasification³⁴⁷”

³⁴³ PA70

³⁴⁴ PA73

³⁴⁵ PA72 p.2

³⁴⁶ CD110a §IR6.12 and 6.21

³⁴⁷ CD110a §6.21

the application for the incinerator should be refused.

278. Those arguments were rejected by the Ince Inspector and Secretary of State³⁴⁸ who observed that the Government's policy on Energy includes the view that a mix of energy technologies including EfW will be required to combat climate change and to provide secure, clean and affordable energy. The suggestion that EfW crowds out recycling was also dismissed as unfounded and contrary to Government policy.³⁴⁹
279. In government policy, the choice of technology is a matter for the promoter.³⁵⁰ In waste policy terms the key objective is to secure the investment in infrastructure required to divert waste from landfill and the Government wants to see a diverse mix of technologies in order to get the most environmental benefit from the investment. The new revised draft NPS for Renewable Energy expressly addresses waste combustion plants and recognises that they may include a range of different types of technologies, but that decision makers "should not be concerned about the type of technology used"³⁵¹ This is a reflection of the now draft but soon to be in force Waste Regulations 2010 which, in Regulation 20, set out the matters which planning authorities must take into account from the Directive when carrying out their planning functions such as determining planning applications. The Regulation expressly removes any requirement to "take into account best available techniques"³⁵². Article 4.2 requires that technical feasibility and economic viability are taken into account and Mr. Kirkman has fully addressed those issues in his evidence. The technology must also "ensure a high level of protection for the environment and public health"³⁵³ and as the issue of the permit by the EA and Mr. Kirkman's evidence has also shown, the proposed plant here meets those requirements³⁵⁴.
280. Whilst the type of technology is for the promoter, the Government is concerned that the waste infrastructure provided under a PFI contract is deliverable, bankable and affordable, again as is required by and consistent with Article 4.2 of the WFD. As noted above, DEFRA have supervised, approved and reviewed the PFI process here and have found it to be consistent with Government policy.³⁵⁵
281. Mr. Kirkman has explained how the EfW technology chosen for this project is proven, reliable and deliverable, whilst other technologies have limitations on feedstock and uncertainties associated with them.³⁵⁶ Anaerobic digestion, for example, is not suitable for the mixed waste stream that would be delivered to the ERF; organic waste would have to be separated out, which would add considerable expense; and, the microbes which drive the process can easily be poisoned by contaminants in the feedstock.³⁵⁷ Mr Kirkman also confirmed to the Inspector that his comparison of the various technologies applies whether the ERF uses MSW or C&I or both.

³⁴⁸ CD110a§IR11.116 and 11.124 and DL (CD110c) 6.1 and 6.4

³⁴⁹ CD110a §11.116

³⁵⁰ WS2007 CD 40 p.79 §27 and Annex E §3

³⁵¹ CD86A § 2.5.9

³⁵² Regulation 20(b)

³⁵³ Regulation 20(c) and Article 16.3

³⁵⁴ See Inspector's consideration 8.

³⁵⁵ VE1.7 Tab 6

³⁵⁶ VE2.2 Section 3

³⁵⁷ VE2.3 3.28-3.39

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282. In any event, given the pressing policy objective to move away from landfill and therefore to make the step change needed through the provision of significant new investment³⁵⁸, it is not argued in either PPS10 or WS2007 that an “optimal arrangement of facilities should be the key objective.” Indeed, this was noted by the Ince Inspector.
283. The proposal here moves the management of waste up the hierarchy. It does so whilst generating energy that is both low carbon and renewable. The technique also performs much better than the alternative of landfill, in terms of carbon generation, as the evidence of Mr. Smyth and Mr. Kirkman shows. It is no part of Government policy to pick away at that structure in order to see whether some other technology might perform better in one or other of those areas.
284. In any event, the technology here is proven, it works, it manages waste further up the waste hierarchy, it generates energy, the opportunity to use the heat can be secured and it makes very big savings in carbon on the realistic alternative of landfill. It therefore meets the requirements of Government waste and energy policy.

Alternative Locations

285. This has been addressed above.

OTHER MATTERS

286. Aside from matters referred to by both the SoS and Inspector, which are addressed above, there are other matters which were raised by PAIN and by local residents.

Health Impacts

287. It is significant, but far from surprising, that this is not an issue identified by the SoS. Indeed, health impacts have not featured as a main part of PAIN's evidence at this Inquiry – although such concerns feature heavily in their campaign against the proposals outside the inquiry³⁵⁹. PAIN do place some reliance upon the perception of health risks but acknowledge that, in the light of Government advice, it would be difficult to sustain a case that the proposals would actually harm health³⁶⁰.
288. PPS10 advises at paragraph 27 that WPAs should work on the assumption that the relevant pollution control regime will be properly applied and enforced. It further advises in paragraph 30 that modern, appropriately located, well-run and well-regulated waste management facilities operated in line with current pollution control techniques and standards should pose little risk to human health.
289. The ES assessed Air Quality and included a Health Impact Assessment which concluded that the ERF would not present any meaningful risk to health³⁶¹.

³⁵⁸ PPS10 §1 CD26

³⁵⁹ VE45.

³⁶⁰ See e.g. xx of Mr Downen

³⁶¹ Chapter 7, and Appendices 7.1 and 7.2 of the ES, CD1.

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- This is entirely consistent with the views of the Health Protection Agency and Nottinghamshire County Teaching Primary Care Trust³⁶².
290. Mr Smyth has provided detailed evidence on the air quality assessment, including the in-combination assessment with the BP and all other relevant developments and proposals. He has also provided a note on bioaccumulation and persistent pollutants, as requested by the Inspector³⁶³. Professor Bridges, a highly respected health expert with vast experience in these matters, has very thoroughly assessed the risks involved and provided the up-to-date position³⁶⁴. He also put into context the very small contributions that modern incinerators make to the emissions that the objectors are concerned about.
291. From all this it can be concluded that there is absolutely no basis for taking any different approach to that advised in WS2007 and accepted by the Inspector and SoS in the Ince and Eastcroft cases.
292. Notwithstanding this, groups opposed to incineration in principle such as PAIN gain much support, whether deliberately or otherwise, from alleged health and safety implications that are on any basis a grotesque distortion of the reality. This is true of the PAIN website in this case³⁶⁵. Notwithstanding this PAIN was only able to claim members in the hundreds, whereas Rainworth has a population of just under 8,000. The population in the surrounding areas, which PAIN alleges would be affected, is very much greater³⁶⁶. So any claim to be representing the community has to be treated with a great deal of caution. The only surprise, given the frightening health impact headlines used to garner support, is that the support is not very much greater. The stance of the local parish councils was hardly one of total objection, with Rufford PC agreeing that the choice of location was a good one and with no objections from Farnfield PC or Blidworth PC³⁶⁷.
293. These fears also manifest themselves in a campaign, which too readily appears to lose contact with reality, with many unsubstantiated allegations against both the WPA and Veolia. There is nothing unusual in the provision of these facilities in terms either of the ERF itself or the PFI³⁶⁸ contract, of which the ERF is one but an important element³⁶⁹. This is one element of the integrated provision of waste management facilities.
294. Allegations have been made regarding Veolia's safety record. As Mr Mitchell's Note in response makes clear, the facts provide a totally different

³⁶² Para. 13.48 on p.97 of the WPA Planning and Licensing Committee Report, CD4; see also paras. 13.44-13.53 of that Report.

³⁶³ VE5.14.

³⁶⁴ VE6.2.

³⁶⁵ VE45 which refers to e.g. food being contaminated with Dioxin, contamination and death of trees, rare and special wild life being made extinct, water courses would be infected by leaching heavy metals and sperm mutation.

³⁶⁶ See VE45 which refers to surrounding villages and towns for up to a twenty five mile radius

³⁶⁷ See the SDCS Planning Committee Report, Appendix 1 to DC1, at section 8; and the WPA Committee Report, CD4, paras. 4.12-4.20. Farnfield and Blidworth wanted measures taken in respect of traffic; the only concern raised by Clipstone and Rufford PCs was with regard to air pollution.

³⁶⁸ See e.g. the response in March 2009, Appendix 26 in VE1.2, from the District Auditor to Mr Downen of PAIN. The Auditor did not support Mr Downen's complaints that the Council had acted unreasonably and had not taken appropriate steps to ensure that it had secured value for money from the contract.

³⁶⁹ See Mr Mitchell's original proof, VE1.1, at section 3 and in particular para. 3.6 on pp. 5-6, which summarises the main elements of the waste facilities in the PFI contract. See also paras 9.10-9.13 of CD4. The only issue in terms of any withholding of any part of the PFI contract is one of commercial sensitivity. All relevant content has been disclosed.

picture³⁷⁰. This is a picture that gave the EA no hesitation in considering Veolia fit to operate the ERF³⁷¹.

295. At the Ince inquiry, the local residents' group (RAIN) was opposed to incineration in principle, just as PAIN are here, and mounted the self same argument. They also called Mr. Watson to support their case that: "Despite assurances to the contrary, local residents will continue to have major concerns about the long term health effects from an incinerator...Whatever the actual effects are proven to be over the next 20 years or so there would be an immediate and sustained adverse effect on public health from this widely held concern."³⁷²
296. The Inspector dismissed not only the argument that there would be actual effects on health from the incinerator there promoted³⁷³ but also addressed anxiety resulting from a perception of health effects. He accepted that the evidence showed that there was widespread concern but concluded that "concern over health effects of incineration of waste is one that is in direct conflict with the position taken by Government in a statement of national policy (paragraph 22 of Chapter 5 of Waste Strategy England). Such a statement will not satisfy everyone but should act to allay anxiety amongst the public at large."³⁷⁴ His conclusion was that, although the proposal raises public anxiety, this should not carry great weight in relation to the planning decisions on the proposals then before the SoS.
297. The Inspector could of course now add to those matters, that should allay public concern on health effects, the Position Statement of the Health Protection Agency³⁷⁵ and the revised draft NPS for Energy.³⁷⁶ The Health Protection Agency also responded positively to the consultation on this planning application³⁷⁷, as did the County Primary Care Trust.³⁷⁸
298. In this particular case we also have the EP issued by the EA after a very thorough consideration of the protection of public health and the literature relating to that issue in the context of EfW in general and this proposal in particular - all as explained in detail in their decision document³⁷⁹ which expressly includes consideration of bioaccumulation³⁸⁰, a matter also addressed in other information before the inquiry.³⁸¹ The inquiry also has the benefit of Professor Bridges' evidence³⁸² as did the Inspector at the Ince inquiry.³⁸³ RAIN there tried to cloud the clear message of Prof Bridges' evidence that there is no rational basis to fear health effects of EfW and PAIN have tried to do the same here. We invite the Inspector and the SoS to come to the same conclusions as in the Ince and Eastcroft cases.

³⁷⁰ VE1.9.

³⁷¹ VE1.9 at para. 4.

³⁷² CD110B para 6.19

³⁷³ CD110a IR§11.19 to 11.27

³⁷⁴ CD110a IR§ 11.28

³⁷⁵ VE6.3 Tab 4 of September 2009

³⁷⁶ CD85a § 4.13.5

³⁷⁷ CD5n

³⁷⁸ CD5o

³⁷⁹ CD44 §C7.3.3 p.53 to 61

³⁸⁰ CD44 p.56

³⁸¹ VE 5.14

³⁸² VE 6.1 to 6.3

³⁸³ CD110a p.176

299. The Government is, in any event, clear that health is principally an issue for the EA and the pollution control regime.³⁸⁴ PPS23 in Appendix A does include as an issue which may be relevant to the determination of a planning application “the objective perception of unacceptable risk to the health and safety of the public arising from the development.” Perceptions based on misinformation or emotions or personal prejudices cannot be objectively held. In this case there is no reliable evidence that could found the basis of any claim that any perceptions of risk to health here are objectively based.
300. The Inspector and the SoS here can be reassured by the Government’s policy position, the evidence from Professor Bridges and the issue of the EP by the EA after obviously careful consideration of these issues.

Traffic³⁸⁵

301. As is very common, some local residents have raised concerns regarding the traffic implications. However, there can be no doubt that this site is extremely well located for the ERF proposal with excellent main road access. This is agreed by the NCC Spatial Planning Team, which also confirmed that the location is in relatively close proximity to the major waste producing areas, thereby avoiding the need for waste to be transported over long distances³⁸⁶. The 2008 Employment Land Review similarly highlighted that the Rufford Colliery benefits from close proximity to the MARR route, bringing advantages in terms of highways access³⁸⁷.
302. There is no evidence that the proposal would cause any unacceptable highways capacity, safety or amenity impacts.

Ground Conditions and Water Pollution

303. The EA raise no objection in principle to the proposed scheme, subject to conditions designed to protect water quality, amongst other things.³⁸⁸ Also, the evidence of Mr Hardwick³⁸⁹ was not challenged, as no party required him to be present.
304. Mr Hardwick concluded that the proposed mitigation measures for the construction and operation phases of the development will ensure that the risk of potential contaminants associated with the development will be low with respect to controlled waters. EP controls will ensure that the site meets its permitted conditions³⁹⁰.
305. However, the issue of subsidence and potential impact on the aquifer was raised at the evening session for the public. These matters are dealt with in a Note that Mr Hardwick produced to clarify the position, based on the findings of geotechnical investigations and the views of the Coal Board and the Environment Agency³⁹¹. He confirmed that subsidence at the former

³⁸⁴ PPS23 §10, PPS10 §5 and 30

³⁸⁵ See Chapter 6 of the ES, CD, together with the additional Regulation 19 Information, CD2, Chapters 12 & 15.

³⁸⁶ CD4 at para. 4.71 on pp.33-4.

³⁸⁷ CD16 on p.81.

³⁸⁸ CD5m

³⁸⁹ VE7.2

³⁹⁰ Para. 7.4 of VE7.2.

³⁹¹ VE7.4

Colliery is not located within the footprint of the proposed ERF and that, since the cessation of mining activities, no further subsidence can be expected at the site³⁹². He also confirms and explains how the ES has satisfactorily addressed the issue of risk of pollution to the regional aquifer by air borne emissions attributable to the proposed ERF and that these risks are negligible³⁹³.

CONCLUSIONS

306. The proposal before this inquiry is supported by a whole raft of Government policy on waste management and energy generation. The urgency to make the necessary infrastructure provision is manifest in all those documents.
307. The proposal is supported by the county's WDA and WPA. It received support from the East Midlands Development Agency³⁹⁴. No statutory consultee on the application objects, save for NSDC whose actual objection is seen to be not an objection to the principle of the scheme, but to a desire for a greater linkage to the Business Park which this scheme may assist by the provision of heat, but which in fact it is independent of. NSDC expressly did not take into account the waste management and energy benefits of this scheme. They have chosen to save into the future NSLP Policy E17 which provides support for this scheme on this site. On that basis the scheme is in accordance with the development plan.
308. DEFRA has given the project consideration over a long period of time and confirms its support for the scheme as being consistent with Government waste and energy policy. It has approved the PFI contract needed to bring the scheme about, commending its flexibility and consistency with the Government's objectives in waste management.
309. The interests of the birds for whose protection the area may in due course become a Special Protection Area have been given extensive, thorough and expert consideration. The issue of the possibility of an SPA was raised late in the day. It never featured in the responses to the consultations on the application. Once it was raised Veolia have acted entirely responsibly - taking the initiative themselves to seek the views of Natural England. Natural England do not object to these proposals. They have been given ample opportunity to do so and do not. The reality is that when the whole project is taken into account including the extensive areas of new habitat for the birds and the 21 hectares of heathland that will be created, the populations of woodlark and nightjar will be better served by the area than they are now. Nature conservation generally will be the beneficiary.
310. The Inspector is invited to recommend that planning permission be granted subject to the conditions which have been given careful consideration at the inquiry, and are now agreed between Veolia and NCC³⁹⁵, and subject to the planning obligations which will secure for now and the future the nature conservation interests. The Secretary of State is invited to accept that recommendation and grant planning permission.

³⁹² Para. 1.20 of VE7.4.

³⁹³ Paras. 1.29 & 1.30 of VE7.4.

³⁹⁴ VE1.7 Apps 4 and 5

³⁹⁵ CD103c

LEGAL SUBMISSIONS

311. Veolia agrees with Natural England that the Secretary of State should adopt a “risk based approach”³⁹⁶ to the consideration of the evidence in this case relevant to issues of the protection of the populations of woodlark and nightjar in the Sherwood Forest area and of the possibility of the area or part or parts of it being classified as a Special Protection Area under Article 4.1 of the Birds Directive (Directive 2009/147/EC).
312. Veolia further agrees with Natural England that such an approach may follow the 5 step procedure set out in Regulation 61 of the Conservation Regulations 2010 and explained in paragraph 3.17 of the Statement of Common Ground on the legal issues in respect of the ornithological issues dated 13 April 2010.³⁹⁷
313. Veolia will therefore invite the Inspector and the Secretary of State to consider the evidence on these issues in accordance with that 5 step approach as if the Sherwood Forest area was a potential SPA given the same level of protection as a classified SPA in accordance with the policy set out in paragraph 6 of PPS9 and paragraph 5 of Circular 06/2005 on biodiversity and geological conservation.
314. In this way, if the SoS grants planning permission for the ERF project and the area subsequently is classified as an SPA before the development is completed, the statutory review of the permission under Regulations 63 and 69 can be carried out safe in the knowledge that the relevant considerations were taken into account by the SoS on the grant of the permission.
315. In these circumstances the law relevant to the “should be” SPA issue as agreed in paragraphs 3.1 to 3.7 of the SOCG10 ceases to be of relevance.
316. Paragraphs 3.8 to 3.27 of that SOCG dealing with law and policy relevant to the potential SPA issue are therefore relevant and agreed, as before. Veolia also agree with NWT’s legal submissions that are set out in paragraphs that are numbered 703-713 in this report.
317. Veolia submit that in determining whether the project is likely to have a significant effect on the pSPA the Inspector and SoS should consider the project including the mitigation and offsetting provisions secured by planning obligations under S.106 of the Town and Country Planning Act 1990 without whose implementation the development cannot be commenced and which contain continuing obligations enforceable by the local planning authority throughout the life of the development. NE agree with this submission³⁹⁸.
318. Veolia will commend the evidence before the inquiry, particularly that of Dr Roger Buisson and Professor Max Wade, as establishing that the project is not likely, either alone or in combination with other plans or projects, to have a significant effect on the pSPA.

³⁹⁶ NE5 §4.1 to 4.5

³⁹⁷ SOCG10

³⁹⁸ NE15 p2 para 4

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319. Veolia will submit that the above holds true whether the boundary of the pSPA looked at by the Inspector and the SoS is the Indicative Core Area identified by Natural England or the Important Bird Area identified by the RSPB.
320. Veolia accepts that whether a project is likely to have a significant effect is not dependent on whether the project itself is within or outside the boundary chosen for the pSPA. It is a matter for judgement in all the circumstances whether a plan or project is likely to have such an effect.
321. Veolia further agree with NWT's propositions³⁹⁹ that:
- Loss or damage to habitat or the disturbance of birds within a pSPA cannot be avoided or mitigated by the provision or improvement of habitat outside the site; but
- It is in principle possible that the unavoidable loss of or damage to habitat or the disturbance of birds within a pSPA can be mitigated so as to justify a finding of 'no significant adverse effect' under Regulation 61(5) by the provision of new habitat within the site. The GCP is within both the ICA and the IBA and so likely to be considered to be within the pSPA.
322. Whether the mitigation is successful in establishing no significant adverse effect in any particular case is a matter of evidence. Veolia will commend the evidence of Dr Buisson on this issue⁴⁰⁰.
323. Veolia have no need to and do not rely on considerations of overriding public interest as set out in Regulation 62.

The Case for Nottinghamshire County Council

The material points are as follows.

324. Issues which the SoS is being asked to decide are conveniently identified under PAIN's banner line "Wrong Site, Wrong Technology". The WPA does not agree with either of those assertions, but they provide a useful overall structure for grouping the matters on which the SoS wishes to be informed,⁴⁰¹ together with the additional issues identified by the Inspector at the first Pre-Inquiry Meeting.⁴⁰² First of all, however, it is necessary to deal with an additional matter, identified by the Inspector at the first Pre-Inquiry Meeting: the question of prematurity.

PREMATURITY

Inspector's identified matter (9): Whether there are good reasons for making a decision on the location of a strategic facility in advance of consideration as part of the Waste Development Framework

325. Although it is hinted at in call-in issues (c) and (d), prematurity is not specifically mentioned in the SoS's call-in letter. However, the point is made explicit in the Inspector's question (emphasis added) "*Whether there*

³⁹⁹ WT21 para 76

⁴⁰⁰ VE12.6 Chapter 7

⁴⁰¹ Call-in letter 18th March 2009, CD62

⁴⁰² PIM Notes 10 June 2009, CD63

are good reasons for making a decision on the location of a strategic facility such as this in advance of consideration being given to it as part of the Waste Development Framework”.

326. Thus phrased, the question places the wrong emphasis on the issue. The Climate Change Supplement to PPS1 and PPS10 both make it clear that “refusal of planning permission on grounds of prematurity will not be justified unless it accords with the policy in *The Planning System: General Principles*”.⁴⁰³ The question, therefore, is not whether there are good reasons for granting permission in advance of the WDF, but whether refusal would accord with that advice.
327. In the WPA’s view, it would not. When similar issues were raised at Eastcroft, the Inspector concluded that “*Slippage on the DPD programme should not lead to a moratorium on waste management infrastructure*” and the same is true here. There is nothing in PPS10 which precludes applications being brought forward in advance of PPS10-compliant DPDs. Indeed, para 23 expressly provides for the possibility that this will occur. Where it does, the “central policy concern”⁴⁰⁴ is whether the development is consistent with PPS10. As the Ince Inspector put it,⁴⁰⁵ PPS10’s support for positive plan-making is “*not ... to be read as a disavowal of planning applications or of planning appeals and inquiry processes as a means for reaching decisions on individual proposals. It is rather a statement of the importance that Planning Authorities should accord to facilitating new investment in waste management facilities and thereby assisting in the ‘step-change’ in waste handling referred to in paragraph 1 of PPS10.*”
328. Para 18 of “*The Planning System: General Principles*” sets out the limited circumstances in which an application should be refused on the grounds of prematurity, and states: “*Where a DPD is at the consultation stage, with no early prospect of submission for examination, then refusal on prematurity grounds would seldom be justified because of the delay which this would impose in determining the future use of the land in question.*”
329. The calling-in of Veolia’s application and the adjournment of this inquiry have already put back the provision of this ERF by approximately 2 years. The indicative timetable for adoption of a Waste Core Strategy is set out at Table 8 of Mr Hankin’s proof.⁴⁰⁶ The Preferred Options are not likely to be identified until May 2011, with a hearing stage in the summer of 2012 and adoption towards the end of that year. Even if it were possible to run some part of the tendering exercise in tandem with the WDF process, this element alone would take a minimum of 2 years, and possibly more.⁴⁰⁷ In the meantime, notwithstanding the improvements in reduction and recycling within Nottinghamshire, there are still very significant amounts of waste going to landfill. This is both contrary to government policy and using up what is, in Nottinghamshire, a scarce resource.⁴⁰⁸

⁴⁰³ CD26 - PPS10 para 5; CD20 - Planning and Climate Change Supplement para 11

⁴⁰⁴ CD27 – Companion Guide to PPS10 para 8.30.

⁴⁰⁵ CD110b para 11.106

⁴⁰⁶ CC15 p. 101

⁴⁰⁷ Mr Allen’s answer to questions from the Inspector. The Veolia tendering exercise took 4 years.

⁴⁰⁸ see submissions on landfill capacity, below

330. Refusing this application on the grounds of prematurity will do nothing to help Nottinghamshire make the “step change” required by PPS10. Neither the WPA nor NSDC (within the context of its own proposals for the Rufford Colliery) considers that refusal on the grounds of prematurity would be justified. We invite the Secretary of State to reach the same conclusion.⁴⁰⁹

THE RIGHT TECHNOLOGY

Overview: (a) The Place of EfW in National Policy

331. It is clear from both Mr Watson and Mr Downen’s evidence that PAIN’s objections to this Inquiry are not limited to the appropriateness of an ERF in Nottinghamshire, but are nothing less than full-frontal assault on the role of incineration generally.⁴¹⁰ As such, their arguments fly in the face of national policy and the recent decisions of previous Secretaries of State.
332. National policy recognises that EfW is not only a necessary part of waste management, but also one which is expected to increase. Hence, DEFRA’s Waste Strategy for England states that⁴¹¹: *“recovering energy from waste which cannot be sensibly recycled is an essential component of a well-balanced energy policy. Energy from waste is expected to account for 25% of municipal waste by 2020, compared to 10% today.”*
333. DEFRA’s Waste Strategy accords with its more recent letter of 15 March 2010⁴¹² which advises that: *“energy from waste has an important role to play in the delivery of long term waste, energy and climate change objectives, particularly when the heat generated can be used in a Combined Heat and Power scheme”*.
334. The Audit Commission advise⁴¹³ that: *“diverting waste from landfill will substantially increase the amount of waste that is incinerated to energy.”*
335. The EA consider⁴¹⁴ that “energy from waste can contribute to a balanced energy policy”.
336. The Planning and Climate Change Supplement to PPS1⁴¹⁵ recognises EfW as a source of renewable and low-carbon energy, and advises that opportunities for such sources of energy supply should be “maximised”⁴¹⁶.
337. The recent Revised Draft NPSs for Energy (EN-1 and EN-3) recognise Energy from Waste both as a means of treating waste and as an important future source of energy generation.⁴¹⁷
338. Critically, national policy recognises that a “vigorous” energy from waste policy is compatible with high recycling rates.⁴¹⁸ The EA table⁴¹⁹ shows that,

⁴⁰⁹ see also the Easctcroft Inspector’s conclusions, CD61 para 341. The development plan in the present case is precisely the same.

⁴¹⁰ See, e.g., Mr Downen’s involvement in the foundation and running of UKWIN

⁴¹¹ CD40, Executive Summary p. 15 para xxiv

⁴¹² See Appendix 12 of CC15; VE1.7 Tab 6

⁴¹³ “Well disposed – responding to the waste challenge” (Sept. 2008) Summary p. 5 (in Mitchell VE1.2)

⁴¹⁴ Position statement on Energy from Waste p. 1 para 6-8 (in Mitchell, VE1.2)

⁴¹⁵ CD20; Glossary

⁴¹⁶ para 13

⁴¹⁷ CD85a para 3.4.3; CD86a section 2.5

⁴¹⁸ CD40 Waste Strategy for England (2007) para 23 p. 78

⁴¹⁹ reproduced at p. 10 of Mitchell, VE1.1

even in 2006 countries such as Netherlands and Denmark were managing recycling rates well in excess of 40% alongside significant levels of EfW. Contrary to PAIN's suggestion⁴²⁰, these figures demonstrate that a properly operated EfW programme reduces the waste which goes to landfill, not that which is recycled.⁴²¹ This also has been the conclusion of the inspectors at Eastcroft and Ince.⁴²² As the Eastcroft Inspector put it⁴²³: *"Experience throughout the EU has shown however that high incineration and recycling rates go hand in hand."*

Call-In Issue (c): Consistency with PPS10

339. In seeking information on the extent to which the ERF would be consistent with PPS10, the SoS's letter makes particular reference to *"the need for the proposal given that preparation of new waste development plan documents is at an early stage"*. We therefore start with the questions of need, before turning to the wider issues of consistency with PPS10.

Is it Necessary to Demonstrate Need?

340. It will be noted that call-in issue (c) expressly links the issue of "need" to the fact that Nottinghamshire's Waste Development Plan is still at a relatively early stage. As such, it may be a reference to the advice in paragraph 22 of PPS10 that: *"When proposals are consistent with an up-to-date development plan, waste planning authorities should not require applicants for new or enhanced waste management facilities to demonstrate a quantitative or market need for their proposal."*
341. In cross-examination of Mr Hankin, PAIN sought to suggest that the corollary to this was that where (as is agreed to be the case here) there is not an "up to date" development plan, there was a requirement to demonstrate need. That, however, is not what PPS10 says. Rather, the advice in paragraph 23 states that: *"In the interim period before the development plan is updated to reflect the policies in this PPS, planning authorities should ensure proposals are consistent with the policies in this PPS and avoid placing requirements on applicants that are inconsistent."*
342. Paragraph 23 thus makes it clear that the key test is compatibility with PPS10,⁴²⁴ and that decision-makers should not impose unnecessary additional hurdles. There is no requirement in PPS10 to demonstrate need, and it would be inconsistent with the generally supportive tenor of PPS10 to impose a requirement which is not found in the PPS itself.
343. The WPA's starting point, consistent with the Secretary of State's conclusions at Eastcroft⁴²⁵ and Ince,⁴²⁶ is that it should not be necessary for Veolia to demonstrate a need. The Ince decision is a particularly clear illustration of that: the proposal in that case was "not designed to meet a particular need" but was a "merchant facility", "brought forward in the

⁴²⁰ PAIN xx Mitchell, Day 1

⁴²¹ See CD61, Eastcroft IR, para 343

⁴²² CD110b para 11.116

⁴²³ CD61 para 343

⁴²⁴ See also CD27 – the Companion Guide to PPS10, para 8.27 and 8.30. The latter describes consistency with PPS10 as "the central policy concern".

⁴²⁵ CD61, Eastcroft IR para 344

⁴²⁶ CD110

context of a general recognition that Energy from Waste has a significant role to play within the overall Waste Strategy".⁴²⁷ The SoS agreed that there was policy support for the provision of waste management facilities on a regional scale at Ince Marshes⁴²⁸, but the "availability or abundance" of C&I waste was a question for the market place to determine.⁴²⁹

If need must be demonstrated, does a need exist?

344. Even if the WPA are wrong about the "need to demonstrate need", it is patently clear that there is a need for additional facilities to treat the County's waste at a level above "disposal" in the hierarchy.
345. A considerable amount of time has been taken up at the inquiry debating how much landfill capacity there is in Nottinghamshire, and how quickly that will be depleted. However, that is a secondary consideration. Disposal of waste sits at the very bottom of the waste hierarchy, and (as PPS10 makes clear) landfill should be the option of last resort, used only when there is no other appropriate solution.⁴³⁰
346. According to the latest monitoring report,⁴³¹ some 44.5% of the County's MSW was sent to landfill in 2008/2009. Analysis of the EA data for the same period suggests that C&I waste added a further 449,000 tonnes.⁴³² On any analysis, these are large amounts of waste, significantly in excess of the 180,000 tpa capacity of the ERF, which need to be moved further up the hierarchy. That need exists, irrespective of the amount of landfill available.

Additional "need" - the shortage of landfill capacity

347. For the reasons outlined above, it is strictly irrelevant whether (as PAIN suggest) there is more than 10 years of landfill available, or whether (as the WPA believes) landfill is dangerously close to running out. However, in the WPA's view we are approaching a critical shortfall in landfill capacity which, while it is not the primary reason why an ERF is needed, makes meeting that need particularly urgent.
348. Estimating the amount of landfill capacity is not a precise science. However, as at December 2008 the EA and the industry's figures were not far apart:⁴³³ the EA estimated that there was 4,877,000 cubic metres (or 4,145,450T)⁴³⁴ remaining; while WRG showed the void capacity at 4,602,900 cubic metres (or 3,912,465T). Against this, audited data from the EA indicates that some 668,000T of non-hazardous waste was landfilled in 2007/8, and some 568,000 in 2008/9.⁴³⁵ At these rates, it is obvious that the existing landfill sites have significantly less than 10 years left in them.
349. These problems are simply compounded if one looks at the latest figures from the EA, which indicate that capacity has now dropped to 2,875,000

⁴²⁷ CD110b para 11.124

⁴²⁸ CD110C para 6.4

⁴²⁹ CD110b para 11.126

⁴³⁰ see PPS10 paras 1, 3 and Annex C

⁴³¹ CD81 p. 32

⁴³² CD81 paras 4.19-20

⁴³³ Hankin Consolidated Proof CC15 paras 6.5.15-6.5.16

⁴³⁴ using a waste density factor of 0.85 tonnes per cubic metre: see below

⁴³⁵ see PA73

cubic metres (or 2,443,750 T).⁴³⁶ Quite how or why capacity has dropped by over 2 million cubic metres in a single year is not clear; recent contact with the EA does not support Mr Kondakor's understanding that the reduction has been caused by legal changes affecting the permitted capacity. Nevertheless, if these figures are correct, then the picture is even more serious than the WPA had appreciated.

350. PAIN argue that this is all wrong for a variety of reasons. In particular, they say it does not take into account other landfill sites which might yet come on stream; that it assumes a waste density factor which is too high; and that it ignores the fact that waste is declining. As to these:

(1) Of the four existing landfill sites, two (Daneshill and Carlton Forest) are at the northern-most extremity of the county. Whether or not they are available, they are not well-placed to meet the needs of the main population centres. As the 2008/9 Annual Monitoring Report records, there is already an identified shortfall in the Mansfield, Ashfield and Greater Nottingham areas;

(2) Notwithstanding the fact that a number of sites within Nottinghamshire have closed⁴³⁷ there have been no new consents for landfill since 2000/2001. The Bentinck Void, which was allocated in the Local Plan, has subsequently become a notified SSSI and is effectively dead in the water.⁴³⁸ Vale Road Quarry is an inert site which Mr Kondakor accepts is of no relevance to MSW or C&I waste.⁴³⁹ Erin is in Derbyshire, and has been earmarked by Derbyshire CC to meet that county's strategic needs, following the closure of the sites at Glapwell, Hall Lane and Sutton.⁴⁴⁰ Although Dorket Head has been granted an environmental permit for an additional area (estimates for which vary between 2.5 and 3.7 million cubic metres)⁴⁴¹ this is not an existing void, but is entirely dependent on the prior extraction of clay. There are no guarantees about the rate at which this will happen;

(3) The 0.85 waste density factor is based on advice from the Environment Agency⁴⁴². It is the figure which is found in the Companion Guide to PPS10⁴⁴³. Comparison of the audited deposits to landfill with the depletion in capacity produces a 5-year average of 0.77T/cubic metre,⁴⁴⁴ which is significantly closer to 0.85 than the 1.1T/cubic metre suggested by Mr Watson;

(4) On any analysis, Mr Kondakor's estimates of the rates of depletion⁴⁴⁵ are woefully short of reality. For 2008 and 2009 he assumes only 424,343 and 403,126 cubic metres of capacity (respectively) were used, when the

⁴³⁶ PA73 p. 5

⁴³⁷ Sutton, Burnt Stump, Bilsthorpe, Barnstone: see CD10 (Waste Local Plan) para 10.12

⁴³⁸ an application for permission was refused in March 2010, and no appeal has been lodged. See also Hankin CC15 para 6.5.23; Standen Ve10.2 para 6.27

⁴³⁹ p. 26 pf PA22, Kondakor in xx.

⁴⁴⁰ see Extract 2 at p.25 of PA22

⁴⁴¹ CC15 Table 1 p. 69

⁴⁴² CC23

⁴⁴³ CD27 Box 26 p. 74

⁴⁴⁴ CC22

⁴⁴⁵ PA40 Table 4B

audited figures for those years⁴⁴⁶ indicate that 668,000 and 558,000 tonnes of waste were sent to landfill. If one uses Mr Watson's preferred waste density factor of 1.1⁴⁴⁷ these figures (for just two years) are more than 295,000 cubic metres adrift. If one uses what we suggest is the more realistic waste density factor of 0.85⁴⁴⁸ the underestimate increases to 625,000 cubic metres. These errors are then carried through into successive years. Cumulatively, they will radically advance the date at which landfill capacity will run out;

(5) Further, Mr Kondakor's figures rely on the assumption that – without some major new facility to handle waste – landfill will continue to fall by 5% per annum. In our submission, this is simply unrealistic. While it is true that landfill has fallen sharply in recent years, that is only to be expected as the impact of the landfill tax has been felt. However, once the early “easy gains” in waste reduction and recycling have been achieved, successive reductions will become more difficult and more expensive to achieve. Moreover, population continues to grow at 0.7% p.a.,⁴⁴⁹ while DCLG predicts that housing numbers in the East Midlands will rise by at least 30% by 2031.⁴⁵⁰ The Companion Guide to PPS10⁴⁵¹ advises that:

“Where growth in the number of households or population is planned or forecast, all else being equal, waste arisings must inevitably increase as well. Forecast increases in household numbers can be accounted for explicitly. This is particularly important for areas where there is substantial development planned ...”

However, Mr Kondakor has made no allowance for the projected increases in population or the number of households in Nottinghamshire.

351. In the WPA's submission, the shortfall in landfill capacity is a real and immediate problem which cannot be ignored. Historically Nottinghamshire has been heavily dependant on landfill for the disposal of its waste and this pattern of waste management is likely to continue if new enhanced facilities are not permitted to address the waste treatment capacity gap which currently exists.

The need for an EFW of this capacity, given the importance of treating waste as close to its source as possible: Inspector's Matter (1)

352. The amount of waste currently being sent to landfill is significantly in excess of the capacity of the ERF. Debate at the Inquiry has focused on whether this would continue to be the case in future years.
353. The WPA's position on this⁴⁵² is based on the audited landfill figures for 2008/9, the recycling rates set out in the PFI contract, and a growth rate of 1.7%. On these figures, there is more than enough MSW for the ERF until at least 2019/2020. Thereafter, there would be a small shortfall of about

⁴⁴⁶ PA73 p. 2

⁴⁴⁷ which would produce 607,272 and 516,000 cubic metres, respectively

⁴⁴⁸ which would produce 785,000 and 668,000 cubic metres, respectively

⁴⁴⁹ Mitchell VE1.1 para 4.30; see also the 2008/9 Annual Monitoring Report Mitchell VE1.7 Tab 7

⁴⁵⁰ Mitchell VE1.1 para 4.31

⁴⁵¹ CD27 Annex D para 8

⁴⁵² CC15 table 7 and paras 6.5.34-6.5.40

8,200 tonnes, which could easily be met with C&I waste. The diversion of C&I waste from landfill is fully in accordance with Government policy.⁴⁵³

354. PAIN criticise this conclusion on the grounds:

- (1) That the growth rates are wrong;
- (2) That the recycling rates are pessimistic;
- (3) That the figures fail to take into account the Eastcroft extension;
- (4) That the PPC permit would not allow the ERF to burn C&I waste.

355. The WPA's response is as follows:

(1) The 1.7% growth rate is that which was set out in the East Midlands Regional Waste Strategy. While the future of RSSs has come into question, during the course of the inquiry, the evidence base which informed them is still relevant. The figure of 1.7% would not have survived the EiP process if it was not robust. Had this inquiry gone ahead on its original timetable (or indeed, after the first adjournment in April) Mr Hankin would have been able to point, in his evidence, to the advice in para 13 of PPS10⁴⁵⁴ (that there should be no need to reopen consideration of the principles or the annual rates of waste to be managed as set out in the RSS) as a knockout blow to PAIN's case. It is not logical that a figure which national policy positively indicates should not be called into question should be regarded as unreliable if RSSs are revoked. There have been no newer assessments of growth rates, regionally or locally since WS2007;

(2) The recycling rates are those set out in the PFI contract, which in fact exceed the targets set out in Waste Strategy 2007;

(3) The Eastcroft extension would increase that facility's capacity by about 100,000 tpa to some 250,000 tpa⁴⁵⁵. The extension was explicitly promoted on the basis that it would be needed to treat C&I waste.⁴⁵⁶ Consequently, if the "third line" is to be added in to the equation, so too should be the C&I waste for the area. Although there are no precise figures for C&I waste, official estimates consistently place existing and future C&I arisings for the City and County at in excess of 1 million tpa, with in excess of 360,000T going to landfill.⁴⁵⁷ At all stages, the inclusion of C&I waste more than cancels out the effect of the "third line";

⁴⁵³ CD40 Waste Strategy 2007 p. 3

⁴⁵⁴ See also CD27 – Companion Guide to PPS10, para 7.15

⁴⁵⁵ CD61 IR39

⁴⁵⁶ See the Eastcroft Committee Report at Standen App. 15 (Ve10.3)

⁴⁵⁷ see:

- App 1, Table 1 of the Eastcroft Committee Report (Standen App 15, Ve10.3)- C&I arisings for 2020 1.22m tonnes, of which 367,500 tonnes to landfill;

- pp. 32-34 of the Annual Monitoring Report 2008/9 (CD81) – C&I arisings for 2006/7 at 1.4m tonnes, with 449,000 to landfill in 2008;

- p. 175, Annex 4 of the East Midlands Plan, March 2009 (CD7): C&I arisings 2019/20 at 1.267m tonnes, of which 735,000 for disposal

- p. 31, ADAS "Study into Commercial and Industrial Waste Arisings". Using the 21% allocation from the RSS would give C&I arisings in 2020 of 1.24m tonnes

- Appendix G of the RPS "Study into Waste Management Capacity in the East Midlands", August 2009 (Ve10.3 App 23). Using the 21% allocation from the RSS would give C&I arisings of c. 1.4m tonnes with over 800,000 after recycling/composting

(4) The WPA can see no reason why C&I waste would not fall within the permitted categories of waste in Schedule S3.2 of the permit.⁴⁵⁸ Mr Kirkman makes clear that the ERF has the flexibility to accept residual C&I waste.⁴⁵⁹

356. The WPA therefore do not accept PAIN's criticisms of Mr Hankin's Table 7. However, even if one reworks those figures to assume an annual 4% reduction in waste to 2020, with 70% recycling of MSW, the third line at Eastcroft and 71% recycling of the forecast C&I waste,⁴⁶⁰ Mr Standen's table VE25b demonstrates that there would still be an 84,000 tonne surplus to landfill.
357. As to the "importance of treating waste as close to its source as possible", the WPA have already made the point that the Annual Monitoring Report for 2008/9 identifies an existing shortfall in the Mansfield/Ashfield/Greater Nottingham area.⁴⁶¹ The starting point for the site selection process was to locate the ERF within an area which is central to the waste arisings within Nottinghamshire to reduce the distance travelled by waste. The Rufford site is well placed to fill that gap.

Whether the proposed plant is a recovery operation: Inspector's Matter (3)

358. Self evidently, the ERF can only help move waste up the hierarchy if it is a form of "recovery", as opposed to disposal.
359. As a matter of domestic policy, there does not appear to be any dispute that EfW is regarded as "recovery". This much is clear from WS2007.⁴⁶² The principal issue at the inquiry has been whether WS2007 is (or will be) consistent with EU legislation.
360. By the time the SoS makes his decision, the relevant legislation will almost certainly be the Waste (England and Wales) Regulations 2010. The purpose of the Regulations, which are due to come into force on 12 December 2010, is to transpose EU Waste Framework Directive 2008/98/EC into domestic law.
361. The Directive seeks to classify waste incinerators as recovery operations where they meet minimum efficiency levels. The WPA has taken advice from the EA which confirms that the Rufford ERF is capable of reaching the 0.65 efficiency level required.⁴⁶³ Further details confirming this are set out in Mr Kirkman's evidence.⁴⁶⁴
362. The ERF should therefore be regarded as a "recovery" operation.

⁴⁵⁸ CD44 p. 18

⁴⁵⁹ VE2.2 para 3.63

⁴⁶⁰ The arisings figure in column V of VE25b already assumes a 42% rate. Mr Standen then assumes that half of the remaining 58% will be recycled – i.e. an overall recycling rate 42% + (1/2 of 58%) = 71%.

⁴⁶¹ CD81 para 4.56

⁴⁶² CD40 Chapter 5 paras 17-23

⁴⁶³ App 10 of CC15

⁴⁶⁴ Ve2.2 paras 3.64 -3.75

Whether the ERF would discourage the reduction, re-use, recycling and composting of waste: Inspector's Matter (2)

363. Firstly, the WPA draws attention to the wording of paragraph 25 of PPS10, which states⁴⁶⁵ that: *"In the case of waste disposal facilities, applicants should be able to demonstrate that the envisaged facility will not undermine the waste planning strategy through prejudicing movement up the waste hierarchy."*
364. For reasons already outlined, the ERF is not a waste *disposal* facility. Accordingly, there is no requirement to demonstrate that it will not prejudice the movement of waste up the hierarchy. This is not merely the WPA's view: it was the conclusion reached by the Inspector and accepted by the Secretary of State at Eastcroft.⁴⁶⁶
365. In any event, national policy makes it clear that even "vigorous" support for EfW will not prejudice the reduction, recycling or composting of waste. There is no reason why what is true nationally should not apply at Rufford and it is important to understand that this is only one component of the overall PFI contract between Veolia and NCC. The ERF will be operated within the framework of the PFI requirements to increase recycling to at least 52% of municipal waste by 2019/2020, and to reduce the amount of biodegradable waste going to landfill to 35% of 1995 levels by 2020.⁴⁶⁷ As such, it will operate alongside the new 85,000 tpa MRF in Mansfield, the 17 HWRC sites within the county, and a proposed new composting facility.⁴⁶⁸
366. It is impossible to assess the sustainability of the ERF without recognising its place in this overall picture. As Mr Kirkman points out,⁴⁶⁹ if the waste management hierarchy was applied at the facility level, in isolation from the wider waste strategy, only the "prevent" option would apply, and no other treatment facility would ever be acceptable. That is self-evidently nonsensical. In the present case, waste incineration is not being advanced in preference to reduction, reuse or recycling, but as a complementary treatment for the non-recyclable fractions of the waste stream which cannot be reused or recycled, and would otherwise go to landfill.⁴⁷⁰
367. Much of PAIN's argument in this regard has been driven by the belief that the PFI contract would in some way "penalise" NCC if the County does not provide sufficient waste to keep the ERF going. In particular, they refer to the Shropshire agreement.⁴⁷¹ For the reasons which were explored in cross-examination with Mr Kondakor, the WPA do not understand how even the Shropshire contract discourages recycling – but, as Mr Allen made clear in his answers to the Inspector, the Nottinghamshire contract is in any event completely different, and contains no minimum tonnages. As PAIN has been pleased to point out, there are areas within the PFI contract where Veolia are already exceeding their contractual targets. There is no reason why they should not continue to do so.

⁴⁶⁵ see also CD27 – Companion Guide to PPS10, para 8.16

⁴⁶⁶ CD61 para 344

⁴⁶⁷ Mitchell VE1.1 para 3.5

⁴⁶⁸ Mitchell VE1.1 para 3.6

⁴⁶⁹ Kirkman VE2.2 para 3.14

⁴⁷⁰ Kirkman VE2.2 para 3.16

⁴⁷¹ PA55, PA56

Other technologies: what weight should the Secretary of State give to the fact that the ERF would rely on incineration, rather than anaerobic digestion, gasification or pyrolysis: Inspector's Matter (7)

368. PAIN's argument that there is "no need" for an ERF relies heavily on the group's belief that this waste should be dealt with by other technologies. However, aside from promoting anaerobic digestion for food waste, Waste Strategy 2007 advises⁴⁷² that the Government *"does not think it appropriate to express a preference for one technology over another, since local circumstances differ so much. Those making investment decisions should consider the 'summary guidance on energy from waste technology' ... and make their own decisions. It is not helpful to rule out a particular technology – such as incineration – in advance, since this unnecessarily restricts options and threatens to raise costs"*.
369. Before resolving to grant permission for the ERF, the WPA sought a comparative assessment of its sustainability against other options. It also attached particular weight to the known reliability of incineration.⁴⁷³ As Mr Mitchell⁴⁷⁴ and Mr Kirkman⁴⁷⁵ point out, there are still significant question marks over alternative technologies such as Anaerobic Digestion⁴⁷⁶ and MBT.⁴⁷⁷
370. When similar issues were raised at Ince, the Inspector concluded that neither the Waste Strategy 2007 nor PPS10 requires an optimal arrangement of facilities to be the key objective.⁴⁷⁸ He was right to do so: this is an issue on which the WPA was free to "make its own decision". Having regard to the advice in WS2007, the Secretary of State should attach no weight to the fact that the ERF relies on incineration, rather than anaerobic digestion, gasification or pyrolysis.

Consistency with PPS10

371. Given the age of the Waste Local Plan, it was the guidance in PPS10 which was the WPA's main touchstone when assessing the application. For the reasons set out in the Committee Report⁴⁷⁹ and Mr Hankin's consolidated proof,⁴⁸⁰ we submit the proposal is consistent with PPS10. In particular, the ERF:
- (1) will drive waste up the hierarchy, reducing reliance on landfill;⁴⁸¹
 - (2) will enable the County to take responsibility for its own waste;⁴⁸²
 - (3) will help implement the national waste strategy and meet targets, consistent with European legislation;⁴⁸³

⁴⁷² CD40 Chapter 5 para 27

⁴⁷³ CC15 paras 6.11.5-6.11.8

⁴⁷⁴ Mitchell VE1.1 paras 4.37-4.39

⁴⁷⁵ Kirkman VE2.2 paras 3.28-3.39

⁴⁷⁶ reliability, the need for pre-treatment/prior separation of the inorganic fraction, the need to find an outlet for the digestate, and cost

⁴⁷⁷ including the need for subsequent thermal treatment of the product

⁴⁷⁸ CD110b para 11.124

⁴⁷⁹ CD4 paras 11.1-11.17

⁴⁸⁰ CC15 paras 5.1.10-5.1.13 and 5.3.1-5.3.8

⁴⁸¹ PPS10 para 1, para 3 key objective 1

⁴⁸² PPS10 para 3 key objective 2

⁴⁸³ PPS10 para 3, key objective 3

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- (4) would secure the recovery or disposal of waste without risk to human health⁴⁸⁴ and would enable waste to be dealt with at one of the nearest appropriate installations;⁴⁸⁵
- (5) would reflect the needs of waste collection authorities, waste disposal authorities and business;⁴⁸⁶
- (6) would not harm the Nottinghamshire Green Belt;⁴⁸⁷
- (7) would be well designed to support sustainable waste management;⁴⁸⁸
- (8) would enable the WPA to be able to demonstrate how it will deal with waste over the next 10 years, without making unrealistic assumptions about the prospects of other waste management facilities coming forward;⁴⁸⁹
- (9) subject to the SoS being satisfied on the SPA issue,⁴⁹⁰ would satisfy the physical and environmental constraints on development in Annex E;⁴⁹¹
- (10) would not result in any cumulative effects from previous waste disposal facilities;⁴⁹²
- (11) would be well-located in terms of existing transport infrastructure, and in particular the ability of HGVs to access the site without needing to travel through congested or residential areas;⁴⁹³ and
- (12) would be located on a site which is currently being used for quasi-industrial purposes, and which the development plan recognises as suitable for future redevelopment for industrial use.⁴⁹⁴
372. Finally, PPS10 advises⁴⁹⁵ that WPAs should look to a “broad range of locations, including industrial sites” for waste management facilities. PAIN have argued⁴⁹⁶ that the Rufford Colliery is not an “industrial site” because of the restoration conditions. This argument is addressed under “The Right Site” below. For the reasons set out there, PAIN’s argument overlooks Policy E17, under which redevelopment of the former pithead for “employment” (which embraces both light industrial and industrial uses under classes B1 and B2) would be appropriate.⁴⁹⁷
373. In all these respects, the proposal is consistent with PPS10.

⁴⁸⁴ see submissions in response to PAIN, below

⁴⁸⁵ PPS10 para 3, key objective 4

⁴⁸⁶ PPS10 para 3, key objective 5

⁴⁸⁷ PPS10 para 3, key objective 6

⁴⁸⁸ PPS10 para 3, key objective 7; paras 35-36

⁴⁸⁹ PPS10 para 18

⁴⁹⁰ As to which, see submissions below

⁴⁹¹ PPS10 para 21(i) criterion 2

⁴⁹² PPS10 para 21(i) criterion 3

⁴⁹³ PPS10 para 21(i), criterion 4

⁴⁹⁴ PPS10 para 21(ii). See also submissions on the “greenfield/brownfield” issue below

⁴⁹⁵ PPS10 para 20

⁴⁹⁶ PAIN in xx of Mr Hankin

⁴⁹⁷ The redevelopment of Blidworth and Bilsthorpe (both of which include B2 uses) and the UK Coal application all demonstrate the sort of mix that could be expected at Rufford: see DC0 paras 6.31-6.32

Call-In Issue (d): Whether the Proposal is a Sustainable form of Development having regard to PPS1 and the (PPS1(S)) Planning and Climate Change Supplement

374. PPS1(S) promotes and encourages renewable and low carbon energy supplies.⁴⁹⁸ The Glossary specifically includes EfW within the definition of renewable and low carbon energy supplies. Schemes which generate electricity from the direct incineration of waste are defined as “low carbon”. This is consistent with earlier (2004) guidance⁴⁹⁹ which suggested that conventional waste incinerators firing MSW cannot be considered as sources of renewable energy.⁵⁰⁰
375. In considering the application, the WPA specifically sought further information on the relationship between the ERF and the Supplement. Veolia’s Regulation 19 response⁵⁰¹ demonstrates that the ERF would provide significant savings in terms of carbon equivalent emissions over the existing reliance on landfill.⁵⁰²
376. The proposal is therefore a sustainable form of development in terms of climate change.

Whether the ERF would secure the highest viable resource and energy efficiency and reduction in emissions: Inspector’s Matter (5)

377. This question relates to the “key planning objectives” in paragraph 9 of the Planning and Climate Change Supplement. That advice needs to be read together with:
- (1) the fact that the Supplement provides explicit support for all forms of EfW (as low-carbon development)⁵⁰³ without distinction; and
 - (2) WS2007 expressly allows WPAs to “make their own decisions” about the technology which is best for them.
378. The ERF would bring positive benefits in terms of energy efficiency and a reduction in emissions. It is a technology which the WPA considers reliable and affordable. Paragraph 9 cannot mean that “the best must be the enemy of the good”.

Effects on Human Health & Progress with the application for an environmental permit: Inspector’s Matter (8)

379. The operation and emissions of the proposed ERF at Rufford will be regulated by the EA. The EA has already issued an Environmental Permit, and explained its decision.⁵⁰⁴
380. The reasons for the application being called in do not include reference to human health. This is hardly surprising, given that:

⁴⁹⁸ CD20 paras 13, 19, 20 and 40

⁴⁹⁹ PPS22 Companion Guide Technical Annex 3

⁵⁰⁰ CC15 5.4.1-5.4.2

⁵⁰¹ CD2 section 2

⁵⁰² CC15 section 5.4

⁵⁰³ CD20 paras 10 and 21

⁵⁰⁴ CD44

(1) National policy provides explicit support for incineration. It is therefore plainly the Secretary of State's view that, if properly regulated, incineration is safe;

(2) WS2007 specifically advises that there is "no credible evidence of adverse health outcomes from those living near incinerators";

(3) PPS10 advises that modern, appropriately located, well-run and well-regulated waste management facilities operated in line with current pollution control techniques and standards should pose little risk to human health";

(4) Numerous Inspectors who have addressed the issue at public inquiries into proposals for incinerators have concluded that the risk to health is not significant;⁵⁰⁵

(5) Consultation responses from the EA, Health Protection Agency and the Nottinghamshire County NHS Teaching Primary Care Trust all confirmed the Rufford ERF was safe to human health.

381. In his evidence on behalf of PAIN, Mr Watson backed away from positively asserting that there would be any harm to human health, and instead relied on the public perception. In the WPA's submission, he should not be able to achieve by the back door what he cannot through the front. Public perception of risk should only be material in so far as it has some credible scientific basis. In the present case, national policy makes it clear that such fears are misconceived. When public anxiety was raised at the Ince Inquiry, the Inspector recommended that this factor should not carry any great weight in the SoS's decision.⁵⁰⁶ There is no reason to reach a different conclusion here.

"The Right Technology" : Summary

382. For all these reasons, the WPA conclude that the ERF is "the right technology". PAIN's argument that incineration is wrong in principle flies in the face of national policy. In Nottinghamshire, there is a clear need to divert significant quantities of waste away from landfill, and move it up the waste hierarchy. There are other technologies which the County could have chosen, but that is a matter which national policy explicitly leaves to WDAs to decide for themselves. There is no inherent conflict between incineration and high rates of recycling, and the ERF is only one of a number of facilities to be provided under the PFI contract. There is likely to be sufficient MSW to "feed" the ERF, but if this proves not to be the case, the ERF will still fulfil a valuable function in diverting C&I waste from landfill.

THE RIGHT SITE

Call-in Issue (a): Accordance with the Development Plan, in particular with policies on the provision of waste management facilities and development in the countryside

383. Following the 2009 adoption of the East Midlands Regional Plan (ERMP), the saved policies of the Nottinghamshire and Nottingham Joint Structure Plan

⁵⁰⁵ See the various decisions summarised by Prof Bridges, VE6.2 paras 2.18-2.26; but in particular the Eastcroft Inspector's Report CD61 para 333

⁵⁰⁶ CD110b para 11.28

no longer form part of the development plan.⁵⁰⁷ The development plan now includes the EMRP, along with the saved policies of the Waste Local Plan (WLP) and the saved policies of the Newark and Sherwood Local Plan (NSLP).

The East Midlands Regional Plan (EMRP)⁵⁰⁸

384. The key EMRP policy, for the purposes of this application, is Policy 38 which, together with the supporting text and Appendix 4 has been prepared in accordance with PPS10. This sets out the East Midlands' regional policy for waste management until 2026. When judged against the relevant criteria of that Policy, it is clear that:

- 1) The size of the ERF has been designed to take account of zero waste growth by 2015. Estimations of the quantity of waste requiring treatment submitted by the applicant as part of their evidence for the inquiry demonstrate that there is a need for a 180,000 tpa ERF to manage residual waste within Nottinghamshire based on current waste arisings and EMRP projections which anticipate waste would continue to increase by 1.7% each year up until 2015 with zero waste growth beyond this period.
- 2) The Rufford ERF would enable residual waste to be managed at a higher level within the waste hierarchy through the diversion of such waste from landfill disposal to an energy recovery process.
- 3) The development, as part of a package of facilities delivered through the Nottinghamshire PFI Waste Contract, would assist in ensuring that recycling and composting targets set out in the EMRP are exceeded at all times (except for a 2 year period between 2015-2017 when 48% recycling/composting would be achieved as opposed a target of 50%). A detailed review of the recycling/composting performance of the Nottinghamshire PFI Waste Contract against (the then draft RSS policy and WS2007/RWS targets) was undertaken within paragraphs 10.7 and 10.8 of the Committee Report. It is noted that WS2007 and RWS targets for composting and recycling would be exceeded in all years.
- 4) The development of the ERF would provide an additional waste management facility to assist in ensuring that sufficient waste management facilities are provided to manage the waste arisings in the Nottinghamshire collection area.

It has been shown⁵⁰⁹ that the apportionment figures in Appendix 4 support the need for the ERF. PAIN's suggestion that future needs should be based on the current low level of waste arisings makes no provision for any economic upturn or for the new development planned for the county, such as the 66,400 dwellings proposed by EMRP Policy 13a.

The EMRP approach smooths out peaks and troughs in arisings and is therefore appropriate for planning the medium to long term. It is quite possible that actual waste arisings will catch up with the EMRP predictions in the later years of the Plan.

⁵⁰⁷ CC15 para 5.1.5

⁵⁰⁸ CC24-25

⁵⁰⁹ CC15

In any event it is clear from paragraph 13 of PPS10 that, with the RSS reinstated, there is no need to re-open consideration of the principles in the EMRP or the predictions of waste arisings that it makes.

5) The siting of the facility is fully compliant with EMRP Policy 38, which supports the development of larger waste management facilities on former colliery land. Furthermore, it is consistent with paragraph 12 of PPS10 that RSS should identify broad locations where waste management facilities should be provided.

PAIN suggest that representations made as part of the EMRP sustainability appraisal indicate that Policy 38 should not be used to support redevelopment of colliery land where planning conditions make provision for the land to be restored. This misunderstands the purpose of the sustainability appraisal which is to help shape policies prior to adoption. Adopted Policy 38 and the supporting text (paragraph 3.3.70) identify previously used land and former colliery land as being suitable for centralised larger waste facilities. No distinction is made between land with or without restoration conditions. (In any event, the sustainability appraisal refers specifically to housing or employment development, rather than waste development which Policy 38 supports.)

If PAIN's interpretation was correct, this would effectively stop almost all waste developments on former colliery land because of the controls introduced by Part 20 Class A of the Town and Country Planning (General Permitted Development) Order 1995 which require collieries to be restored.

6) The ERF development would not adversely affect any designated site of international ecological importance. If Sherwood Forest were to be designated and the ERF were to have a significant impact on the designated site, the application would fail in any event.

385. Policy 3 seeks to concentrate new development in or alongside settlements. However, the supporting text (paragraph 2.1.7) makes it clear that this is not intended to rule out development elsewhere. Development in rural areas is allowed for provided certain criteria are met. The ERF would not conflict with this Policy and it would support the economic regeneration of a former colliery site.
386. Policy 7 identifies regeneration of the northern sub-area, where the ERF site lies, as a regional priority; an important element of this is the provision of new jobs to replace those lost from the coal industry. Paragraph 2.4.21 points out that this applies to rural and urban communities. The ERF would clearly assist with this aim. Indeed, paragraph 4.3.11 points to the needs of smaller settlements which have suffered from the decline in mining.
387. Policy Northern SRS1 identifies the potential role that Rainworth should play in the regeneration of the region, whilst Policy Northern SRS3 encourages development which assists the growth and regeneration objectives of the strategy along the Mansfield Ashfield Regeneration Route (MARR).

The Waste Local Plan (WLP)

388. The WLP is now “past its sell-by date”. It recognises the positive role that incineration can play in the management of waste,⁵¹⁰ but does not assess the need for facilities beyond December 2004. In the circumstances, the WPA believe that consistency with PPS10 is the key issue.
389. In any event, aside from the nature conservation policies (W3.22 and W3.23) which are considered below, the only part of the WLP to which anyone⁵¹¹ has made reference is W3.20, concerning the destruction or degradation of areas “defined as heathlands”.
390. In the WPA’s view, W3.20 is not engaged here, because it is clear from paragraph 3.65 that it is concerned only with the 250 hectares of heathland-type habitat which has survived. Although the application site has a condition requiring its restoration to woodland or heathland, it has none of the “complex association of flora and fauna”⁵¹² which the Policy seeks to protect. Since the appeal proposals would provide for significantly more new heathland than would be gained from restoration of the Rufford site, there is no conflict with W3.20.

Newark & Sherwood Local Plan (NSLP)⁵¹³

391. The key policies of the NSLP are NE1, NE8, NE9 and E17.
392. Of these, NE1 encapsulates the “normal” policy presumption against development in the countryside. It is common ground that the ERF does not fall into any of the specified exceptions, and to that extent there is a conflict with NE1 if that Policy is read in isolation. However, development plans need to be read as a whole, and Policy NE1 has to be seen in the context of E17, which specifically encourages the redevelopment of the pit head area of disused collieries within the district for employment development.
393. On behalf of PAIN, Mr Watson argued that E17 did not apply to colliery sites such as Rufford, which are subject to restoration conditions. That argument is plainly wrong:
- (1) the justification for the Policy expressly refers to the four collieries which had then closed in the Western area.⁵¹⁴ Rufford was one of those four collieries.⁵¹⁵ Mr Watson’s argument therefore asks for acceptance that the Policy does not apply to one of the four sites which is explicitly referred to in the justification;
- (2) contrary to Mr Watson’s confident assertion, there are not “lots of collieries” to which E17 could apply: there are only six. All of these are covered by restoration conditions.⁵¹⁶ If Mr Watson is correct, Policy E17 would have no application;

⁵¹⁰ CD10 paras 6.4-6.12 and 6.30-6.34

⁵¹¹ Inspector’s question to Veolia

⁵¹² CD10 para 3.67

⁵¹³ CD13

⁵¹⁴ CD13 para 6.74

⁵¹⁵ CD13 para 1.7: Rainworth = Rufford

⁵¹⁶ see CC21 – extract from the Notts Minerals Local Plan 1997, paras 11.63, 11.65, 11.69, 11.70, 11.81 and 11.83

(3) Policy E17 has recently been saved. Rufford and Clipstone are the only two collieries to which it could apply. Since Clipstone is within the settlement boundary, Policy E17 would not be needed to allow redevelopment there;

(4) As the author of Policy E17, NSDC accepts that E17 applies to Rufford.⁵¹⁷

394. Policy E17 is critical because it means that, notwithstanding the restoration conditions, the application site is one where the development plan looks favourably on redevelopment in order to provide new job opportunities to replace those which have been lost.⁵¹⁸ It is for this reason, combined with the fact that the site is currently an unrestored post-industrial landscape, that both the WPA and NSDC refer to it as “technically” greenfield. Contrary to PAIN’s suggestion, this is not a form of weasel words which seeks to invent some new category of land unknown to planning law; it is a simple recognition of the fact that redevelopment of the former colliery in accordance with the development plan would necessarily entail the loss of its status in policy as a “greenfield” site.

395. In this respect, it is noteworthy:

(1) that NSDC do not object to the principle of the ERF.⁵¹⁹ Their concern is that the proposal has not been brought forward as part of a comprehensive scheme. They recognise that this is a site on which development is appropriate;

(2) that this position is unchanged by NSDC’s emerging Core Strategy.⁵²⁰ While no decision has yet been made as to the extent of employment development which will be needed at Rufford, it is apparent that some allocation is likely. Indeed, until the Allocations DPD is prepared, Policy E17 will remain a “saved” policy.⁵²¹

396. This necessarily impacts on the conflict with Policy NE1. If the NSLP is read as a whole, it is clear that E17 creates a further exception to NE1. E17 must “trump” NE1, because otherwise it is meaningless.

397. In the WPA’s submission, Policy E17 is therefore pivotal to the question of accordance with the development plan for the purposes of S.38(6).⁵²²

398. The support which E17 provides depends on 4 criteria being met. Of these, it is common ground between Veolia, the WPA and NSDC⁵²³ that criteria 1, 3 and 4 are satisfied. The critical issue is criterion 2 – that: *“the redevelopment would not intrude into the openness of the countryside”*

⁵¹⁷ see DC0 paras 6.27-6.39

⁵¹⁸ see CD13 para 6.75

⁵¹⁹ see CC15 App 5; DC0 para 6.4

⁵²⁰ CD14a

⁵²¹ CD14a: see at Appendix F the list of policies which the Core Strategy is intended to replace. Policy E17 is not affected.

⁵²² Which is to be distinguished from the test which NCC applied when referring the application to the Secretary of State under the Departures Direction. Whereas the need to refer was determined by reference to conflict with individual policies, the s. 38(6) question requires consideration of the development plan as a whole. As Mr Hankin made clear, notwithstanding the conflict with certain individual policies, the WPA consider that the proposal is in accordance with the development plan for the purposes of s. 38(6).

⁵²³ DC0 paras 6.36, 6.38, 6.39

399. For the reasons explained by Mr Hankin, the reference in criterion 2 to “openness” cannot possibly mean openness in the normal PPG2 sense of the word, because if that were the case no redevelopment would ever satisfy the test. Instead, criterion 2 must be directed at the broader, landscape impact of the development. At this point, Policy E17 intersects with policies NE8 and NE9.

Visual and Landscape Impacts

400. Throughout its consideration of the application, the WPA has accepted that there would be some adverse effect, particularly if the proposal is measured against the baseline of a restored site. However, this impact has to be put in context:
- (1) It is unlikely that redevelopment of the Rufford site for employment purposes in accordance with Policy E17 could be achieved without any landscape impacts. The ERF needs to be seen in that light;
 - (2) As the recent wind-farm development demonstrates, this is a robust, large-scale landscape which is capable of absorbing large structures;
 - (3) As Ms Demmar’s illustrations of what an ERF at Portland Road might look like, and notwithstanding Monsieur Mazaud’s comments, a facility of this size and scale is likely to have an impact no matter where it is located;
 - (4) The recent Revised Draft NPS for Energy reflects the need to take a sensible approach to the landscape and visual impacts of what will almost invariably be large scale facilities. Hence, para 5.9.17 advises that: *“All proposed energy infrastructure is likely to have visual effects for many receptors around proposed sites.”* and at para 5.9.7⁵²⁴ that: *“Having regard to siting, operational and other relevant constraints the aim should be to minimise harm to the landscape, providing reasonable mitigation where possible and appropriate”*
- It is implicit in this that the “operational and other constraints” will frequently make it impossible to avoid harm altogether, or to provide complete mitigation.
401. Ultimately, the visual and landscape impacts of the ERF are a matter which have to be judged on site, having regard to the landscape and visual impact assessment in the ES and the evidence of Ms Demmar. In the WPA’s view, any adverse effects which it might have are acceptable in the wider context, and given the benefits which would flow from the facility.
402. Overall, and taking into account the advice in PPS10 relating to the role of “positive planning” in delivering sustainable waste management, the proposal accords with the development plan.

Other development plan –related issues

403. Whatever the future of the EMRP, it is difficult to ignore some of the concepts which it promotes, and which will continue to influence the way in which local authority DPDs are brought forward. In particular, as NSDC’s

⁵²⁴ see also para 5.9.14

evidence makes clear, the identification of Newark and Sherwood as a Growth Point, and the emphasis on the economic, social and environmental regeneration of the Northern sub-area along the (MARR) Mansfield Ashfield Regeneration Route (Policy Northern SRS3) is likely to remain a key driver of local development plan policies. The proposed ERF is fully in accordance with those strategic objectives.

Call-In Issue (e): Consistency with PPS7

404. NSLP Policy E17 impacts on the interpretation of other policies such as NE1. In the same way, E17 is directly relevant to the advice in paragraph 1(v) of PPS7 (and paragraph 21(ii) of PPS10, requiring priority to be given to the re-use of brownfield land). Local Plans are not required to slavishly follow national guidance: they are entitled to create local exceptions, where there is good reason for doing so. That is what NSDC have done under Policy E17, in response to the devastating effect of the closure of the collieries on the local communities.⁵²⁵
405. E17 will have been subject to scrutiny through the Local Plan process, and should be given weight accordingly. In short, it would be illogical to “prioritise” the use of brownfield sites over a site which is technically “greenfield”, but which the development plan allows to be developed in any event.
406. In considering paragraph 1(v) of PPS7, it is also relevant to bear in mind the advice in the Revised Draft NPS on Energy⁵²⁶ that: *“Although the re-use of previously developed land for new development can make a major contribution to sustainable development by reducing the amount of countryside and undeveloped greenfield land that needs to be used, it may not be possible for many forms of energy infrastructure.”*

Call-in Issue (b): The Appraisal of Alternatives; and Inspector’s Matter (6): The availability of sites where CHP might be provided:

407. Although it is necessary for an Environmental Statement to outline any alternatives which the developer has considered, there is no legal requirement for an application to be the optimal solution. The WPA’s consideration of Veolia’s appraisal of alternatives has been carried out in the light of the well-established principle that the existence of an arguably better alternative is irrelevant if the proposal under consideration is acceptable in its own right.⁵²⁷ This body of case-law has been most recently summarised by Sullivan L.J. in *Governing Body of Langley Park School for Girls v. Bromley LBC*⁵²⁸ as follows: *“There is no ‘one size fits all’ rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning*

⁵²⁵ CD13 para 6.74 “Many of the settlements in the area were constructed to serve the local colliery and its closure can strike at the heart of the community...”

⁵²⁶ CD85a at para 5.10.3

⁵²⁷ see *Trust House Forte Limited v. Secretary of State for the Environment* (1986) 53 P&CR 293; *R (o.a.o. Mount Cook Land Ltd) v. Westminster CC* [2003] EWCA Civ 1346

⁵²⁸ [2009] EWCA Civ 734; [2010] JPL 434 – transcript appended.

authority would need to be persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the Applicant that there was no possibility, whether by adopting an alternative scheme or otherwise, of avoiding or reducing that harm."

408. If there is any "defect" in the appraisal of alternative sites, it lies in the fact that the Rufford site was regarded as a brownfield site when the initial sift was carried out. However, while this was technically incorrect as a matter of policy, for the reasons we have already canvassed in relation to Policy E17, the error was of little consequence. The WPA was fully aware of the status of the site when it took its decision. However, for the reasons which are outlined above, the WPA's view was (and is) that this proposal is acceptable. It is therefore not necessary to embark on a detailed analysis of the appraisal of alternative sites.
409. The one area where the WPA did seek further information on alternatives was in relation to the relative potential for CHP. Veolia supplied this information in response to the Council's (EIA) Regulation 19 request.⁵²⁹ The conclusion was that none of the sites offered the potential for viable CHP at present, but that Rufford could have the greatest future potential.
410. If the opportunity for CHP should arise at Rufford (whether through the UK Coal BP proposals or any other end-user), the Planning and Climate Change Supplement would provide further support for the proposal.⁵³⁰ However, the Supplement does not require CHP to be part of EfW proposals. The fact that there is no certainty that the UK Coal proposals will be approved may limit the weight which can be attached to the potential for CHP in this case, but that does not affect the compatibility of the proposal with PPS1 or PPS10; at worst, it means there might be no icing on the cake.

Inspector's Matter (11): Why it is considered appropriate to consider these proposals now, rather than as part of the wider redevelopment scheme which is currently being developed by the owners of the pit head site

411. NSDC's core objection to the ERF is that it has not been brought forward as part of a comprehensive scheme for the redevelopment of the wider colliery area. We find this difficult to understand. There is no development plan or development brief requirement for a comprehensive scheme. Mrs Bland accepts that the ERF would not prejudice any future employment development either in terms of using up capacity on infrastructure such as the access road, or in constraining the lay-out of any scheme on the adjoining UK Coal land. Her only point is that it may not be possible to ensure the use of CHP without a comprehensive scheme.
412. That cannot be right. There are problems in retro-fitting CHP to existing industrial development, but government policy specifically encourages planning authorities to require developers to secure a proportion of the energy supply for their developments from renewable or low-carbon energy

⁵²⁹ CD2 section 3

⁵³⁰ CD20 para 27

sources, and proceeds on the basis that authorities can “set specific requirements to facilitate connection”.⁵³¹ The design of the ERF makes provision for CHP to be taken from it, and conditions could be imposed to ensure that this forms part of the construction. Thereafter it is a matter for NSDC to condition any future employment development to take advantage of the opportunity which the ERF would create. If NSDC cannot do this, then there is a fundamental flaw in the government’s aspirations for CHP. We do not believe that to be the case.

413. Accordingly, there is no reason to require the ERF to be brought forward as part of a comprehensive scheme.

Nature Conservation and the SPA issue

414. When the WPA first consulted on the scope of the Environmental Statement, Natural England made no mention of the possible designation of the area around Rufford as a Special Protection Area for woodlark and nightjar. When the planning application and Environmental Statement were advertised for public consultation, no statutory consultee or third party complained that the ES was in any way inadequate. The WPA considered the impact of the proposal on protected species and, having regard to Natural England’s advice, was satisfied that there would be no adverse effects for the purposes of WLP Policy W3.22.⁵³² The WPA’s position in that regard remains unchanged.
415. It was only when NWT’s evidence was received, four weeks before the start of the inquiry, that the possible SPA was raised as a ground for objection to Veolia’s application. Certainly, if an SPA were to be declared, this would engage WLP Policy W3.23; but this would make no material difference to consideration of the application, given the requirements of the Conservation etc. Regulations.
416. In the period since the first adjournment, the WPA has taken no part in the debates between Veolia, NWT and Natural England about either the status of the appeal site as a possible or “should-be” pSPA, or the effects which the ERF might have on an SPA if one were to be designated. However, in terms of the approach which we ask the SoS to take, the WPA’s position is clear:
- (1) It is common ground that the area around the Rufford site meets the Stage 1 criteria for designation. While this does not mean that there will be a Sherwood Forest SPA, it means that this is a “reasonable possibility”;⁵³³
 - (2) If permission is granted, construction of the ERF is estimated to take around 3 years. While there are no guarantees as to the date by which a decision on designation will be taken,⁵³⁴ it is therefore also possible that the area around Rufford could become an SPA before the ERF is substantially complete;
 - (3) If that were to happen, the WPA would then be under a legal duty to review the grant of planning permission in accordance with the Conservation

⁵³¹ Planning and Climate Change Supplement, CD20, paras 20 and 27-29

⁵³² CD10 p. 44

⁵³³ see Natural England’s position NE8 para 5.5

⁵³⁴ as to which, see NE8

etc Regulations 2010. Depending on the outcome of that review, it might then be duty-bound to revoke the permission;

(4) Aside from the fact that revocation would involve the payment of substantial compensation (which, on current authority, is probably not a relevant consideration), the potential loss in some two or more years time of a significant component of the County's waste planning strategy would obviously be damaging to the County's ability to meet its obligations in relation to waste;

(5) Consequently, whether or not the Rufford area is a pSPA, a "should-be" pSPA or simply a possible proposed SPA, the WPA endorses Natural England's advice:

That the SoS should take a "risk based" approach to the grant of permission; and

That the "most robust"⁵³⁵ form of risk based approach is to treat this application as if the Habitats Directive applied.

417. In short, the only way to be confident that it will not be necessary to revoke any permission which might be granted is for the SoS to ask now the questions which would need to be asked if the site is designated an SPA before the ERF is substantially complete. Natural England have confirmed that this is consistent with their position,⁵³⁶ and that is what the WPA ask the SoS to do.
418. As to the answer to which the SoS should come, the WPA leave the detailed representations to Veolia. The WPA merely note that Natural England has still not objected to the ERF; that Veolia's offsetting proposals would result in the creation of substantially more heathland habitat than would result from restoration of the Rufford site; that such reservations as NE has expressed about the ERF are now limited to the results of the I-CA and the ability to control third party access to the GCP off-set land; and that these are matters on which Veolia has produced detailed evidence which we commend to the SoS. In the light of that, we sincerely hope the SoS will either conclude that there would be no significant effect on any possible SPA, such that there is no need to make an appropriate assessment, or will make an appropriate assessment which concludes that the ERF would not adversely affect the integrity of that SPA.

Conclusions on "The Right Site"

419. For all these reasons, and subject to the SoS being satisfied on the SPA issue, the WPA believes that the former Rufford site is the right site.
420. In considering PAIN's arguments to the contrary, it is necessary to consider closely the history of the ERF proposals in this case, and in particular the fact that many of those who are opposed to the Rufford ERF were equally opposed to the earlier choice of what (on the basis of PAIN's arguments to this inquiry) ought to have been the much more suitable site at Crown Farm. What that history demonstrates is that incinerators almost inevitably

⁵³⁵ Mr Pike (NE) in answer to questions from the WPA

⁵³⁶ Mr Pike in response to questions by the WPA

generate opposition, wherever they are proposed; and that the closer a proposed facility is to residential areas, the more vociferous the objections are likely to be.

421. There is an obvious irony in this, given that “brownfield” sites will frequently be closer to centres of population. If the ERF is “the right technology”, the SoS should think long and hard before refusing this permission on the basis that it will be any easier to obtain planning permission on any of the alternative sites which have been canvassed at this inquiry. History indicates that this is unlikely to be the case.

OVERALL CONCLUSIONS

422. There can be no doubt whatsoever that Nottinghamshire needs an alternative to its current heavy reliance on landfill. As a form of technology, the ERF is tried and tested and fully in accordance with national policy on EfW and climate change. It forms one of a number of complementary facilities which are necessary for NCC to make the “step-change” referred to in paragraph 1 of PPS10. As a location, the Rufford site is in an area of high unemployment for which the strategic objective is regeneration; has been identified by NSDC as suitable for future employment use development; is well situated in terms of its proximity to arisings; enjoys good vehicular access without the need to travel unnecessarily through urban or residential areas; has relatively few immediate neighbours to be disturbed; and, sits in a landscape which is capable of absorbing large-scale structures.
423. In the WPA's view, this is a proposal which accords with the development plan and, more importantly, accords with PPS10. Permission should therefore be granted.

The Case for Newark and Sherwood District Council

The material points are as follows.

424. The application must be determined in accordance with the statutory development plan unless material considerations indicate otherwise⁵³⁷. Conversely, applications which are not in accordance with relevant policies in the plan should not be allowed unless material considerations justify granting a planning permission. Planning Policy Statement (PPS1) indicates that “where there are other material considerations, the Development Plan should be the starting point, and other material considerations should be taken into account in reaching a decision.”
425. NSDC, as a statutory consultee, have based their objection to the proposals for ERF on site specific concerns they have that the development does not comply with the established and relevant planning policies of the Development Plan.

⁵³⁷ Section 38(6) Planning and Compensation Act 1991

Relevant Development Plan Policies:

426. The Development Plan includes the saved policies of the Newark and Sherwood Local Plan (adopted March 1999) (NSLP)⁵³⁸ and the saved policies of the Nottinghamshire and Nottingham Waste Local Plan (adopted January 2002) (WLP)⁵³⁹.
427. The East Midlands Regional Plan, which was adopted in March 2009, and the East Midlands Regional Waste Strategy, adopted in January 2006, were revoked by the Secretary of State for Communities and Local Government on 6 July 2010, part way through the inquiry. Much of the subsequent discussion concerning development plan policies during the inquiry focussed around the NSLP and their interpretation and application to the application. Following the quashing of the revocation, the EMRP is once again part of the development plan.

EAST MIDLANDS REGIONAL PLAN (EMRP)

428. Proposals for the ERF, submitted on a stand alone basis, do not contribute to the aims of EMRP Policy 3. This is because the ERF would be in the countryside; the scheme would change the rural character of the area; the number of jobs generated would be few; and the development would not benefit existing rural enterprise. Furthermore, the site is not previously developed land and so would gain no support from the priority that this Policy gives to the redevelopment of previously developed land. In terms of Policy 7, the scheme does little to provide jobs and nothing to promote environmental enhancement.
429. Policy 30 encourages increasing woodland cover in Sherwood Forest, but the tree planting proposed as part of Veolia's application is restricted to providing a setting for the ERF building. Indeed, EMRP paragraph 3.3.55 notes, in accordance with MPS1, the environmental and other benefits that can be expected to accrue from restoration of former minerals sites. Piecemeal redevelopment of the Rufford colliery would not be conducive to this.
430. Policy 38 notes that former colliery land may be suitable for new waste facilities within the context of previously used land. This does not mean that restoration conditions can be ignored. If it did, this would contradict the priority that PPS10 affords to locating new waste facilities on previously developed land.
431. Policy Northern SRS3 highlights the special consideration that should be given to the impact of development on former mining sites that are outside settlements, but along the MARR, given the character of these areas and the encouragement that Policy Northern SRS4 provides for the enhancement of green infrastructure. This is made explicit in the reasoned justification for SRS3 (at paragraph 4.3.37) which points to the fact that some former collieries are remote from the pit villages and, in many cases, such sites are best returned to "green uses" to enhance the landscape and biodiversity.

⁵³⁸ CD13

⁵³⁹ CD10

Further support for this is given in the (February 2010) NSDC green infrastructure strategy which indicates that use of the application site should be prioritised for wildlife and recreation.⁵⁴⁰

432. The ERF proposals are also inconsistent with the (Policy Northern SRS5) aim of promoting the creation of a Sherwood Forest Regional Park which generates environmental, economic and social benefits by, amongst other things, protecting and enhancing the distinctive landscape of the area.

NSLP POLICY NE1

433. Policy NE1 states that planning permission will not normally be granted for development in the countryside except where it is associated with agricultural development, recreation and tourism facilities, utility installations, change of use of rural buildings and roadside services. There has been consensus from the outset between the parties that since the ERF does not meet any of the exceptions listed as appropriate development in NE1, it should be considered as a departure from the development plan.

NSLP POLICY E17

434. Policy E17 allows for the redevelopment of the pit head area of disused collieries for employment purposes providing a number of detailed criteria are met. There has been some debate during the inquiry about the interpretation of this Policy and whether the proposal is in compliance with it. Mrs Bland, in her evidence⁵⁴¹, set out the District Council's view that the ERF proposal conflicts with criterion 2 of Policy E17 on the basis that the development would intrude into the openness of the countryside.
435. Conversely, Mr Standen in his evidence⁵⁴², whilst accepting that the proposed development would partially intrude into the openness of the countryside did not agree that it necessarily followed that the proposal would not therefore comply with E17. When pressed in cross examination he could not adequately explain his assessment of 'partial intrusion' and its application to criterion 2, which does not indicate that a quantitative assessment of a level of intrusion is required to be made.
436. Mr Hankin on behalf of NCC also had the same difficulty with this issue, taking the view that the proposal, even though it would intrude into the openness of the countryside, nevertheless 'broadly' complied with Policy E17. In response to questions from the Inspector however, he agreed that "intrusion into the openness of the countryside" required a different consideration to the one applied by PPG2 criteria dealing with openness in terms of the greenbelt.
437. Mrs Bland stated very clearly to the inquiry that the key question in considering criterion 2 was whether the proposal would 'intrude' or not. She also clarified that the criterion sets out no level of intrusion so it is a

⁵⁴⁰ DC21 p10 and DC26

⁵⁴¹ DC0 paragraph 6.40

⁵⁴² VE10.2 paragraph 4.77

question of judgement taking into account issues such as the scale, and type of development, proximity to settlement, level of mitigation available etc. Applying these factors to the ERF proposal it is difficult, if not impossible, to come to the conclusion that such a large scale development would not intrude into the openness of the countryside in this location.

438. Put plainly, the approach to the interpretation and application of E17 by the applicant and NCC cannot be correct. Policy E17 is a permissive policy, which sets out a list of criteria, all of which must be satisfied for a proposal to take the benefit of it. It must follow on a proper interpretation of its wording that if a proposal fails to meet any of the criteria, as is the case with the ERF proposal, it is not in compliance with it.

NSLP POLICY NE9

439. Policy NE9 provides that planning permission will be granted for appropriate development within the Sherwood Forest Special Landscape Area (SLA) provided that the proposal would conserve and enhance the landscape and ecology of the area, and maintain its function as a recreation and tourist area. The reasoned justification points out that all development, outside villages, will be carefully controlled and directed away from sensitive locations, although the area will continue to provide a focus for recreation and tourism. Appropriate development, for the purposes of this Policy, are the same categories considered as exceptions to the general restraint in the countryside, as defined in Policy NE1⁵⁴³.
440. Ms Demmar gave evidence that the history of the Sherwood Forest SLA, its boundaries and the special landscape elements and qualities that it protects are difficult to trace.⁵⁴⁴ She questioned the sensitivity and 'special' protection to be afforded the area, although this view and her approach to the matter seems to have been informed and influenced by the erroneous conclusion she made as to the boundary of the Heritage area.⁵⁴⁵ Indeed, she argues that permission for the Lindhurst windfarm demonstrates the capacity of the landscape to absorb large-scale development. However, as the committee report points out, that development lies outside the SLA but nevertheless has an adverse impact on it⁵⁴⁶. There is no doubt that it is a varied landscape with some detracting features which has led to the policy objective of enhancement and restoration. Mrs Bland referred in her evidence to documents⁵⁴⁷ that formed the evidence base for the landscape policies of the NSLP. These clearly explain the context for those policies indicating that derelict colliery sites are likely to play a key role in the future economic development of the region with green after uses, including agriculture, forestry and recreation, being the preferred options for certain rural collieries and spoil tips. Heathland creation is seen to be particularly appropriate to sites located to the east and south of Mansfield.⁵⁴⁸

⁵⁴³ Mrs Bland's proof DC0 para 6.44

⁵⁴⁴ VE4.2 para 6.9

⁵⁴⁵ Indicated correctly on the NSLP map

⁵⁴⁶ VE4.3 7.22-7.25

⁵⁴⁷ The Plan for Sherwood Forest (DC27) & Countryside Appraisal Sherwood Regional Character Area (DC28)

⁵⁴⁸ DC28 pages 31 & 32

441. Evidence given by Mrs Bland demonstrated that the replacement of the SLA designation, through the local development framework, with landscape character assessments has not altered the long term vision and policy actions for this landscape area, which has led to a recommendation to create and conserve heathland habitats within the area of the application site. It also aims to promote the sensitive siting of new industrial buildings, to concentrate new development around the existing settlements, and to conserve the remote rural character of the landscape.⁵⁴⁹
442. Ms. Demmar referred to the restoration conditions applicable to the site as being aspirational.⁵⁵⁰ Similarly Mr Standen has referred to the restoration conditions as being the 'fall back' position.⁵⁵¹ They have both described the site as being industrial in nature. However, this is clearly overstating the case, for a site upon which mining operations ceased some 15 years ago, the majority of the buildings have been cleared, and parts of the site have been restored. The inquiry heard evidence from both Mrs Bland and Mrs Bradley to the effect that when the restoration conditions were agreed by the then owner RJB Mining, it was on the basis that restoration of the former colliery site at Rufford to heathland was the most appropriate approach as part of the ongoing vision for the Sherwood Forest area, and was RJB's contribution towards that goal. Indeed Mrs Bradley stated that her former employer, RJB Mining, viewed the former Rufford Colliery site as an exception to the usual approach of development of pit head areas for employment use, and specifically put forward complete restoration of Rufford to heathland. This evidence demonstrated that to view the restoration conditions as a fall-back position belies their true force and original intent, which has just as much relevance now as when first agreed.
443. Much emphasis was placed by Mr Hankin in his evidence⁵⁵² about the support of Policy E17 for industrial development at the former Rufford Colliery. He specifically sought to draw comparisons between the treatment of the former Bilsthorpe Colliery and the application site. Mrs Bland's evidence⁵⁵³ demonstrated the significant difference between Bilsthorpe and Rufford, both in terms of their respective locations and proximity to settlements, topography, landscape protections, and the fact that when the restoration proposals for the former Bilsthorpe Colliery had been approved in 1996 – it was envisaged, even at that time, that the former pit head area would be redeveloped for industrial/business use.⁵⁵⁴ This is significantly different from the restoration proposal for Rufford, as explained above.
444. NSDC's conclusion, which is supported by the CLA, is that an assessment of the proposals against a restored landscape results in an impact upon landscape character of moderate/substantial adverse. The WPA are of the view that the proposed ERF would not comply with Policy NE9 and NSDC agree that the proposal does not comprise appropriate development within the SLA and would be contrary to this Policy.

⁵⁴⁹ Landscape Character Assessment (DC25) & DC21 paras 4.12 to 4.18

⁵⁵⁰ VE4.2 para 5.15

⁵⁵¹ VE10.2 para 4.16

⁵⁵² CC15 paras 5.1.14 onwards

⁵⁵³ DC0 para 6.32

⁵⁵⁴ Appendix DC12 showing approved restoration scheme with development area

APPRAISAL OF ALTERNATIVE SITES

445. NSDC consider that overly high weighting was given to the application site in scoring the final shortlist of four sites which undermines the robustness of appraisal process. In evidence,⁵⁵⁵ Mrs Bland set out NSDC's view that an over-emphasis in the appraisal was given to the potential of the site for employment purposes. It placed reliance upon NSLP Policy E17 when the proposal does not comply with this Policy, and failed to give proper regard to the greenfield nature of the site and designation as open countryside under NSLP Policy NE1. It also became clear from Mr Standen during cross examination that the appraisal process in fact post-dated the selection of this site and that the applicant had in fact fixed upon this site some time before undertaking the appraisal. This must beg the question as to how robust and genuine any appraisal is in these circumstances.

PROGRESS ON LOCAL DEVELOPMENT FRAMEWORK

446. Whilst the NSDC Publication Core Strategy (CS)⁵⁵⁶ can only be afforded limited weight as a material consideration in determination of this application, because it has not been tested for soundness by an Inspector, it is of relevance in expressing NSDC's most up to date vision, strategic objectives and spatial strategy for the District.
447. NCC have sought to draw support from this document that the former Rufford Colliery will be a key regeneration site.⁵⁵⁷ Mr Hankin, also cited in support the Employment Land Review, which was updated in July 2010⁵⁵⁸, as adding weight to the Rufford site having been identified as suitable for employment land. This gives undue weight to the documents and misinterprets them. As Mrs Bland clearly set out in her evidence,⁵⁵⁹ the CS does not seek to identify key regeneration sites. This is something that will be carried out at a later stage as part of the preparation of the site allocations and policies and in fact directs the vast majority of new employment allocations to the Newark Urban area, with a relatively low figure of 10 – 11 hectares of new allocations to be provided within the Mansfield Fringe Area. It should be noted that the combined site areas for the proposed ERF (5.4 hectares) and the proposed (BP) Business Park (26.34 hectares) would significantly exceed this proposed guideline figure.
448. The Employment Land Review and update are factual, background documents which form part of the evidence base of the CS. Whilst they are useful in providing up-to-date information or analysis and are used by NSDC in the formulation of policy, the fact remains that they are simply part of the evidence base to an unadopted CS and so are of limited weight. Whilst the applicant and the WPA give limited weight to the CS, they both appear to

⁵⁵⁵ DC0 Para 6.45 onwards

⁵⁵⁶ CD14a

⁵⁵⁷ CC15 para 5.1.31

⁵⁵⁸ Northern Sub-Regional Employment Land Review (2008) and Employment Land 2010 Arup Update

⁵⁵⁹ DC21 Para 3.0

seek to afford more weight to the evidence base documents that underpin it, which does not follow a rational approach.⁵⁶⁰

449. NSDC have restricted their views to the inquiry to site specific concerns, regarding compliance with Local Plan policies, but have watched with interest as evidence has been given to the inquiry about the issue of the SPA. However, the fact that the issue has been raised has had implications for the Council in preparing its CS document to ensure that it is flexible enough to deal with any future potential designation. It has therefore undertaken a risk assessment of the CS to ensure that its proposals and policies are compatible with any SPA. Clearly there are a number of options open to the SoS about the SPA question, which the Inspector alluded to. NSDC's view is that certainty about the matter, whatever conclusion is reached, would be infinitely preferable to deferring consideration as part of the national review, as NSDC move to preparing their DPDs for the District.

PROPOSED BUSINESS PARK AND CHP

450. It is accepted that the applicant has presented the ERF proposal for consideration as a stand alone development on its own merits, although certainly at the outset and particularly in Mr Standen's evidence it is fair to say that much reference was made to the perceived benefits of the proposed (BP) business park. This is demonstrated by the reference in the NCC's committee report, and in a number of witness proofs for the applicant.
451. As the inquiry heard, NSDC have now received an outline planning application for a BP on the remainder of the former pit head adjacent and to the north of the proposed ERF facility. It is fair to say that the application for the BP indicates little by way of firm commitment towards maximising opportunities for the development of CHP. As Mrs Bland indicated in her evidence⁵⁶¹ the application simply recognises the opportunity for the future occupiers of the BP to take a proportion of their energy supply from the ERF, but states that this would be determined by market demand. The proposals do not include any provision for infrastructure to connect the ERF with the BP.
452. NSDC have from the outset been concerned that the submission of the ERF proposal in isolation does not enable the layout or amount of new development and necessary infrastructure required for CHP, in addition to other important factors, to be planned in a comprehensive manner.
453. Mr Hankin suggested in his evidence to the inquiry that NSDC could seek to secure the CHP potential by imposing a planning brief on any surrounding development requiring it to incorporate CHP⁵⁶². This of course presupposes the question as to whether this site is suitable for employment regeneration, which is one of the issues that the inquiry has heard evidence on. Notwithstanding that point, the fact remains that this suggestion is in any event unrealistic given the stage that NSDC are at with their Local

⁵⁶⁰ Statement of Common Ground 24 September 2010

⁵⁶¹ DC21 Para 5.6

⁵⁶² CC15 Para 6.14.11

Development Framework, and the fact that they have already received a planning application for the site, which they must determine.

CONCLUSIONS

454. The (NSDC) District Council, as the local planning authority for the area and one of the statutory consultees in the decision-making process relating to this planning application, have limited their objections throughout to areas specifically within their area of competence, namely site specific concerns with particular regard to compliance with local plan policies. NSDC have given evidence on these concerns to demonstrate that the proposal does not accord with development plan policies. Clearly the more finely that the national and local policies are balanced, the more important it is to balance the alternatives and other material considerations that have been put forward by the applicant and other parties to justify this proposal in this location. NSDC remain of the view that the proposed ERF would not bring about sufficient benefits to warrant allowing the development on this site and on land that, if the conditions attached to it are complied with, will be restored.

The Case for (NWT) Nottinghamshire Wildlife Trust

The material points are as follows.

455. The Trust's fundamental assertion is that, even if there is a need for an incinerator of the type proposed (which others contest) the application site is most certainly the wrong place for it. Such a development in this location would conflict with a whole raft of soundly-based planning policy, from the national to the local level; and in the light of what is now known about the populations of nightjar and woodlark in this area, it would indeed be impossible to grant planning permission without contravening law and policy protective of the habitats hosting species of birds of European importance.
456. The proposed incinerator would cause substantial harm:
- (1) by the imposition on the local landscape of an alien structure utterly out of scale with its surroundings, and the loss of a site already used by local wildlife including the Annex 1 birds;
 - (2) through introducing impacts and pressures on the surrounding area and its biodiversity through traffic, noise, lighting, emissions and simple people pressure;
 - (3) by preventing the achievement of long-standing policy for the restoration of this whole tract of land, between Rainworth and Clipstone, to a natural condition, mainly heath, as part of the wider vision for Sherwood Forest; and
 - (4) by providing a bridgehead which would substantially increase the risk of industrial and commercial development on the wider Rufford Colliery site, so preventing the consolidation of existing and potential open habitat into the wide swathe of open, restored habitat intended for this locality.

NEED AND ALTERNATIVES

457. There are two aspects to “need” here; these are whether a facility of the type and size of this ERF is needed in Nottinghamshire, and if so, whether it needs to be at Rufford. It is the second of these which is addressed here, ignoring initially the possible application of the Birds and Habitats Directives.
458. In the present case it is common ground that there are planning objections to this development, arising from harm to landscape and to visual amenity, even though there is disagreement as to the severity of that harm. NWT assert that there is other relevant harm; and both Veolia and NCC claim that there are factors in favour of the development which overcome any planning objections, including the advantage of developing the Rufford former pit-head area for employment purposes.
459. Nevertheless in the present case, if the planning judgement be that the development of an ERF at Rufford is objectionable, consideration of alternative sites would only assist Veolia if they were contending that Rufford is the only available site, in the sense that no other site can be found which is less objectionable. Veolia do not set out to show this; and indeed, it is clear from their own site selection exercises that there are alternative sites available. Mr Mitchell accepted, in cross-examination by NWT, that if planning permission is refused, Veolia would look for an alternative site. Mr Allen’s evidence was consistent with that. Mr Allen also said that the Waste Planning Authority had made no plans for the possible refusal of planning permission at Rufford. They would be looking for a long-term solution, but waste would be down for the next few years and the short term problem is not there.
460. One of the issues on which the SoS wishes to be informed is “b. Whether the appraisal of alternative sites is robust”; and it has become clear that it was anything but robust, even to the extent that Rufford only survived initial screening because of its being incorrectly regarded as previously developed land. It is also clear from Ms Demmar⁵⁶³ that the review of alternative sites⁵⁶⁴ did not take into account the visual effects of development.
461. More fundamentally, the site selection exercise now looks like an elaborate sham, since M Mazaud was instructed to design an incinerator for the Rufford site in November 2005, a year before the selection exercise commenced, and some two years before it was reported.
462. An absence of alternatives would not assist Veolia if Sherwood is found to be a “should be” SPA, and would only be relevant as one of the requirements for derogation under the Habitats Directive and 2010 Regulations, should they be applicable. Since Veolia have now stated⁵⁶⁵ that they do not rely on considerations of overriding public interest as set out in regulation 62, and “IROPI” would be another necessary element of a derogation case, the possibility of alternatives does not arise for consideration in that context. Indeed Mr Standen’s evidence, making a case for derogation, can be disregarded⁵⁶⁶.

⁵⁶³ VE4.8 S.15, VE9 7.8

⁵⁶⁴ CD84

⁵⁶⁵ VE52 para 13

⁵⁶⁶ VE10.7 paras 1.5.2-1.5.11

NWT'S OBJECTIONS

The material points are as follows.

463. The Trust's case, as originally presented and still maintained, embraced three main themes:
- Adverse impact on landscape and visual amenity, and on the countryside;
 - Adverse impacts, and risk of harm to, existing and proposed habitats important for nature conservation, and the fauna which frequent them; and
 - Direct conflict with the longstanding objective of restoring and improving the land between Rainworth and Clipstone to an appropriate Sherwood mosaic of heath and woodland.
464. Just before the start of the inquiry, these objections were augmented following the Trust's recognition (now widely accepted) that the concentrations of nightjar and woodlark at Sherwood required the development to be considered against the Birds and Habitats Directives, as a matter either of law or policy. The European dimension is addressed as a specific issue below. NWT's case is that this application should be rejected even if that issue were disregarded; for the following reasons.

LANDSCAPE AND VISUAL AMENITY: DEVELOPMENT IN THE COUNTRYSIDE

465. The ES assessed the significance of the impacts of the development, by reference to the as-is situation on the ground, as Slight Adverse for landscape character⁵⁶⁷ and Moderate Adverse as regards the visual amenity of some parts of Rainworth⁵⁶⁸. When assessed on the assumption that the remaining land within the coal stocking permission would have been restored in accordance with the relevant conditions, in the Regulation 19 Response (CD2), the significance of the effect on the immediate character of the site was given as Moderate Adverse, but remained as Slight Adverse as regards the wider area⁵⁶⁹ whilst the significance of visual effects was changed from Slight to Moderate for "a small number of visual receptors", but remained as Slight/Moderate Adverse overall.
466. These assessments were adopted by Ms Demmar, so that there is at least agreement that the ERF would have some adverse impact on landscape and visual amenity. In her evidence, however, Ms Demmar made light of these effects. She opined⁵⁷⁰ that "the development will not be a dominant feature in the landscape surrounding the site", and concluded⁵⁷¹ both that the proposals "will not significantly affect either the overall character of the existing or proposed future landscape" and that the scheme "will not significantly harm the visual resources of the site and surrounding area".
467. Ms Demmar was at pains to stress (in XX) that her appraisal was a professional one. I suggest that it was also somewhat mechanistic, in her concentration on what could or would be seen from locations or routes to

⁵⁶⁷ CD1 8.6.58

⁵⁶⁸ CD1 8.6.88

⁵⁶⁹ CD2 18.3.3

⁵⁷⁰ VE4.2 8.56

⁵⁷¹ VE4.2 9.1

which the public has access, as though local people would only find the ERF an objectionable feature in their local landscape at moments when they would actually have it in view.

468. These impacts have been considered with three others with professional expertise, namely Nancy Ashbridge the County Landscape Architect⁵⁷², Tony Player the County's Urban Design Officer⁵⁷³ and, on behalf of Natural England, David Tyldesley (a landscape architect) whose advice is reflected in page 2 of Natural England's letter of 13/11/08⁵⁷⁴. It is fair to say that all three are considerably less sanguine than Ms Demmar about the acceptability of these impacts. The consensus appears to be to the effect that the development would be out of scale and out of place; and that its impacts cannot be further mitigated.
469. These professional advices were reflected in the NCC committee report observation⁵⁷⁵ that "NCC's landscape team and Natural England feel that the adverse impact will be greater than that set out in the applicant's submission". Ultimately, Mr Hankin adopted the view that the development would fail to satisfy Local Plan policies NE8 and NE9.
470. The inquiry has heard the views of a large number of very engaged and well-informed local people. Their views about the intrusion of the ERF into their locality are well considered, and almost uniformly adverse. Certainly, the proposals are at odds with the EMRP (Policy 1) objective of minimising the adverse environmental impact of new development; the Policy 4 preference for making best use of previously developed land; the Policy 7 aim to regenerate the Northern Sub-Area by promoting environmental enhancement and protecting the Sub-Area's natural assets; the Policy 31 encouragement of initiatives which would protect and enhance the particular character of Sherwood Forest; and, the Policy Northern SRS5 promotion of a Sherwood Forest Regional Park that would generate environmental, economic and social benefits of both local and national significance by protecting and enhancing the distinctive landscape of the area.
471. The committee report correctly identified the development as failing to satisfy the Local Plan landscape policies NE8 and NE9, as well as Policy NE1 which is protective of the countryside⁵⁷⁶. Policy NE7 is also relevant, and echoes national policy in seeking to conserve the visual quality and amenity of the countryside, and to protect the countryside for its own sake.
472. When measured against PPS4 Policy EC6.1 and 6.2a, the ERF would be inimical to every reason which EC6.1 gives for protecting the countryside. Accordingly, the strict control enjoined by EC6.2a over economic development in the open countryside, and outside development plan allocations, points towards the rejection of Veolia's scheme.
473. These impacts, on landscape, visual amenity and countryside, are ones where verbal description has its limitations. The Inspector's impressions, formed against the background of information and views expressed, may be

⁵⁷² CD5v

⁵⁷³ CD5x

⁵⁷⁴ CD5p

⁵⁷⁵ CD4 19.35

⁵⁷⁶ CD4 15.27 15.32

of decisive importance. NWT say that the adverse impacts of this development, in these respects, are very substantially adverse and in clear conflict with national and development policy. These factors alone justify the rejection of this application in the absence of overriding planning advantages.

IMPACTS ON BIODIVERSITY

474. These impacts fall to be assessed against a range of protective policies and law, which include:

PPS9, notably key principles (i), (ii) and (iv) and paragraphs 8,9,12 and 16;

EMRP Policies 1, 26, 29, 30, 38 and Northern SRS5

Newark and Sherwood Local Plan, notably policies NE12, NE13 and NE17;

Waste Local Plan, Policy W3.22; and

The Birds Directive, now the codified version of 31/11/2009, which applies as a matter of law as regards the habitat of Annex 1 species irrespective of any site classification⁵⁷⁷. The text is unaltered from that of the 1979 Directive.

475. National and development plan policies do not absolutely rule out all development adverse to the nature conservation resources which they seek to protect, but they make it very clear that development causing significant harm to these resources requires powerful justification. Indeed, the East Midlands has suffered a greater decline in biodiversity than any other region in England and only 2% of its surface has a legally binding nature conservation designation, compared with the national average of 7.5%. As a result, Policy 1 of the EMRP highlights the need for a step-change increase in the delivery of biodiversity gains⁵⁷⁸. The EMRP recognises the value of the Sherwood Initiative, which seeks to recreate habitat, and it points to the need for action to avoid further fragmentation of habitats and in particular of those, such as lowland heathland, which are highly restricted geographically.⁵⁷⁹ This is reflected in the terms of Policy 29 which also seeks a net gain in restricted BAP habitats, such as lowland heath, which have special environmental requirements⁵⁸⁰. Policy 26 is clearly opposed to any damage to EU designated Natura 2000 sites; it also points out that unavoidable damage to the region's natural assets should be justified by a need for development in that location which would outweigh the damage caused. Policy 38 indicates that new waste facilities should avoid causing pollution or disturbance to internationally designated nature conservation sites and that increased traffic on roads adjacent to such sites should also be avoided.

476. The land take inherent in the development of the ERF site involves the disturbance and exclusion not only of woodlark and nightjar, but of birds generally (some of which might start breeding on the site in February), and other fauna such as common lizards and flora such as bee orchids.

⁵⁷⁷ WT2 paras 87-90

⁵⁷⁸ CD7 Policy 1 objective h)

⁵⁷⁹ WT1 4.2.8

⁵⁸⁰ WT38 para 7

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- Translocation is always a worse option than retention in situ, so the pre-emptive removal (or attempted removal) of these last two species does not take the impacts on them out of consideration.
477. The development would also prevent the restoration of this site along with adjoining areas pursuant to the 1996 condition⁵⁸¹, and intrude into the intended continuity of such habitats across a swathe of countryside including, though not limited to, the as yet partially unrestored UK Coal land, Springhill SINC and Rainworth Heath SSSI.
478. The existence and operation of the ERF would also generate adverse effects on the area closely surrounding it, which are likely to affect woodlark and nightjar amongst other species of fauna, and which for convenience are considered in more detail in the (p)SPA context. Firstly, it is necessary to consider emissions to air and their deposition, especially of nitrogen, because they have their effect on habitat, including flora, rather than directly on the fauna which rely on it.
479. Background levels of nitrogen deposition, at most nature conservation sites in the area, already exceed the relevant environmental quality standard. Veolia point out that process contributions from the ERF would be less than 1% of the background rates of deposition at all sites, but greater than 1% of the critical load⁵⁸² at the Rainworth Heath SSSI. NWT do not question Mr Smyth's calculations, though it can be noted that site-based investigations, undertaken before the (p)SPA issue fully emerged, were limited in this locality to designated nature conservation sites; specifically Rainworth Heath SSSI.
480. NWT do, however, take issue with the approach which says that increases in levels and loads, especially of nitrogen, can be disregarded as insignificant. An approach appears to have become prevalent, shared by for example the EA, to the effect that, in respect of habitats where critical loads are already exceeded, relatively small additional deposition can be sanctioned, on the basis, in effect, that the position is already so bad that one can make it a bit worse with impunity.
481. Such an approach offends common sense; but the offence is compounded when the rule of thumb most relied on to justify it is that the threshold below which an increase can be disregarded is 1% of the current load/level. Thus, the higher the current nitrogen load, the more that can be added without exceeding 1% of it. Further, in the present case, the figure taken as the current load is a 2000 figure, even though it is known that background levels are falling, and the background is likely to have diminished by 20% (2% per annum) over the last ten years. Mr Smyth's use of the 1% guideline (which he does not always himself respect) is thus undermined.
482. Further, the reports of workshops⁵⁸³, held in 2009, show that the emerging view of relevant experts is that the conventional approach is flawed. In particular, the report of the York Workshop (Ref 2) records, as part of the response to Q3: *"Later there was general agreement with the Brussels COST*

⁵⁸¹ DC3

⁵⁸² VE5.13

⁵⁸³ WT18 refs 1, 2 and 3

729 Natura 2000 Workshop conclusions (Sutton et al.,) that potentially any additional exceedance of critical load/level is adding to the risk of impacts, especially as an assessment under the Habitats regulations requires the consideration of 'foreseeable risks' to the site. This implies that there can be no additional contribution above the critical load/level that can be considered de minimis or inconsequential."

483. NWT commend that approach to the SoS, not only because it has been expressed by eminent experts, who included representatives from all four of the Country Nature Conservation bodies and the JNCC, but also because it is supported by logical argument, avoids the inconsistencies identified in the "conventional approach", and is properly precautionary when the habitats under threat are ones listed nationally and protected under habitat action plans in the UK BAP and are listed in Annex 1 of the Habitats Directive.
484. Overall, and irrespective of (p)SPA issues, the ERF will have a significant adverse effect on nature conservation resources on and around the development site.
485. NWT note the fact that the idea of offsetting such impacts, by improving habitat elsewhere, was mooted on behalf of Veolia in December 2009 and January 2010, at a time when they were still resisting the idea that Sherwood should be treated even as a "potential" potential SPA. In that context, the principles governing mitigation/avoidance of impacts are not as precise as the rules obtaining under the European Directives or the 2010 Regulations, but many of the points which NWT will make in that context also apply here, and justify the conclusion that the GCP proposals do not negate the conclusion expressed in the paragraph above.

CONFLICT WITH SETTLED STRATEGY

486. Sherwood Forest is special. It is of worldwide renown, and its maximum extent and special character is defined by the underlying geology. The Forest has been substantially impacted by coal mining, plantation forestry and agriculture, but over the last twenty years there has been a concerted drive by a wide range of local authorities, agencies and communities, to rehabilitate the Forest and maximise its potential as a biodiverse, recreational and cultural resource. The word "vision" recurs frequently in the documentary record of these endeavours, as genuinely reflecting the spirit in which this strategy has progressed. The historic forest of Sherwood was a mosaic of heathland, acid grassland and oak-birch woodland, and this habitat complex is the model which inspires future progress.
487. These efforts are widely recorded in documents before the inquiry⁵⁸⁴ and summarised by Mrs Bradley⁵⁸⁵. Areas that have already been restored to heathland include the southern part of the colliery tip, just to the west of the application site; the Spring Hill SINC, immediately to the south of the site; and, just south of the SINC, the Rainworth Heath SSSI. Restoration of the northern part of the colliery tip has already started and restoration of the former coal stocking area, which adjoins the northern edge of the application site and spreads to the east, is due to take place no later than

⁵⁸⁴ CD55-59, CD109

⁵⁸⁵ WT1 3.2.4

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- April 2012. Immediately to the north of that area is a former landfill site that is due to be restored by September 2011.⁵⁸⁶
488. Despite NWT's use of the word "strategy", there is no single document which sets out comprehensively all the component actions, commitments, permissions and initiatives by which it is being advanced. The achievement of the shared objectives requires the consistent commitment of all those involved, and a mutual confidence that their individual actions and decisions will continue to promote the common aims.
489. The policies of the development plan are consistent with, and protective of, these efforts. The EMRP seeks to reverse past trends of habitat fragmentation and it specifically records the Sherwood Initiative for habitat re-creation. Policy 29 seeks to protect and enhance features of the landscape which act as wildlife corridors. However, it is an appreciation of the evolution and partial fulfilment, of the dynamic continuity of the shared undertaking, over the last two decades, which enables an understanding of the extent to which a grant of permission for the ERF would undermine it.
490. The area of open land between Rainworth and Clipstone is both central to the Forest and, because of its proximity to Mansfield and other settlements, is potentially susceptible to pressures for development. Mrs Bradley's plan⁵⁸⁷, and explanation⁵⁸⁸, demonstrates very clearly how this area, all open but partially unrestored, is made up of a patchwork of parcels in different ownerships and occupations, subject to the unified strategy as a result of ownership by sympathetic landowners (including Lafarge, Mansfield Sand Company, Sherwood Forest Golf Club and, until now, UK Coal Ltd and committed public bodies including the Local Authorities, the Forestry Commission and NWT) and the existence of restoration conditions either fulfilled or enforceable.
491. It has been claimed, (XX of Mrs Bland), that the pithead area at Rufford was always envisaged, in common with such areas at other collieries, as being retained for employment development; but this was not so. The restoration conditions in the 1996 Rufford coal-stocking permission were different from those applied at other colliery sites. Mrs Bradley was, at the time, employed by RJB Mining (UK) Ltd (now UK Coal) and she has been able to explain that this distinction was deliberate. It was the conscious choice by the mining company, written into the permission granted by NCC, to commit the Rufford pithead area to restoration to heath and woodland, pursuant to a scheme to be approved by the County Council.
492. This background explains why the attempt of the County, hitherto in the forefront of the restoration effort, to break ranks by permitting an incinerator to be built at Rufford, would have been so damaging to the common cause. It would inevitably have sapped the will and confidence of others to pursue and protect the vision whose most recent expression is to be found in the draft Vision Statement for Sherwood Forest Regional Park⁵⁸⁹.

⁵⁸⁶ WT16 and WT17

⁵⁸⁷ WT16

⁵⁸⁸ WT17 Appendix 1

⁵⁸⁹ CD109

INTERIM OVERVIEW

493. These themes of course overlap, and together they amount to a powerful case against the ERF, in the absence of overriding planning advantages. Whilst EMRP Policy 38 allows for large waste management facilities to be located on former colliery land, that does not mean that all former colliery land is suitable for such facilities. Indeed, Rufford is unique in the area because it is subject to a site specific requirement⁵⁹⁰ for restoration to heath and woodland, rather than to a condition that would make it suitable for industrial or commercial use⁵⁹¹. That requirement is what prevents it from being described as previously developed land.
494. In contending that there are advantages to the scheme, NCC argue that (consistent with EMRP Policy 7) the ERF would provide jobs to replace some of those lost as a result of the decline in the coal industry. However, this does not justify the choice of site, as the same modest number of jobs would be provided regardless of location⁵⁹². Mr Hankin relies on Local Plan Policy E17 as being “the key policy supporting industrial redevelopment at the former Rufford Colliery⁵⁹³. Before examining his reasoning, some preliminary observations are required.
495. Notwithstanding PAIN's argument to the contrary, E17 does apply to Rufford. However, it also applied to other collieries in the District, and even if it be the case (as argued) that it no longer has any purpose to serve in respect of other closed collieries, it did have when the Plan was adopted in 1999. Neither the passage of time, nor the prolongation of the life of the Policy in 2007, can retrospectively alter its meaning.
496. The inclusion of criterion 2 in the Policy necessarily implies the view of the Council that pithead development at a disused colliery might intrude into the openness of the countryside, but would not inevitably do so.
497. These last two points make untenable the argument that criterion 2 can be disregarded because the Policy could only relate to Rufford, and pithead development there would inevitably intrude into the openness of the countryside. In any case, as pointed out for the District Council, it cannot be assumed, even at Rufford, that all possible development would inevitably have this effect.
498. There is nothing unusual about the form of Policy E17. It supports development of the pit head areas of disused collieries for employment purposes if all the criteria are satisfied, but not otherwise. When the criteria are met, it will have effect to excuse compliance with other Local Plan policies which might prevent or restrict the development. When the criteria are not met (as in the present case) it does not have that effect. Indeed, it has no effect, and ceases to have any relevance to the proposal under consideration.

⁵⁹⁰ WT38 para 8

⁵⁹¹ WT38

⁵⁹² WT38 para 11

⁵⁹³ CC15 5.1.15

499. This last is the position here because, as Mr Hankin himself found, the ERF application does not satisfy criterion 2. Neither does it satisfy criterion 4 (“The amenities of neighbouring residents are not adversely affected”), though that makes no difference here, when all the criteria have to be satisfied to take the benefit of the Policy.
500. Despite this, Mr Hankin manages to enlist E17 as a policy which actually supports the ERF development. The steps by which he reached that position can be seen in his Committee Report.
501. First, having concluded that the ERF proposal does not satisfy criterion 2, he reports at paragraph 12.36 merely that “the development would not fully comply with the requirements of the policy”, without pointing out that it therefore cannot take the benefit of the Policy because all the criteria must be satisfied. This is a sort of “curate’s egg” argument, the equivalent of claiming that a bad egg is “good in parts”.
502. Secondly, Mr Hankin goes on, in paragraphs 12.37 and 12.38, to give several reasons why the ERF could be regarded as being in accordance with “the objectives” of Policy E17 (and regional policy objectives) “insofar as it would secure the redevelopment of part of a former colliery pit head site for employment development”. Such objectives cannot be derived from the subtext to Policy E17 at all, still less as a justification for setting aside the criteria expressly written into the Policy.
503. The third step is in paragraph 12.48, where Mr Hankin advises that, “Notwithstanding the countryside designation, the site is a former colliery pit head and therefore employment development is supported by NSLP Policy E17”; thus standing E17 on its head and enlisting it as a policy promoting such development on pit head sites even when all the criteria are not met. A non-existent conflict between policies NE1 and E17 is then asserted, leading in due course to the conclusion that the latter overrides the former.
504. Mr Hankin’s interpretation and application of Local Plan Policy E17 is plainly wrong. The true position is that the proposal conflicts with NE1 and other Local Plan policies, and receives no support from E17.
505. Thus, before even considering the (p)SPA issues, it is clear that the SoS’s view of this proposal should be adverse.

SPA ISSUES

Question A: Should Sherwood already have been classified?

506. As the European cases demonstrate⁵⁹⁴, the ECJ has taken a robust line towards laggardly Member States and has treated the inclusion of a site within the current IBA list as raising a presumption in favour of classification, which can only be displaced by evidence.
507. In the present case, Sherwood is not at present an IBA site, despite the fact that the RSPB intend to put it forward for inclusion in the next IBA edition. Nevertheless, on the facts now known, the case for classification is unanswerable. There is a legal obligation on Member States to classify all

⁵⁹⁴ WT2

the most suitable sites. In the United Kingdom there are settled guidelines⁵⁹⁵ under which a site holding more than 1% of the UK population of a relevant species qualifies for classification as one of those sites. By reference to known data, Natural England, the nature conservation body for England, confirms that Sherwood holds more than 1% of the relevant populations of both nightjar and woodlark.

508. Natural England also accept that, in terms of their Stage 2 selection criteria for SPAs⁵⁹⁶, Sherwood Forest would improve the geographic range of designations for these species by filling in the gap between the south east and the Humber; the Forest also has a long history of occupancy by these species; and, another qualifying species (honey buzzard) is known to use the area⁵⁹⁷. It is therefore absolutely clear that Sherwood should already have been classified, and the only matter which requires further consideration before formal classification is the identification of a suitable boundary.
509. The necessary data (though they have since been augmented) were known to English Nature/Natural England as a result of the 2004 and 2006 national surveys, and the extraordinary delay in classification goes to demonstrate the justification for the insistence of the European Court that, in considering whether a site should have been classified, no account must be taken of the requirements of domestic procedures.
510. The duty of a Member State, and thus of the SoS in deciding this application, is to apply the law as laid down by the ECJ and, in NWT's view, the conclusion that Sherwood is a "should be" SPA is unavoidable. This means that the application must be assessed against the first sentence of Article 4(4) of the now consolidated Birds Directive, not against Article 6 of the Habitats Directive, as would be, and will be, the case following formal classification.
511. It is of course possible that a Sherwood SPA will now be classified as a matter of urgency, and should that occur before this application is determined, it would fall instead to be decided, as a matter of law not policy, by reference Article 6 of the Habitats Directive, transposed by the 2010 Regulations.

Question B: If No to question A, is Sherwood a potential SPA under PPS9 paragraph 6?

512. The meaning of "potential SPA" has been the subject of extensive discussion⁵⁹⁸. Nothing has emerged to suggest that there is any authoritative policy or guidance which supplies a definition of "potential SPA". The words of the policy in paragraph 6 of PPS9 should therefore be given their ordinary meaning, and on that basis the only possible conclusion is that Sherwood is indeed a potential SPA. Therefore, the SoS must follow published policy (unless he can give reasons for not doing so), and in the application of that policy the pSPA must be treated as if it had already been classified.

⁵⁹⁵ NE10

⁵⁹⁶ NE10

⁵⁹⁷ Cross examination of Mr Pike

⁵⁹⁸ WT7, NE8 para 5.6

513. It is illogical, and potentially confusing, for Veolia and/or NCC to deny the operation of the PPS9 policy, yet ask the SoS to decide the application as it would require. Their reasons for desiring that approach themselves demonstrate the wisdom of the policy. Let it simply be applied.

Basis of assessment

514. Whilst the regimes of scrutiny under the Birds and Habitats Directive are different, there is in practice no significant difference in the strictness of scrutiny of impacts under the two Directives⁵⁹⁹. The more structured procedure provided under the Habitats Directive (transposed in the Regulations) could conveniently be utilised in either case. That is the approach adopted here below, but on the footing that the controlling instrument is the Birds Directive. In doing so NWT refer to the site, purely for convenience, as “the pSPA”.
515. A view is needed on the likely boundary of the pSPA⁶⁰⁰ and NWT suggest some guiding principles⁶⁰¹ which NE accept as reasonable⁶⁰². It would be reasonable, on applying those principles, to treat the boundary as enclosing all land within either the Natural England ICA or the RSPB IBA boundary. That was indeed the approach initially adopted in developing the I-CA report, and it is still reflected in that report⁶⁰³.
516. In legal submissions, Veolia accept that “whether a project is likely to have a significant effect is not dependent on whether the project itself is within or outside the boundary chosen for the pSPA”, a view that is consistent with NWT⁶⁰⁴. Since the sole offsetting provision now proposed, at GCP, is on any view bound to be within any pSPA, the assessment of that provision is unaffected by the question of whether the ERF site is within or outside the boundary.
517. However, the SoS’s view as to the likely boundary is material to two other issues.
518. First, NE have expressed the view that that, if the ERF site is regarded as lying outside the pSPA, it would not have a likely significant effect alone, but that, if it is taken to lie within the pSPA, it will have such an effect alone⁶⁰⁵. (NWT’s position is that the ERF will have a likely significant effect, alone, in either case.)
519. Secondly, the I-CA Report in its final form assesses in-combination effects with reference specifically to NE’s (ICA) Indicative Core Area, and not the larger combined ICA/IBA area.
520. NWT’s case is therefore based on the assumption that the prospective pSPA boundary should or will approximate to the combined ICA/IBA areas, and will include the ERF site; whilst maintaining that the position of the boundary does not significantly affect NWT’s reasoning or conclusions.

⁵⁹⁹ WT2 para 44

⁶⁰⁰ WT21 paras 9-14

⁶⁰¹ WT21 paras 15-16

⁶⁰² Cross examination of Mr Pike

⁶⁰³ VE22 (p6)Fig 1 and para 4.64

⁶⁰⁴ WT21 paras 19-23

⁶⁰⁵ NE15 two paras following (iv)

Summary of case

521. NWT's case, briefly stated, is:

(1) The ERF will have a likely significant effect alone, and a likely significant effect in combination.

(2) An appropriate assessment is therefore required; which will consider both effects alone and effects in combination.

(3) An appropriate assessment is possible, in the sense that there is ample information on which to prepare an appropriate assessment which will inform the answer to the question whether it can be ascertained that the ERF, either alone or in combination with other plans or projects, will not have a significant adverse effect on the integrity of the pSPA. In any case, an appropriate assessment is mandatory, and cannot be avoided by a lack of information which the applicant might have supplied.

(4) The I-CA report is flawed, and of limited value to inform the SoS's appropriate assessment.

(5) It cannot be ascertained that the ERF would not, alone, have a significant adverse effect on the integrity of the pSPA.

(6) It cannot be ascertained that the ERF will not, in combination with other plans and projects, have a significant adverse effect on the integrity of the pSPA.

(7) The potential adverse effects of other plans or projects, or even just very local ones such as the Business Park proposal, are so obvious that the ERF could only avoid an adverse decision under the Integrity Test "in combination" if Veolia could demonstrate that the ERF will have no adverse effect on the integrity of the pSPA at all; so that there would not even be insignificant effects which might contribute to a significant combined effect.

(8) It cannot be established that the ERF alone will have no effect at all on the integrity of the pSPA; and indeed, it will.

(9) In these circumstances, the Secretary of State cannot lawfully, alternatively cannot consistently with government policy under PPS9 paragraph 6, grant planning permission for the ERF.

522. It can be noted that Dr Buisson made the claim (in his evidence in-chief) that consideration of in combination effects is irrelevant because the ERF will have no adverse effects to be combined with the effects of other plans and projects.

523. Thus, when considering the possible effects of the ERF itself on the pSPA, there are two related questions to be borne in mind: (1) Can it be concluded that the ERF will have no significant adverse effect on the pSPA? And (2) Can it be concluded that the ERF will have no adverse effect at all on the pSPA? In the light of paragraph 521(7) above, Veolia requires favourable answers to both of these questions in order for their application to survive the Integrity Test.

The ERF: loss of existing habitat

524. The loss of existing habitat, used by breeding woodlark and foraging nightjar, is admitted.
525. Veolia's contention that this will not involve a likely significant effect, or indeed the possibility of any adverse effect at all on the integrity of the pSPA, relies wholly on the GCP scheme embodied in the S.106 undertakings. This scheme does not meet the case, for the following reasons.
526. First, in order to avoid the loss of functional habitat one must create new habitat, by making suitable and available habitat on land which is non-functional as regards the species for which a site is (potentially) classified, and cannot be expected otherwise to be brought forward and used by those species. GCP is existing functional habitat already identified by Natural England as being within the core area of any Sherwood SPA.
527. Veolia's reliance on the A11 case is misplaced. It is clear from the Jacobs Report⁶⁰⁶, read alongside the Letter of Undertaking dated 18/11/09⁶⁰⁷, that the basis of the agreed conclusion that the road would have no significant adverse effect on the integrity of the SPA was that new habitat would be created, both for stone curlew, and for nightjar and woodlark. This is plain from the documents themselves; and Mr Clifton's evidence to the inquiry, informed by contact with colleagues involved in the A11 agreement, confirms this to be the case.
528. The evidence about Bovington Camp⁶⁰⁸ provides another example in which new suitable habitat was created to replace that lost.
529. NE's approach here is entirely consistent with that taken, for example, in relation to the Draft Delivery Plan for Thames Basin Heaths SPA. Veolia suggest (in an interjection during the cross-examination of Dr Buisson) that the Plan's "site" reference in "The proposal to improve management of the site as part of the development"⁶⁰⁹ might be to the proposed development site rather than to the SPA. A moment's reflection disproves this notion, since a site proposed for development, outside the SPA, is clearly not intended to be managed as if it were part of the SPA. The fact is that what is proposed as offsetting at Rufford falls precisely within the above description.
530. If confirmation of NE's approach is required, it is found at paragraph 2.2.4 of the Draft Delivery Plan, which states that the Plan is a key component of a three part approach to mitigating recreational impacts (off site avoidance measures, on site access management and on site habitat management) and concludes (with emphasis as in the original):

"It is important to note that all three approaches are required in parallel to safeguard the SPA from recreational impacts that may arise from new housing development. It is the combined effect of all three measures that provides the assurance under the Habitats Regulations that the SPA will not be adversely affected."

⁶⁰⁶ CD88

⁶⁰⁷ VE12.3 Doc 11

⁶⁰⁸ VE33 and re-examination of Dr Day

⁶⁰⁹ WT21 Ref 25 para 1.5.17 c

531. If it were possible to avoid adverse impacts on an SPA, arising from the actual loss of functional habitat, simply by improving the management of existing functional areas, the way would be open to sacrifice good functional habitat in return for the improved management of other parts of the SPA which should, and might, be achieved in any event; particularly where, as here, the proposed offset area is for the time being relatively underused for reasons which appear to reflect recent, and possibly reversible, adverse influences.
532. Secondly, it is uncertain whether the habitat required to be established under the HOEP can be both achieved and maintained. Veolia have not carried out basic baseline investigations such as surveying for current use by woodlark and nightjar, soil and soil seed bank tests, or a visitor survey. Accepting that heath can be created here, albeit not necessarily so easily as has been assumed, it is entirely uncertain whether disturbance, and habitat damage by visitors, legal or illegal, can be adequately controlled, especially in the long term. This would be so even if one could assume (which one cannot) the indefinite continuance of Operation Nebraska, whose aim in any event is to reduce illegal vehicular activity, not to control access on foot. The likelihood that, as heathland, the cleared area will become open access land under the Countryside and Rights of Way Act 2000, must also be kept in mind.
533. Thirdly, and since there is no baseline information to establish the level of current use of GCP by woodlark and nightjar, there is nothing to support an informed forecast about the future use of GCP by those species, if normal forestry rotations are continued or (since they appear to have been interrupted as a result of unlawful abuse of this area in recent years) resumed. The degree of advantage that might be derived from the HOEP is therefore unknown.
534. Fourthly, even if the HOEP is successfully implemented, and disturbance from intruders and visitors fully controlled, it remains uncertain whether woodlark and nightjar, especially the former, would make such intensive use of it as Veolia predict. Dr Day has identified apparently suitable clear areas in Sherwood Pines Forest Park where woodlark do not breed, and has produced evidence suggesting that, in Breckland, the density of breeding woodlark is less in open areas than in more confined clearings⁶¹⁰.
535. Fifthly, the HOEP management regime is for a temporary (though potentially lengthy) period, and one can only speculate about the utility of the ERF, and its surrounding area, for renewed use by woodlark if and when that site is restored to heathland several decades hence.
536. In these circumstances, it is impossible to conclude, with the requisite certainty, that the HOEP will eliminate the significant adverse impact on the pSPA arising from the development of the ERF site; still less that it would cancel any such adverse impact altogether.

⁶¹⁰ WT31 (p85) Fig 4.2b and WT36

The ERF: Effects on nightjar and woodlark outside the application site

537. There is good evidence that, all other things being equal, the numbers of nightjar and woodlark on heathland correlate negatively with the amount of built development in the near vicinity⁶¹¹. In the seminal study, relating to nightjar, Liley and Clarke (2003) made it clear that there is no basis to believe that this effect is confined to residential development⁶¹².
538. At Rufford, this very substantial development would not merely be close to, but actually within, an area used by both woodlark and nightjar; an area within which its existing value is not merely to be maintained, but enhanced by an enforceable commitment to restoration. This immediately raises the likelihood that, around the ERF site, there will be adverse effects on these species and on the habitat used by them.
539. This likelihood is reinforced when one considers the possible mechanisms of effect arising from the construction and use of the ERF, all of which have the potential to operate adversely on bird populations, even though in some cases evidence about thresholds is scant. Dr Day has carefully and fairly set out what is known about these types of effect⁶¹³.
540. For woodlark, courtship activity starts in February and nesting takes place between March and July; whereas for nightjar, the birds arrive in May and breeding extends into August.⁶¹⁴ It has now been accepted by Dr Buisson (in cross-examination), that suitable breeding territory for both woodlark and nightjar actually adjoins the ERF site. Thus, for example, anyone exiting the ERF site for a lunchtime walk will almost immediately enter what is now usable breeding territory. The increased comings and goings of people and vehicles along the access road will be immediately alongside such habitat. Noise emitted across the ERF site boundary will impinge immediately on that habitat; there is no intervening buffer across which the noise will attenuate.
541. People pressure: The existence of the ERF would inevitably lead to some increase in the number of visitors to the open land surrounding it. More visitors means an increased risk of disturbance to breeding birds, and increased damage to vegetation by trampling, and by other means such as fires.
542. Noise: If the ERF is permitted, noise levels around the site will rise significantly during the three year construction period, and then throughout its operational lifetime. Birds, including woodlark and nightjar, can be and frequently are adversely affected by noise. The noise levels proposed in the draft conditions are not set at levels which the scientific evidence suggests might safely be regarded as innocuous. They are set at the lowest levels with which Veolia are able to comply. They are substantially above even the top of the range (40 to 50 dBA) within which, according to the ES, conservatively adverse effects on birds begin to be observed⁶¹⁵. Mr Humpheson accepted that the ERF would be within woodlark breeding territory, but he explained that the design of the ERF would not allow noise

⁶¹¹ WT11 paras 7.11-7.17

⁶¹² WT11.2 p227

⁶¹³ WT11 sections 7 and 8

⁶¹⁴ WT11 paras 5.1 and 5.5

⁶¹⁵ CD1 12.3.62 and Mr Humpheson's answer to the Inspector's question

levels of 50dB to be achieved at the boundary.⁶¹⁶ In defending a specific noise level of 55 LAeq dB, as a boundary limit during normal operation, Veolia point to the EA's decision document and horizontal guidance which suggests that birds are unlikely to be disturbed at levels below this. However, the EA's controls reflect Best Available Technology, rather than the needs of the birds. This is clearly demonstrated by the fact that the LAeq cited in the decision document has no time period specified; a point which Mr Humpheson agreed was strange. Indeed, Mr Humpheson acknowledged that an LA10 or LAm_{ax} would be appropriate, to protect against the disturbing effects of impulsive noise events, but argued that such a control was impractical to monitor, given the potential for interference by events such as overflying aircraft.⁶¹⁷ He also said⁶¹⁸ that, whilst it would be possible to achieve a boundary limit of 78 dB LAeq(1hour) during construction, this would put a restriction on the contractor and might result in a longer period of construction than the 3 years which the ES assumed, based on a limit of 78 dB LA(eq) across the full working day.

543. NWT make just two additional points about noise. Dr Day gave evidence about the masking of bird calls by noise, pointing out that these are not limited to singing (a male territorial activity) but include a variety of vocalisations.⁶¹⁹ Mr Humpheson and Dr Buisson have responded in a Note⁶²⁰, but on reading it, it is apparent that the bird sounds provided by Dr Buisson were from the RSPB Birdsong library and that the conclusions expressed relate to bird songs and bird alarm calls. This reflects a highly selective approach and does not contradict the general point that Dr Day was making.
544. Dr Day has already pointed out that the fact that individual birds tolerate a certain noise level at nest sites does not support the inference that the species is unaffected by noise of that level. The effects of noise on bird populations can only be observed at the population level.
545. Lighting: Dr Day explains⁶²¹ that there is scanty evidence about the effect of lights on birds, but it is not possible to be sure that it has no negative impact on breeding bird species. For example, it is not clear whether nightjar would be attracted to lights, by the insects that congregate there, or repelled by them. The ERF would introduce lighting to the developed site, and lead to increased light levels from vehicular movements along the access road during hours of darkness. Light effects on the birds cannot be ruled out.
546. Inhibition of bird movement: Birds will of course be able (usually) to avoid flying into the ERF building(s). But the presence of the buildings, and on site activity, is likely to constrain the movement of birds in the area outside the site. As Dr Day explained, in evidence in chief, birds will often steer clear of large buildings because such structures can harbour predator birds. The effect of this, on woodlark and nightjar, can only be adverse.

⁶¹⁶ Under cross examination by Mr Machin

⁶¹⁷ Mr Humpheson's answers to the Inspector's questions

⁶¹⁸ Answer to the Inspector's question

⁶¹⁹ VE12.4 Ref 5

⁶²⁰ VE11.7

⁶²¹ WT11 para 7.8

547. Emissions: Further to the observations above, an increase in deposition levels, especially on heathland, can only be adverse in relation to the birds which depend on that habitat. This is because a heathland habitat is essentially low in nitrogen, which limits the growth of vigorous species that might otherwise swamp weakly competitive species (such as heather, bryophytes and fine-leaved grasses) and thereby degrade the diversity of the habitat⁶²².
548. Veolia's approach has been to address each of these mechanisms separately, and conclude either that it will give rise to no effect on the pSPA, or that any effect will be insignificant. This is not a correct approach, because, even though it is necessary to consider these mechanisms separately, ultimately the questions whether the ERF will have a likely significant effect on the pSPA, and whether it can be ascertained not to have a significant adverse effect on the site's integrity, are single questions, which must draw in all possible adverse effects of the development, including, as regards the external effects now under consideration, their possible combined effects.
549. Given the information now assembled about these external effects, a legitimate approach to assessment would be to consider whether, if the ERF is built and operated, the area around its site would continue to be used, or usable, by woodlark and nightjar to the same extent that it is now; and would be in future in the absence of the ERF. It would be impossible to answer: "Yes, it certainly will be." Similarly, the answer to the question "Can it at least be concluded that any effect on such use or usability would be insignificant in relation to the SPA?" must be no.

ERF: overall effects on the pSPA

550. In fact, both the adverse effect of direct habitat loss and the adverse effects of the ERF on the surrounding area, must be brought together in answering the single questions which are alluded to above; the Significance Test and the Integrity Test. Under the first, and with Waddenzee in mind, objective information does not preclude the possibility that the ERF will have a significant adverse effect on the pSPA; and since in this case the same body of information informs both tests, it follows that it cannot be concluded that the development will not have a significant adverse effect on the integrity of the pSPA.

The ERF and other plans and projects in combination

551. An in-combination appropriate assessment is in principle required. NWT's criticisms about Veolia's methodology in preparing their own I-CA report, and about the substance of that report, are outlined in evidence⁶²³ (WT15) and are as follows.
552. In NWT's view, the approach to this I-CA has been flawed from the start and NWT have advised RPS/Veolia to that effect, both in meetings on 11 May, 7 June, 22 June and 12 July 2010, and in writing, including in particular in

⁶²² WT1 paras 3.4.1-3.4.6

⁶²³ WT15

letters which were written by Mrs Bradley in close consultation with counsel, and appropriate discussion with Dr Day:

- Letter 1, dated 20/5/2010, commenting on assumptions and assertions stated in the first iteration of the methodology that were not helpful to the process and also cautioning that it would be extremely challenging to produce an adequate “report to inform an appropriate assessment” before the deadline of the 30 July (in Appendix 3.).
- Letter 2, dated 20/7/10, commenting on (1) the draft methodology then current, and (2) a note by Veolia regarding recreational pressure on woodlark and nightjar (Appendix 3).
- Letter 3, undated but emailed on 26/7/10, which commented on the Veolia document on Screened in Projects and Plans (Appendix 3).
- Letter 4, dated 30/7/10, which commented on draft v3 of the RPS Report. (Appendix 3).

553. In addition, a note tabled to the PIM of 7 June (CD99) also made clear the Trust’s significant concerns over the process that was underway.
554. It is fair to say that whilst some of NWT’s more minor concerns were accommodated in the evolving methodology and assessment, the fundamental flaws in approach that NWT identified as early as the May meeting, and expressed clearly in the Note tabled to the PIM on 7 June (CD99), have not been adequately addressed. Thus the I-CA does not achieve what it was intended to do and is inadequate as a report to inform an appropriate assessment. It is necessary to comment in some detail on why this report is unacceptable.

Methodology applied in the in-combination assessment

555. These comments relate to section 2 of Appendix A to the (VE22) I-CA report and the “Para” references are to paragraphs within that Appendix.

Stage 1: Establishing the criteria for plan and project identification

556. Letter 2 said: “*The text here is acceptable, as are the criteria in Appendix 1, the plan in Fig 1 and the categorisation in Appendix 2.*” However, NWT do not agree with the significant changes now belatedly (6/8/10) made in paragraphs 2.3 and 2.4, which introduce reference to NE’s Indicative Core Area (“ICA”) as part of the criteria for identifying relevant plans and projects. This conflicts with the approach described in the retained text in paragraph 2.3. Further, in the revised text, reference to the ICA is linked to what are now called ‘the whole site approach’ and the ‘sphere of influence approach’ which is unacceptable and poorly explained. NWT note, however, that this late change in the methodology has not resulted in any changes to the projects and plans listed in Appendices B and C, as distinct from changes to the headings and/or to the information contained in the last three columns of each.

Stage 2: Describing the effect of the Rufford ERF

557. The comment in Letter 2 stands, which is that this text is acceptable, as is the list in Appendix 3, subject to the recognition that, as explained by Dr

Day, development may be known to cause disturbance to birds within a (p)SPA even though it may not be possible to identify the operative mechanisms which produce that effect.

Stage 3: Describing the effects of habitat offsetting and enhancement

558. Comments in Letter 2 also still stand, in that the text is acceptable but subject to NWT's case that the measures proposed as "*habitat offsetting and enhancement*" are not shown to have the advantages claimed (as detailed in Dr Day's Supplementary and Second Supplementary Proofs), and cannot be considered to avoid the known or potential adverse effects of the ERF project (alone or in combination) on the pSPA.

Stage 4: Drawing up a 'long list' of the plans and projects

559. This text remains acceptable as revised, but subject to the fact that the reference to Stage 1 must be read in the light of NWT's disagreement with the revisions to the text of the methodology under Stage 1.

Stage 5: The 'screening' of the 'long list' of plans and projects

560. NWT do not agree with this stage of the methodology. One problem is that it does not distinguish between the range of projects and plans to be looked at to decide whether an appropriate assessment is necessary (which should be the long lists) and the projects and plans to be included in an appropriate assessment ("AA") (which should be screened-in sets which should be longer than Veolia's in respect of projects but could be shorter in respect of plans).
561. The Report should have been structured so as to inform three things – (1) the Significance Test and, depending on the outcome of that test (2) an appropriate assessment and (3) the Integrity Test. Although the relevant material for all three exercises needs to be brought forward at one time, the failure of Veolia's methodology properly to distinguish between them undermines them all. One effect of this is the attempt to screen out from scrutiny certain plans and projects whose possible effects need to be examined, and made subject to judgments which cannot sensibly be made in advance of an AA.
562. In the description of this stage, as elsewhere, there is no recognition that, in assessing possible effects, the precautionary principle applies; that is to say that possible effects need to be excluded by the promoter, rather than proved against it.
563. NWT did not accept the July 2010 version of this stage of the methodology, and the comments in Letter 2 on para 2.16 of that version remain relevant.
564. Otherwise, the Stage 5 text has been so completely re-written in the final version that a new commentary is required. NWT note however that, despite the substantial revision of the text since the July draft (reflected in the final version of the Report at, for instance, paragraphs 2.7-8, 3.30-31, 3.37, 4.5 and 4.13) this does not appear to have affected the conclusions of the report or most of its reasoning. This is perhaps unsurprising, when most of the changes to the methodology were made, in effect, after the event, "*over a short period by a single author from a version that was circulated on Weds 28 July 2010*" (Record of changes paragraph 1.4); thus it suggests that

some at least of the conclusions expressed in the report were arrived at independently of the methodology said to have informed them.

565. The screening test proposed and attempted to be explained is not acceptable. NWT's position remains that not only must the 'long list' of plans and projects looked at for the purposes of the Significant Test be drawn widely enough, but that, if likely significant effect alone or in combination is found (as NWT say it should be) the AA must look at any plan or project which could have any adverse effect on any part of the pSPA. A report intended to inform an AA must be similarly inclusive if it is to enable the competent authority a sufficient evidential basis to decide whether it can be ascertained that the project under decision would not, either alone or in combination with other plans or projects have a significant adverse effect on the integrity of the pSPA. Without prejudice to these criticisms, NWT make the following points on the new text relating to this Stage:

Para 2.14

566. The test here proposed is over-complicated and obscure. By fragmenting the assessment of in-combination effects it creates the danger of ignoring cumulative effects which are not confined within any one category of assessment.

Para 2.14.1

567. The concept "sphere of influence" has replaced that of "zone of effect". There is no explanation of what is meant by the phrase; whether a project is regarded as having one sphere of influence, or different spheres for different effects; and no sphere of influence is identified for any project.

Para 2.14.2

568. Here, and in the next sub-paragraph, the examination is restricted to effects manifest in the ICA. It is NWT's opinion that the boundary of a Sherwood SPA would inevitably be drawn more widely, not least given the results of the RPS woodlark survey of this breeding season, which highlights the importance of the proposed development area for this species.

Para 2.15

569. This paragraph appears to describe a criterion different from, and less stringent than, the requirements of either the Significance Test or the Integrity Test.

Para 2.16

570. Insofar as this paragraph has any discernable meaning, it appears to be wrong, as it relies on the incorrect idea that effects on the pSPA are not to be regarded as cumulative if they depend on causative mechanisms which would not operate in the case of the ERF.

Para 2.18

571. This exhibits the confusion resulting from the failure to adhere to the stepwise approach required by the Directive and Regulations, and the failure to apply the precautionary principle. Investigations such as are here

described need to follow, not precede, screening, if plans or projects are not to be inappropriately excluded from an AA.

Stage 6: Detailed assessment of the 'screened in' plan(s) or project(s)

572. NWT do not agree with this stage of the methodology. Veolia's approach to screening under Stage 5 would result, and has resulted, in the omission from the detailed assessment (Stage 6) of many projects that should have been included. For that reason alone, the methodology informing Veolia's "detailed assessment", even if otherwise adequate, could not sufficiently inform an AA to be carried out by the Secretary of State.
573. This part of the methodology has been substantially revised, again, after the assessment process, which the methodology was meant to inform and control. Fundamentally, it still fails to embody the precautionary principle. With reference to the new text, below, it can clearly be seen how the early errors in the principles of the process have resulted in substantial omissions and flaws at this stage. It is not at all helpful that at this stage no detailed information has been provided on any of the projects in question, indeed there is not even a map that indicates their locations. No further information appears to have been provided by RPS on any of these projects beyond what NWT produced in haste for the (unsigned) Sites Statement of Common Ground in April⁶²⁴, when Veolia failed to produce this document, as requested previously by the Inspector. In the absence of the details of the projects that have been assessed, it is not possible to determine whether they have been accurately assessed (even based on the flawed principles previously described).

Para 2.21

574. This describes a fragmented approach to assessment which reflects the approach described in paragraphs 2.14-16 in Stage 5.

Para 2.22

575. This fails to distinguish between the Significance Test, and an AA to inform the Integrity Test. It also refers to the assessment being "*quantitative*", which implies rigour in the methodology used, however this is not manifest in the results and conclusions, where there is little quantitative data.

Para 2.23

576. As a preliminary point, NWT recognise that most of the plans under consideration have already been adopted, and many of the projects have already been authorised. As to those not yet adopted or authorised, the approach advocated in this paragraph is contrary to the statutory requirements. It proposes to assume that projects predicted to have a significant impact alone "let alone in combination", would be refused permission. There is no warrant for making this assumption in respect of any proposal. Decisions are not always as predicted, and nor are the considerations as they might appear to a competent authority making a future decision, at the time of that decision. For example, to assume that all

⁶²⁴ WT13

local planning decisions are made by Councillors wholly based upon the advice of Officers is clearly flawed, as other matters than scientific rigour may appear more pressing to those Members. Further, such an approach would undermine the intended precautionary operation of Article 6(3) and Regulation 61.

Para 2.24

577. This posits a further assumption, namely that any other projects permitted in future would be made subject to such limitations or controls as to ensure that any adverse impact (on integrity) would be reduced to the extent that any consented project would not have a likely significant effect alone. Despite the reference to likely significant effect, presumably what RPS have in mind is that likely significant effect would be found, but that following an AA it would be ascertained that the project, as proposed to be consented, would alone have no significant adverse effect on the (p)SPA. Again, this assumption cannot safely be made as a matter of fact. Even if it could, how in practice are the known details of outstanding applications to be “revised” down so as to contribute only an insignificant level of adverse impact to an in-combination assessment?

Further observations on methodology

578. Although the draft Statement of Common Ground refers solely to Veolia’s methodology as described in Appendix A, Section 3 of the Report itself (2/8/10 version) contains “*some additional explanation of how the methodology was applied and issues that arose with its implementation*” (paragraph 3.1). This raises some further points of principle upon which there is need to comment, by reference to the stages and paragraphs in the Report:

Stage 2

579. The text under this heading has been substantially re-written for the final version of the Report. It now (especially at 3.10-3.12) embodies an incorrect approach because:
- It appears (3.10-11) that the only potential effects of the ERF included in an in-combination appraisal were those considered not to be significant alone. These are identified as disturbance due to light spill, disturbance due to noise from the site and generated traffic, and aerial emissions from the combustion process and generated traffic. It is wrong in principle to limit assessment in this way. It is to be noted that in v3 of the Report, at paragraph 3.8, it is said that “*the effects from the ERF that were considered were aerial deposition, noise, lighting, disturbance and habitat loss*” – a significant wider set of potential negative effects. In consequence, various known or potential effects of the ERF appear to have been omitted from consideration, including the certain loss of currently used habitat within the ERF site itself, which the 2010 Woodlark Survey has confirmed.
 - The Report (see 3.12) does not appear to recognise that the offsetting and enhancement proposals are only relevant to the operation of Article 6(3) and Regulation 61 if they would mitigate (that is, reduce) or avoid adverse impacts on the integrity of the pSPA. An addition to habitat (even if

demonstrated) cannot be netted off against damage to the integrity of the (p)SPA which is or may be unavoidable.

Stage 3

580. The text relating to this stage has been expanded in the final report to include claims (at paragraphs 3.14 and 3.16) for offsetting and enhancement which are disputed by NWT.

Outcomes of the assessment

Stage 4: The 'long lists' of projects and plans

581. The long list itself is agreed, subject to NWT's comments on stage 4 of the methodology.

Stage 5: the 'short list' of screened in projects

582. NWT do not agree either short list. NWT do not accept the limitation of the Table 1 short list to projects said to have a "sphere of influence" overlapping with that of the ERF. Despite the change in terminology between v3 and the final Report, the Table 1 short list is unchanged. Comments on Table 1 in Letter 3 stand, and are repeated here for convenience, with minor clarifications and the substitution of "sphere of influence" for "zone of influence".
583. This short list is far too short. The main reason appears to be the restriction to projects perceived to have a "zone of influence" overlapping with that attributed to the ERF. This is, in NWT's view, wrong in principle. Any project which might contribute to a significant adverse effect on the integrity of the pSPA should be included.
584. The concept of overlapping zones of influence is in itself imprecise. Even if this were a legitimate approach, some of the exclusions based on it are inappropriate. For instance, proposals for further development in or adjacent to Sherwood Pines Forest Park in NWT's view would have a clear propensity to overlap with the effects of the ERF, in restricting the extent of undisturbed habitat available to nightjar and woodlark in this part of the pSPA where, as Dr Day has amply demonstrated, impacts of disturbance are already evident.
585. It is also important to note that NWT's agreement to the inclusion of projects in the short list does not imply that NWT regard their effects as limited to those given in the "Effect of Project" column.
586. With respect to No 24 in the long list of projects, NWT do not accept that, without a more concrete undertaking, it can be assumed that there is no proposal for a motorcycle facility. Such a facility was part of UK Coal's intended development as recently as last autumn, and it cannot be assumed from its omission from the recent planning application that it has been abandoned. Indeed, there are indications in the material supporting that application that UK Coal/Harworth Estates harbour aspirations to achieve built development at the former Rufford Colliery on areas outside the current application site. NWT would suggest that, in order for the motorcycle proposal to be set aside, what is required is an explicit assurance direct from Harworth Estates that that proposal has been abandoned for good, and

that they are now committed to the restoration of the relevant area in accordance with the existing enforceable restoration conditions.

587. NWT's objection to Table 1 is not overcome by the new identification of an additional (and notional) short list of projects "*identified as falling into one of the two whole site circumstances and identified in Appendix B*". The claimed distinction between the two types of short list is unjustified. For the reasons explained in Letter 3, NWT would include in the short list, as requiring consideration in an AA, the projects listed in Appendix B as 1 to 3, 5, 7, 9 to 13, 15 to 31, 103, 104, 110, 115 and 117, plus the following residential projects which NWT understand to be located within the search area defined by the green line on the plan Fig 1 to the Report. These are the projects listed as 35 to 41, 44 to 62, 64 to 74, 76 to 79, 81 to 84, 86 to 90, 93 to 96, 98, 102, 105 to 109, 112 to 114, 121 to 123, 125, 126, 130, 131, 135 and 138.

Stage 5: The 'short list' of screened in plans.

588. NWT do not agree either short list. NWT do not accept the distinction now claimed between two categories of screened in plans, namely those listed in Table 2 of the Report and those said to be identified in Appendix C. In fact, those identified in Appendix C are all (except 20A) included in Table 2, which has not changed since draft v3 of the Report. Since 20A is marked as screened in, in both versions of Appendix C, NWT presume that either that plan was not intended to be screened in, or that it is omitted from Table 2 by mistake. Thus Appendix C does not identify any plans as "*falling into one of the two whole site circumstances*" referred to.
589. Comments in Letter 3 relating to Table 2, still stand, as follows. It appears to NWT that the inclusion of some of these plans is questionable. Some NWT can agree to, such as the inclusion of 8A, in respect of the identified allocation. NWT also agree with the inclusion of 552A and 553A, but if these are included, so too should the Forest Design Plans for other parts of the pSPA. NWT do not understand the inclusion of 546A, the updated Habitat Action Plan for Lowland Heathland, given that assessment under the Habitats Directive is aimed at avoiding adverse effects on the integrity of European sites: see Article 6(3) and Waddenzee at paragraphs 44, 47 and 48. Whilst this plan is relevant and important to the issues before the inquiry, NWT do not understand how it can be regarded as having or contributing to any adverse effect on the integrity of the pSPA. In fact, the ERF proposal (and indeed other projects which are or should be on the short list) would run counter to the targets in this Action Plan.
590. NWT are also puzzled by the inclusion of 556A, 557A, 558A and 559A. Although, unlike 546A, these are site specific, it is not immediately obvious to NWT how these plans might contribute towards an adverse effect on the integrity of the pSPA. However, NWT do not question the fact that these plans also are relevant and important to the issues before the inquiry. In the Trust's view 580A and 581A, which are strategies expressed at a regional level, are too general to be regarded as in themselves giving rise to any adverse effect on the integrity of the pSPA, and NWT note that no effect is attributed to them in Table 2.

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591. As regards 582A, although NWT note that there are several outstanding applications for modification orders in or near the pSPA, it appears to NWT that these cannot be regarded as plans (or projects) in the sense of those terms in the Habitats Directive. They are simply applications for the formal recognition of claimed rights of way, which the County will have to determine by reference to legal criteria.
592. Although NWT would exclude several of the plans included in Schedule 2, for the reasons given, there are other plans, or elements of plans, which should be included, namely site-specific residential allocations in adopted plans, provided that they fall within the area of search shown on Fig 1, have not subsequently been developed, and are not already included in Appendix B as projects permitted or proposed but not yet developed.

Stage 6: The detailed assessments of the 'screened in' project(s) and the 'screened in' plans

593. NWT do not with agree any of the conclusions under these assessments, which have in the Trust's view been carried out following a flawed methodology which renders them incorrect and incomplete. Further NWT disagree as a matter of scientific judgement with much of the reasoning and many of the conclusions advanced in the Report, for reasons many of which are given elsewhere in the proofs of Mrs Bradley and Dr Day. What follows is a very concise critique of the Stage 6 part of Section 4 of the RPS Report, that is, of paragraphs 4.14 to 4.130.

Paras 4.14-4.21

594. NWT disagree with the exclusion from consideration of a number of projects mentioned here, for reasons already given in Letters 2, 3 and 4, and earlier in WT15.

Paras 4.22-4.24

595. Conversely, the Report includes more plans than appropriate. It appears that the Report is intent on treating the ST/AA/IT exercise as a basis for arguing that the ERF, in combination with the UK Coal business park proposal and the extension to the sand quarry, will actually benefit the nightjar and woodlark populations and their habitat; ie, if there is a pSPA, these projects will in combination improve it. Quite apart from the fact that NWT say that there will be significant harm, not benefit, this is not relevant to the exercise that Veolia were meant to be engaged upon.

Para 4.25

596. The construction phase cannot be ignored, especially when habitat will be lost and birds disturbed before offsetting measures (even if otherwise effective) are in place. Adverse effects on site integrity can be for short as well as long periods, and short-term disturbance can have long-term effects. There are also adverse effects from construction operations that cannot adequately be controlled through planning conditions, for example noise, demonstrated by Veolia's refusal to agree to conditions restricting noise to less than 40dBA at the proposed development site boundary. It is evident that they believe that this figure simply could not be met.

Para 4.26

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597. Possible operational impacts are not limited to those mentioned here. More detail is provided in the comments below.

Paras 4.27-4.33 (Ref 24 – Rufford Business Park)

598. NWT reject this appraisal as inadequate and inaccurate, for several reasons, some of which are spelled out in Dr Day's evidence. The RPS Report conflicts in many important ways with the information provided (by RPS) in the UK Coal application and supporting documents, including the ES. The Report contains no adequate description of this project and no reasoned identification and assessment of its effects. The list of potential in-combination effects at 4.27 is obviously incomplete, omitting, for instance, loss of existing known woodlark breeding habitat and nightjar foraging areas⁶²⁵, fragmentation of existing and committed habitat and increased visitor pressure on adjoining open areas. The suggested positive in-combination effects (4.32 and 4.33) are speculative, unrealistic and ignore the harm arising from these projects both alone and in combination. The suggestion that a huge building complex in the area is necessary to make it appear managed is ludicrous. Completion of the outstanding restoration requirements for all these areas would undoubtedly render the appearance of the area as better managed and "cared for" and is already provided for through enforceable planning conditions. The transfer of the restored land to suitable, committed land management organisations would then ensure the proper stewardship of the land in the long term.

Paras 4.34-4.35 (Ref 26 – sand quarry)

599. The effects of the sand quarry extension are understated by, for example, ignoring loss of known woodlark breeding habitat (confirmed in the RPS 2010 report⁶²⁶) in the IBA, potential for increased or prolonged disturbance (to woodlark in particular, but also nightjar) and delay in restoration already committed. Also, the extension land is just to the north of the business park site and so the loss of habitat here would be almost contiguous with the loss to the south.⁶²⁷

Paras 4.36-4.40 (Ref 18 – Lindhurst)

600. No adequate description of the project is provided. This is an instance of the fallacious argument that when a project is judged to have a likely significant effect alone, its possible contribution to in combination effects can be limited to a level which would not alone be significant. The contribution of this development to people pressure is discounted on the basis that it will not generate visits to the part of pSPA near the ERF site (which is wrong in fact) and that generated visits to adjacent part of the pSPA (presumably Harlow Wood, where nightjar are known to breed) will not cumulate with ERF effects. This is wrong in principle, since both cause habitat damage and disturbance, and the spatial separation of adverse effects is irrelevant if the different areas of impact are within (or relevantly close to) the pSPA.

Paras 4.41-4.42 (Ref 12, Lindhurst Wind Farm)

⁶²⁵ CD83 Figures 3 and 5

⁶²⁶ CD83 Fig 3

⁶²⁷ WT13.1 Appx 26

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601. The NWT view is that this development can possibly be disregarded, but in the absence of information about the foraging behaviour of nightjars in this area (which was supposed to be monitored through the planning conditions) NWT cannot be sure that there would be no in combination adverse effect.

Paras 4.43-4.44 (Ref 16, Sherwood House extension)

602. The assessment limits its consideration to traffic, whereas visitor generation and loss of existing habitat are also relevant. Planning permission has now been now granted, in light of the NE advice that they do not currently regard Sherwood as a pSPA, demonstrating the error of assuming that permissions will not be granted which might harm the pSPA.

Paras 4.45-4.55 (Housing and holiday accommodation)

603. This section contains numerous errors of reasoning. There is a failure to understand and respect principles that have been well settled in relation to decisions relating to the Thames Basin Heaths SPA, underpinned by decisions of the High Court. Paragraph 4.46 appears to, erroneously, assume that residents (permanent or on holiday) will always or generally walk to visit the pSPA. Attention is thus focussed on proposals very close to the pSPA, largely ignoring the generality of proposals within the 5km buffer zone. The reasoning from 4.45 onwards, leading to the conclusion at 4.54, is contrary to established principles in looking only to housing development projects within 5 km of the ERF site (instead of within the overall 5 km buffer zone). It also flies in the face of the substantial body of published studies showing that new housing close to SPA does give rise to cumulative impact by disturbance of both nightjar and woodlark in the absence of measures to deflect demand, so as to eliminate the possibility of any net increase in visits to the SPA; despite the fact that these effects do appear to be recognised at paragraph 4.108.

604. The contrary approach taken here is unsupported by any evidence showing why different principles might operate in Sherwood. This is also an example of limiting aggregation to the ERF and, here also, only one category of projects; thus disregarding other projects (eg the UK Coal BP) which would also damage habitat and generate disturbance. Paragraph 4.55 attempts to justify the limited approach applied at 4.54, but the reasoning is tortuous and completely wrong. This involves the proposition that, if other projects might together have a significant adverse effect as regards recreational disturbance, one can safely grant permission for the ERF, as even if permission were refused, there would still be a possible adverse effect from the other projects. If that were a correct approach, then the in combination restriction would only bite when the target project would make the difference between a significant and insignificant combined effect (assuming that one could safely make such a distinction in light of the precautionary principle). Under this approach, the greater the possible combined effect of other projects, the less need to constrain or refuse the target project!

Paras 4.56-4.57: Conclusion

605. There is no information to suggest that RPS' assessment was thorough, and this conclusion in 4.56 is therefore unjustified. NWT also see nothing to justify the claim to benefit nightjar and woodlark by developing the ERF and

the Business Park, so reducing recreational pressure and increasing and enhancing their habitat, as stated in 4.57.

Paras 4.58-4.62: Assessment of individual plans in combination with ERF.

606. Some of the short-listed plans are irrelevant because they would not cause or threaten any adverse effect on pSPA. The Forest Design Plans included are restricted, illogically, to those relating to this part of Sherwood, and the Forest Design Plan for the SPFP is claimed not to have any effects which overlap with the sphere of influence of the ERF, UK Coal Business Park and Lafarge projects – which NWT regard as clearly incorrect for the reasons explained by Dr Day (even if the “sphere of influence approach were acceptable, which it is not).

Para 4.63: Assessment of in-combination effects for aggregated projects

607. This section of the report appears to spring from a belated attempt to respect a whole site approach by including in a second notional short list of projects omitted from the Table 2 shortlist, and considering their possible combined effects in combination with the ERF. This is another example of an in combination assessment being carried out for a subset of all relevant projects (and plans). Further, it is in NWT’s view incorrect in principle to limit this “whole site” approach to the effects of road traffic (emissions and noise) and of recreation.

Paras 4.64-4.95 – overview - emissions from road traffic

608. NWT are relatively unconcerned by a possible increase in traffic on the wider road network arising from the ERF or other projects, because any net increase from development in or near the pSPA instead of elsewhere is impossible to assess, but would be modest as proportion of overall traffic; and any effects diffuse. On the other hand, NWT are very concerned about the increase in traffic on Colliery Road and the immediate environs of the A617 arising from the development of the ERF or the ERF and Business Park combined, which, by reference to those data provided in relation to those proposals, is predicted to be substantial.
609. It is unclear why RPS have used figures in their traffic assessment in this report which are different from (and lower than) those in their Revised Table 6.2 in the Regulation 19 Submission. In that Table, 270 vehicles, of which 198 would be HGVs, would each move 2 ways along the access road each day as a result of the proposed ERF alone (270 movements). In the I-CA Report this has reduced to 208 vehicles 2-way per day (208 movements). This must be added to the minimum of 6525 2-way movements predicted daily from the UK Coal BP application (Chapter 5), giving a total of at least 6941 (or 7065) vehicle movements per day, including at least 396 HGV movements (assuming ERF alone and none for the BP, which is scarcely credible given the intention of a distribution use). There will also of course be an increased number of vehicles from the extended Sherwood House (figure unknown).
610. Thus the current baseline comprises approximately 20 HGV movements daily (10 in and 10 out) from the Lafarge Quarry (source: Lafarge) (of which there have been rather less during the recession), the Weighbridge supervisor, arriving and leaving each day, the staff and visitors’ vehicles

going to and from Sherwood House, a visit of approximately once a week from NWT staff to the Nature Reserve, and other occasional users. There has, of course, been no meaningful movement of HGVs associated with coal stocking since 2004, as recognised by Mr Turner in his enforcement note in the core documents. Thus erring on the side of an over estimate, it might be said that there are 40 movements in total each weekday and Saturday, and less on Sunday, when the Quarry is shut. So even on this basis it can be seen that the predicted increase in traffic for the ERF alone would be at least 6 fold, and for the ERF and BP combined would be at least 173 times the current daily traffic movements. It is very unclear what information Mr Archibald has used to inform his model but on the basis that he cites (in paragraph 4.99) that the doubling of traffic flow on any road will lead to a 3dBA increase (assuming the same vehicle mix), it can be clearly seen that this would amount to an enormous increase in noise along the access road and throughout the surrounding habitat. This would, in reality, be greater, as a significant number of those vehicles would be HGVs.

611. NWT are concerned at the impact of such increases as regards not only noise but also vehicle lighting, which has not been taken into account in any of RPS's assessments. Currently there is no night time HGV access along Colliery Road, but this would undoubtedly change were a distribution centre to be built, as planned for the BP. NWT's concern with regard to noise extends beyond Colliery Road to include connecting sections of bypass, where these are close to the pSPA area. It is unclear from the text of the I-CA and the Traffic Flows document which developments have actually been taken into account in these calculations, since there is no list of projects and the predicted vehicle numbers associated with each. If standardised figures have been used, these are highly unlikely to accurately reflect the scale of proposed developments in the pSPA area. Without the details of each application it is hard to see how this can have been done in a meaningful way.
612. NWT are unconvinced by the conclusion of no likely significant effect as regards emissions. Further, it is not appropriate, in relation to emissions or any other source of potential harm, to dismiss it from consideration on the basis that that particular source of harm would have no likely significant effect. The assessment of possible effects under the Habitats Directive relates to all the effects of a plan or project alone, and all the possible effects of that plan or project in combination with others. Different types of effect, individually insignificant if they were each the only possible effect, may combine at any level to produce a combined effect on the relevant European site which might be significant.
613. NWT's concerns over traffic emissions are highlighted by the fact that the critical load for nitrogen deposition on Rainworth Heath SSSI is already far exceeded⁶²⁸, yet deposition from ERF traffic alone is greater than 1% of the critical load for up to about 45m from the access road⁶²⁹. However, the ERF traffic accounts for less than 5% of traffic that is expected to use this road once the business park is in place⁶³⁰ and the I-CA gives no figures for

⁶²⁸ VE5.3 Appx A Table 3.5

⁶²⁹ VE22 4.90 and Table 4

⁶³⁰ VE5.3 Appx A Table 3.7

nitrogen deposition as a result of the combined flows, let alone as a result of combined stack and traffic emissions. Furthermore, the suggestion that the EA could take remedial action, if monitoring of the SSSI showed that harm is occurring, provides no reassurance because emissions could only be improved if the technology for nitrogen stripping improves beyond that which is currently believed to be the Best Available Technique⁶³¹.

614. The papers in WT18 represent evidence of the widespread body of opinion amongst the statutory nature conservation agencies in the UK that the critical threshold levels and loads for oxides of nitrogen (NO_x), ammonia (NH₃) and Nitrogen (N) are set too high. It is particularly pertinent in the "Peterborough" paper⁶³² that in paragraph 4 of page 4 it states that "*our (JNCC) reporting of SSSI condition and the adverse factors affecting condition is likely to significantly underplay the importance of air pollution: CSM (Condition Standard Monitoring) is not designed to assess these impacts and will fail to detect and attribute the effects of air pollution in a consistent and auditable manner*". It also raises the valid point that whilst it may be feasible to treat the damage to sensitive habitats caused by N deposition, such as the ongoing removal of nettles and brambles, this is hardly cost effective or sustainable. Page 5 outlines how it may be possible for N deposition to have an impact that keeps increasing, before the normal monitoring methods would identify the problem. This emphasises the point made in earlier submissions that the damaging effects of current deposition on Rainworth Heath SSSI (and other heathland sites in the vicinity) may be not, as yet, significantly detected but they will be there and can only be exacerbated by the further deposition that would result from the ERF and the BP. This is an issue in its own right. But also, with regard to nightjar and woodlark, this could lead to a reduction in the invertebrates on which they depend.
615. The "York" paper⁶³³ reflects the widespread doubt about the current threshold levels and loads used for NO_x and Nitrogen (as referenced in proofs), and indeed the strong consensus view (based on evidence also) is that the thresholds are too high and effects can be seen below those values, but that current recording is not adequate to report this and research to date has been insufficient to help define more accurate thresholds. Whilst the paper mainly concentrates on Natura 2000 sites, the principles would apply to SSSIs also. Indeed the last paragraph on page 2 explicitly states that the same precautionary approach should be applied to SSSIs. In this case the approach can also be applied to effects on pSPA habitats that support nightjar and woodlark. Page 9, paragraph 3 states that "*there can be no additional contribution above the critical load/level that can be considered de minimis or inconsequential*", particularly when taking the precautionary approach. This is directly applicable in the case of this application. The low end of the threshold range is also advised to be taken when assessing impacts (page 9). This view is reinforced by the recommendations of the "Brussels" paper⁶³⁴ embodied in paragraph 33 that "*The workshop concluded that there are no acceptable exceedances above a*

⁶³¹ Prof Wade in cross examination and in answer to the Inspector's question

⁶³² WT18 Ref 1

⁶³³ WT18 ref 2

⁶³⁴ WT18 Ref 3

Critical Load or Critical Level. Discussions regarding “acceptable exceedances” are not a science issue and should be addressed at a policy level. In order to improve the situation, one should aim at reducing nitrogen deposition below the Critical Loads and Levels.”

616. On this basis, ie. on the latest review of most recent evidence, it can be seen that the emissions from the proposed ERF and BP would cause heathlands in the area (particularly at Rainworth Heath SSSI) to stay above the critical threshold and at a higher level for many more years than would be the case if the ERF and BP were not built, and thus to directly lead to greater damage over a longer period. There is little relevant research on the effects of this on heathland invertebrate fauna, but damage to their principal food items is highly unlikely to be beneficial; thus contributing to their decline and the degradation of the biodiversity of the heathlands. This is a serious material issue in its own right. But with regard to the SPA issue, it is equally unlikely that a decline in the invertebrates on which nightjar and woodlark feed can be beneficial to either species, and a precautionary approach should be taken in this regard.
617. Thus NWT's main reasons for doubting RPS's conclusions, in respect of the ERF and Business Park combined and with respect to the ERF alone, are (1) that the figures being use for baseline traffic level are too low (2) the assumptions about the increase in emission levels are wrong and (3) the assessment of the significance of possible increases in emission and deposition levels is too optimistic, in the light of an emerging body of expert opinion which regards presently used threshold levels as too low, and any increase in already harmful emission levels as itself harmful. Dr Day's evidence of course bears on these issues, especially in respect of the distances over which effects may be felt by nightjar and woodlark.

Paras 4.96-4.107: overview – noise disturbance

618. NWT are not persuaded that proper consideration has been given to the likely noise from the Business Park. The Environmental Statement, submitted in support of those proposals, suggests that operation of the Park would not startle the birds through impulsive noise effects⁶³⁵. However, it does acknowledge the potential for cumulative effects (with the ERF) during construction⁶³⁶. In terms of mitigating those effects, the Statement merely observes that dialogue is likely between the contractors involved, with a view to securing the best practicable means⁶³⁷. Certainly, in the light of Dr Day's evidence, NWT do not accept that the I-CA's conclusion of “no likely significant effects “ in paragraph 4.107 is safe, for reasons similar to those already expressed in relation to emissions.

Paras 4.108-4.123: Overview – recreation

619. This section overlaps with the section on housing and holiday accommodation (paragraphs 4.45-4.55) and, since visitors to the pSPA will have similar impacts there, whether coming from home or from holiday

⁶³⁵ CD95 12.6.12

⁶³⁶ CD95 12.6.23

⁶³⁷ CD95 12.7.1

accommodation, NWT do not understand why visitor impact was not addressed on an overall basis.

Para 4.108

620. There is here a welcome recognition of the negative effects of visitors on nightjar and woodlark, but this has not led to the acceptance of such effects as contributing to a possible in combination significant adverse effect on the integrity of the pSPA. Looking forward to paragraph 4.129, one can see why, because there this allegedly “in-combination” assessment is said to have demonstrated that *“any increase in recreational pressure in the Sherwood Pines Forest Park is geographically separated from the habitat used by the Woodlark and Nightjar associated with the Rufford ERF site and the areas proposed for offsetting a woodlark territory and habitat foregone that might be used by Nightjar for feeding.”* In short, relevant effects are treated as geographically limited, and even a part of the pSPA as close to the ERF as SPFP is considered so remote that it can be ignored. The remainder of paragraph 4.108 suggests a curious and unexplained breakdown of recreation in the Sherwood Forest complex to four distinct types.

Para 4.109-4.117

621. This section of the I-CA builds on the exchange, in July 2010, of the RPS paper on recreation at SPFP and Letter 2 of 20 July. SPFP accommodates various educational and recreational facilities and the I-CA acknowledges the increased recreational use of the area in recent years⁶³⁸. There is a large holiday complex to the north west and the main visitor centre is in the north of the Park, but the complex of mountain bike trails extend south from here towards the ERF and BP sites. However, there is a plan to provide a new visitor centre at Edwinstowe, further to the north, and permission has been granted to increase the amount of holiday accommodation available at Centre Parcs. Veolia are clearly very concerned at effects of recreational use of SPFP, and its possible connection with the south-west shift of nightjar, towards the UK Coal land. Dr Day disputes the RPS thesis that this is (or may be) caused by a change in the distribution of open areas in SPFP and the woodland which adjoins it to the south, and demonstrates (WT19) that this suggestion is not only unsupported by evidence, but contrary to the evidence.
622. In paragraphs 4.116 and 4.117 RPS develop a fall-back position based on the proposition that, even if birds are being pushed southwards by disturbance in SPFP, they will still be sufficiently distant from the ERF as not to be within its “sphere of influence”. In NWT’s opinion this is wrong in fact (because nightjar are already found close to the ERF site) and wrong in principle (because disturbance of nightjar, even in two or more distinct areas within or close to the pSPA, still represents a cumulative effect in relation to the integrity of the pSPA).

⁶³⁸ VE22 4.109

Paras 4.118-4.130

623. The main purpose of these paragraphs appears to be to develop the thesis that the presence of the ERF and other projects such as the Business Park will reduce the number of visitors to this part of the pSPA, so reducing disturbance and increasing the breeding territories and feeding resources for nightjar and woodlark (that conclusion being expressed at paragraph 4.130). NWT do not accept this thesis, which has no evidential basis. At paragraph 4.118, RPS themselves recognise an absence of data about the number of visitors to this countryside from neighbouring residential areas, or where they walk. It is also inconsistent with the details of the UK Coal application, which show intended footpath links into the adjacent parts of the pSPA.

An additional point

624. At paragraph 4.47 of their Report, RPS refer to Project 12, a development of 420 dwellings at Clipstone for which outline planning permission was granted in November 2009, and draw inferences from the fact that NWT did not object to the development despite the fact that the site is about 1 km from the IBA boundary. NWT would therefore point out that the Trust's response to that application was made in November 2008. At that time, although the possible classification of a Sherwood SPA was well known to relevant bodies (including Veolia) NWT had been led to believe by NE that, pending the result of the JNCC SPA review, there were no grounds to object on that issue. NWT's consultation response to that application therefore mentioned the potential impacts on nightjar and woodlark, but did not raise the SPA issue. As the inquiry is already aware, NWT did not realise the full implications of the Habitats Directive for this application until Counsel's advice was taken in September 2009.

Conclusions in relation to the I-CA

625. The foregoing demonstrates that the principles of the approach taken in preparing the I-CA were flawed, the execution was similarly erroneous and the results are, therefore, both inadequate and inaccurate. In addition, the approach of off-setting is wrong in terms of legal principle in this case, but in any event would not deliver what is promised and would add little to what is already planned and has been achieved for this area. Were the ERF to be built it would so seriously compromise the shared partnership vision for this area, that it is questionable how that partnership might proceed going forward.
626. Above all, one does not have to look very far beyond the ERF application itself to see that there are projects, some already with planning permission, which clearly involve likely adverse effects on the pSPA. In close proximity to the ERF site there are the UK Coal business park application, the proposal to extend the sand quarry, the Sherwood House permission, and the permission for additional holiday accommodation in SPFP. More generally (though without attempting to be comprehensive) there are numerous proposals likely to generate additional visitor pressure on the pSPA, not only through normal housing development, but by other proposals for visitor accommodation within or close to the Forest.

627. It is therefore obvious that, if the ERF has any likely adverse effects at all on the pSPA, even if they would be insignificant as regards the ERF alone, those would, in combination with other plans and projects, be likely to have a significant adverse effect on the pSPA. The known information shows that there certainly would be a significant combined adverse effect.
628. Whilst NWT now accept the reconciliation of predicted traffic flows along Colliery Road, should both the ERF and the Business Park be developed⁶³⁹, the effect as regards Mr Humpheson's evidence is that he has overstated the noise level at weekends, but understated it for weekdays. In any event, the increased traffic as a result of the combined flows would be very substantial, given the limited use of Colliery Road at present. The BP Environmental Statement anticipates a noise change here of some 12.6 dB as an LA10 18hour.⁶⁴⁰ Model predictions suggest that elevated noise levels would be confined to a strip of land on either side of the Road, and would have little impact on the ICA and on the birds' known nesting sites.⁶⁴¹ However the effect on the IBA, which surrounds the access, has not been assessed other than to note that peak vehicles movements would not coincide with peak bird activity in terms of when they forage and defend their territories.⁶⁴²
629. Turning to Mr Smyth's predictions, although he has provided⁶⁴³ predictions for NOx concentrations which include the ERF and the Business Park in combination, as well as the ERF alone, he has unrealistically assumed that the BP would generate no emissions other than from vehicles. Further, despite the fact that the I-CA report was intended to assess the effects of the ERF in combination, Mr Smyth has not assessed the possible significance of the combined effects of the ERF and the BP. Instead⁶⁴⁴, Mr Smyth estimates the increase in traffic on Colliery Road and on the westward link of the main A617, that he considers necessary to raise NOx concentrations to critical levels, and calculates the proportion of that increase represented by traffic generated by the ERF. The calculation relates to road links 4 and 5, and appears to be on the lines: $(153+208=361)$ divided by $(10900+7200=18100)$, expressed as a percentage. This calculation gives 1.99%, and Mr Smyth's result, at paragraph 4.94, is "less than 2.1%". A similar calculation was not carried out for the ERF and BP traffic combined, which would have yielded a very different result.
630. Finally, as can be seen from Document VE29, and by comparing the final report (VE22) with the v3 draft (VE28), significant changes were made to the methodology at the very last minute, essentially after the report had been prepared. It is not unfair to label the report as partial in both senses of the term⁶⁴⁵, in that it appears to have been written and re-written to justify a pre-determined conclusion favourable to Veolia.

⁶³⁹ VE11.6

⁶⁴⁰ CD95 12.6.15 and Tables 12.7 and 12.8

⁶⁴¹ VE22 Figure 5 and 4.105, CD95 p8.49 and 8.50

⁶⁴² CD95 p8.49 and 8.50

⁶⁴³ VE22 p36 Table 5

⁶⁴⁴ VE22 p38

⁶⁴⁵ WT21 para 52

OVERALL CONCLUSION

631. In summary:

This development would be seriously damaging to the landscape of this part of Sherwood and to visual amenity;

It would have substantial adverse impacts on biodiversity and the interests of nature conservation;

It would subvert the achievement of long-standing and widely shared objectives for the preservation and restoration of the open land between Rainworth and Clipstone;

In these respects it would be contrary to national and local planning policy; and

It is in any case ruled out as a matter of law, or alternatively as a matter of settled policy, because of its certain or likely effects on the integrity of Sherwood “should be” or potential SPA.

LEGAL SUBMISSIONS

Legal submissions provided before the opening of the inquiry

632. NWT's legal submissions (WT2) and further legal submissions (WT21) stand unchanged. Parts of WT2 were agreed by Veolia and NE (SoCG10) and, in their legal submissions, Veolia now agree with paragraphs 72 to 81 of WT2 and paragraph 76 of WT21. Since the remainder of NWT's legal submissions, though not expressly agreed, have not been contested, NWT's case on the merits of the application is based on the submissions in WT2 and WT21.

633. The submissions here made as to relevant legal principles are independent of the facts of the case, but in order to relate them to the circumstances of the application under consideration NWT have:

(1) taken as given the facts in the Statement of Common ground between Veolia and NWT⁶⁴⁶; and

(2) assumed that, within the areas shown edged blue and red on the plans Figs 3a and 3b to Mrs Bradley's proof⁶⁴⁷, the data assembled and interpreted at a national level show not less than 33 breeding pairs of woodlark and 61 breeding pairs of nightjar, as at 2004 and 2006 respectively. An area, which corresponds substantially to the combined areas so edged on Figs 3a and 3b, will here be referred to as “the Sherwood Site”.

634. Woodlark and nightjar are Annex 1 species under the Birds Directive, and their occurrence in an area including and surrounding the inquiry site necessarily requires the Secretary of State to consider the application in this case of the Birds Directive, the Habitats Directive, and the Habitats Regulations.

⁶⁴⁶ SOCG4

⁶⁴⁷ WT1

635. This is a subject where law and policy are inextricably intertwined, not least because it is Government policy to apply the provisions of the Habitats Directive and The Regulations as a matter of policy to sites which are not formally designated as SPAs or Special Areas of Conservation (SACs). Appropriate reference will be made to policy and guidance issued by the UK Government or Government agencies.
636. For reasons explained below, the circumstances as outlined give rise to three questions:
- A In law, is the UK government in breach of the Birds Directive for having failed already to have classified the Sherwood Site as an SPA; and if so, what are the implications for the determination of this application?
- B Alternatively, should the Secretary of State treat the Sherwood Site as a pSPA and so, in determining this application, apply the provisions of the Habitats Directive and the Habitats Regulations as a matter of policy, as if the Sherwood Site had already been classified?
- C In any event, what are the implications, in this case, of the duty imposed on the UK by the second sentence of Art 4.4 of the Birds Directive: "Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats"?

QUESTION A: BREACH OF THE BIRDS DIRECTIVE?

637. The law under discussion here is specifically that relating to SPAs. Although a classified SPA is a "European site" subject to the Habitats Regulations (see Reg 10(1)(d)), it is not classified under those Regulations. When the UK Government classifies a site as an SPA, it is acting pursuant to its duty under Article 4(1) and/or 4(2) of the Birds Directive itself, and not by virtue of any domestic legislation.
638. Before their judgment in *Case C-374/98 Commission v France ("Basses Corbieres")* on 7th December 2000⁶⁴⁸, the ECJ had already confirmed or established the following principles.
639. First, in deciding what sites, within what boundaries, to classify, Member States are bound to have regard only to ornithological criteria: see *Santoña Marshes*⁶⁴⁹ at paragraphs 26 and 27 and *ECJ Case C-44/95 R v The Secretary of State for the Environment ex parte RSPB [1997] Env L R 442 ("Lappel Bank")*⁶⁵⁰ at paragraphs 26 and 39-42 of the judgment.
640. Secondly, notification under Article 4(1) and (2) of the Birds Directive is an obligation for Member States. This was established in *Santoña Marshes* paragraphs 24 to 32, and is very clearly expressed in *ECJ Case C-3/96 Commission v Netherlands 19/5/98*⁶⁵¹ at paragraphs 61 and 62.
641. Thirdly, that obligation is to classify all the sites which, in accordance with the ornithological criteria, appear to be the most suitable for the

⁶⁴⁸ WT2 Ref 1

⁶⁴⁹ WT2 Ref 2

⁶⁵⁰ WT2 Ref 3

⁶⁵¹ WT2 Ref 4

conservation of the species in question: see *Commission v Netherlands*⁶⁵² paragraph 62 and *ECJ Case C-418/04 Commission v Ireland*⁶⁵³ paragraphs 37 and 53.

642. Fourthly, *Santoña Marshes* also established that the protective regime under Article 4(4) of the Birds Directive applies to areas that have not been classified as SPAs, but should have been so classified. This conclusion was concisely expressed in paragraphs 20 to 22 of the judgment, and has been consistently applied by the ECJ.

643. Fifthly, this last principle applies both in the case of a failure to classify altogether (as for example in *Santoña Marshes*), and a failure to classify a sufficient area (as for example in *ECJ Case C-96/98 Commission v France* 25/11/99 (*“the Marais Poitevin”*))⁶⁵⁴.

644. Sixthly, a Member State cannot excuse failure to classify, in due time, a site which should have been classified, by reference to its own internal rules or procedures. See for instance *ECJ Case C-235/04 Commission v Spain*⁶⁵⁵ paragraph 55:

“Although the Spanish Government submits that there were internal difficulties in the classification of certain SPAs, it must be recalled that, according to the Court’s settled case-law, a Member State cannot plead provisions, practices or situations prevailing in the domestic legal order to justify failure to observe obligations and time-limits laid down by a directive”

645. Despite the fact that judgment was not delivered until 2 August 1993, *Santoña Marshes* was decided under the law as it stood before the adoption of the Habitats Directive on 21 May 1992. This Directive contains a more liberal regime of protection, which includes, in Article 6(3) and (4), the derogatory provisions now incorporated in the Habitats Regulations. This new regime was extended by Article 7 to classified SPAs.

646. After implementation of the Habitats Directive it appears to have been generally assumed that the “new regime” of protection under Article 6(3) and (4) of the Habitats Directive, would apply to areas which should have been classified as within an SPA, as well as to areas which had actually been classified, in place of the “old regime” of protection under the first sentence of Article 4(4) of the Birds Directive. However, until *Basses Corbières* the European Court of Justice did not have occasion to determine whether that was indeed the case.

647. The point arose for decision in *Basses Corbières* because the Commission, assuming, correctly, that an SPA should have been classified, charged France with failing to comply with obligations that would arise under Article 6(2) to (4) of the Habitats Directive (the new regime) rather than with infringement of Article 4(4) of the Birds Directive (the old regime). The Court questioned whether the new regime applied, and held that it did not.

⁶⁵² WT2 Ref 4

⁶⁵³ WT2 Ref 5

⁶⁵⁴ WT2 Ref 6

⁶⁵⁵ WT2 Ref 7

The reasoning of the Court on this issue is at paragraphs 42 to 58 of the judgment, the conclusion being expressed at paragraph 47:

“It is clear, therefore, that areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive.”

648. This ruling has since been consistently applied; see for example *Commission v Ireland*⁶⁵⁶ at paragraph 84.
649. The *Basses Corbières* principle was first considered by a United Kingdom Court in *R (Bown) v Secretary of State for Transport* [2002] EWHC 819 Admin, [2004] Env LR 19 (at first instance)⁶⁵⁷ and [2003] EWCA Civ 1170, [2004] Env LR 509(Court of Appeal)⁶⁵⁸.
650. The central issue in that case is encapsulated in the question: What is the position of a site which should have been classified as an SPA at some date in the past, but which does not deserve classification on the facts as they stand at a later date when its status is called into question? That issue does not arise in the present inquiry, and it must be said that the reasoning of the Court of Appeal on that question (though not necessarily the result) is difficult to reconcile with the governing European case law, because they appear to have treated the status of a “constructive” or “should be” SPA under EU law as being the same as the status of a site listed by the Secretary of State as a potential SPA (“pSPA”); a concept addressed below.
651. However, in summary, the Court of Appeal in *Bown*:
- cited the relevant ECJ cases, and clearly accepted that they must indeed be respected and applied domestically;
- accepted that the competent authority has the responsibility to decide whether an area should already have been classified as, or as part of, an SPA;
- accepted that authoritative scientific reviews and reports, whether European or domestic, provide a starting point for consideration of the claims of an area to be “should be SPA”, and the inclusion of an area in such a publication of current application is likely to prevail in the absence of scientific evidence to contradict it; and
- confirmed that land found to be “should be SPA” is indeed subject to the “old regime” of protection provided by the first sentence of Article 4(4) of the Birds Directive.
652. The possible operation of the *Santona Marshes/Basses Corbieres* principles was also canvassed in *Humber Sea Terminals v Secretary of State for Transport* [2005] EWHC 1289; [2006] Env L R 4⁶⁵⁹, a decision of Ouseley J. However, the Claimants ultimately disclaimed any assertion that the relevant Secretary of State (and therefore the United Kingdom) was in breach of the Birds Directive for having failed to classify at least part of the

⁶⁵⁶ WT2 Ref 5

⁶⁵⁷ WT2 Ref 8

⁶⁵⁸ WT2 Ref 9

⁶⁵⁹ WT2 Ref 10

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- area under discussion, and in the absence of such a claim the judge held that *Basses Corbieres* could not be relied on.
653. NWT does now assert that the UK government is in breach of Article 4.1 of the Birds Directive for having failed already to have classified as an SPA, for one or both of nightjar and woodlark, an area, including the present application site, approximating to the areas, or combined area, shown edged blue and red on WT3 Figures 3a and 3b.
654. These areas have already been subject to investigation as regards their qualification for classification as an SPA. The available information is presented in evidence at this inquiry by NWT.
655. This information is sufficient to alert the Secretary of State, as competent authority, to the possibility that an additional area should already have been classified as SPA, with the consequence, under the authority of *Santoña Marshes* and *Basses Corbières*, that such an area should be treated as if classified, and subjected to the control of Article 4(4) of the Birds Directive. In consequence, this is an issue which he will need to address and decide.
656. The ECJ has adopted a robust approach in deciding whether an SPA should have been classified, or what land should have been included. When the issue has been contested by a Member State, the Court has consistently treated serious and up-to-date ornithological surveys as *prima facie* evidence of what should have been classified, in the absence of scientific evidence adduced by a Member State tending to show that the obligations flowing from Articles 4.1 and 4.2 of the Birds Directive were otherwise satisfied.
657. The approach of the ECJ is evident in *Commission v Ireland*⁶⁶⁰ at paragraphs 40 to 67 inclusive. Reference is made (paragraph 40) to the Court having taken account in the past of IBA 89, having found that, although it was not legally binding on Member States, it could, by reason of its scientific value in such cases, be used by the Court as a basis of reference for assessing the extent to which a State had complied with its obligation to classify SPAs.
658. The Court went on to make reference to IBA 2000 for the same purpose, on the basis that (see paragraph 48) it revised the initial Europe-wide study carried out in IBA 89 by presenting more specific and up-to-date scientific data.
659. IBA 2000 is now itself dated, but in *Commission v Ireland* the ECJ confirmed the following principles which can be applied in the present case.
660. First, “the updating of scientific data is necessary to determine the situation of the most endangered species and the species constituting the common heritage of the Community in order to classify the most suitable areas as SPAs”: see paragraphs 47 and 66.
661. Secondly, IBA 2000 was not exhaustive, and other ornithological studies might serve as a basis for the classification of SPAs: see paragraphs 50 and 51.

⁶⁶⁰ WT2 Ref 5

662. In the United Kingdom, authoritative guidance about the current state of the SPA network is available from the JNCC. The following references, in WT2, are informative here (all as currently published on the JNCC website):
- Ref 11: "Special Protection Areas (SPAs)".
- Ref 12: SPA Selection Guidelines.
- Ref 13: Extracts from The UK SPA Review – Its Scope and Content (also known as the "UK SPA review", comprising:
- Ref 13A – Web page
- Ref 13B – Executive Summary
- Ref 13C – Section 4 – Applying the SPA selection guidelines
- Ref 13D – Appendix 5. Data handling issues
- Ref 13E – A6.97 Species Account for nightjar
- Ref 13F – A6.98 Species Account for nightjar
- Ref 14: Natura 2000 Standard Data Form for Thames Basin Heaths SPA, classified site for nightjar, woodlark and Dartford warbler on 9 March 2005.
663. The case of *R (Aggregate Industries UK Ltd) v English Nature [2002] EWHC 908; [2003] Env L R 3*⁶⁶¹ illustrates the delay that can occur under domestic procedures between the identification of an area as appropriate for classification as an SPA, and actual classification. Any such delay is irrelevant under EU law, which of course must be applied by the Secretary of State in determining this, or any, planning application: see paragraph 644 above.
664. Aggregate Industries challenged EN's notification as a SSSI of a 600 acre site in Hampshire known as Bramshill, comprising mainly managed conifer plantations within which, on a rotational basis, a small proportion of the site was planted with trees less than 10 years old and provided nest sites for nightjar and woodlark. EN's decision to notify reversed an earlier policy, under which it had decided not to confirm a previous notification on the footing that the specific areas of interest were transitory. The challenge failed, but the decision provides useful guidance in the present case, as follows:
- (1) The Birds Directive provides an important context for the decision: see paragraphs 21 to 26 of the judgment. The site was then part of the Thames Basin Heaths pSPA (listed in PPG9 – 1994) and enjoying protection on that basis. The policy of the UK government is that terrestrial SPAs should be made up of sites notified as SSSIs, and government had encouraged EN to reconsider the notification of Bramshill in order to facilitate (according to that policy) the classification of the Thames Basin Heaths SPA of which it would (and now does) form part. The case thus demonstrates how a site may be recognised as appropriate for classification as an SPA before, or irrespective of, notification as an SSSI.

⁶⁶¹ WT2 Ref 15

- (2) The case also shows that, for the purpose of assessing the significance of an area of habitat for Annex 1 birds, it is the area as a whole, and the numbers of birds resorting to that area, which must be considered. The argument was advanced that Bramshill should be rejected as a SSSI because, viewed alone, it did not host a sufficient percentage of the national populations of Annex 1 species, but that view was roundly rejected: see paragraphs 120 to 125 of the judgment.
665. As can be seen from its Standard Data Sheet, Thames Basin Heaths SPA is an archipelago site (and a huge one) extending to 8274 hectares in three counties, of which 44% is heathland, 34% coniferous woodland, 10% other woodland, and, of the remainder, 5% is “other land” (a description “including towns, villages, roads, waste places, mines, industrial sites”). The Sherwood Site is also an archipelago, substantial though much smaller than Thames Basin Heaths, and can be seen to have a similar mix of habitats, which is not surprising given that it also hosts nightjar and woodlark.
666. The data which informed the UK SPA Review is significantly out of date, presenting⁶⁶² “a ‘snap-shot’ assessment of the UK SPA network in the mid-1990s”. The GB population source for nightjar is dated 1994⁶⁶³, and that for woodlark is dated 2000⁶⁶⁴.
667. The data available for the nightjar and woodlark populations at Sherwood are considerably more recent.
668. If the current UK SPA Guidelines⁶⁶⁵ are applied to the population figures assumed above, by reference to the GB population estimates given by RSPB in their letter to the Planning Inspectorate dated 23 September 2009⁶⁶⁶, it appears that the Sherwood population of nightjar presently represents 1.32% of the GB population, and of woodlark 1.89% of the GB population.
669. In each case the percentage satisfies Stage 1.1 of the SPA selection guidelines, and it can be noted that, in respect of the present SPA suite for each species, every site found to satisfy Stage 1.1 went forward to classification. Moreover, of the Stage 2 criteria, Sherwood would score favourably under, at least, 2.2 as providing a wider geographic SPA coverage across the species’ ranges, and 2.5 because the site hosts qualifying populations of two Annex 1 species.
670. NWT contend that Sherwood Site is a “should be SPA”. Whilst this combines considerations of both fact and law, it is very difficult to see how that conclusion can be resisted on the basis of known information and past practice.
671. If that be the case, there appear to be no factors which could lead to the present application site being excluded from the “should-be” SPA.
672. If the Secretary of State concludes that the Sherwood Site should now already have been classified, that will ipso facto involve his accepting that

⁶⁶² WT2 Ref 13.D para A5.6

⁶⁶³ WT2 Ref 13.E

⁶⁶⁴ WT2 Ref 13.F

⁶⁶⁵ WT2 Ref 12

⁶⁶⁶ CD 6.5

the United Kingdom is currently in breach of article 4.1 of the Birds Directive. Accordingly, unless and until the Site is classified, the *Basses Corbieres* decision will operate to subject it to the “old” strict protection regime under Article 4.4 of the Birds Directive, and deny possible access to the derogation provisions contained in the Habitats Directive and Habitats Regulations.

673. The first sentence of Article 4.4 of the Birds Directive imposes the following duty:

“In respect of the protection areas referred to in paragraphs 1 and 2 above, Member states shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbance affecting the birds, in so far as these would be significant having regard to the objectives of this article.”

674. The objectives of article 4 may be gathered from the first sentence of Article 4.1:

“The species mentioned in Annex 1 shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution”

That sentence itself echoes the words of the ninth recital to the Directive.

675. The stringency of this protection was demonstrated in *ECJ Case C-57/89 Commission v Germany (“Leybucht Dykes”)*⁶⁶⁷, in which the Court held that the power of a Member State to reduce the extent of an SPA could be justified only on exceptional grounds, which “must correspond to a general interest which is superior to the general interest represented by the ecological interest of the directive”. It was held that, in that context, economic requirements do not enter into consideration.

676. Nevertheless, as regards the assessment of harm, there is in practice no significant difference between scrutiny under Art 4.4 of the Birds Directive, and that under Art 6.3 of the Habitats Directive (transposed in Reg 61 of the 2010 Conservation etc. Regulations), although these latter provide a more structured procedure for assessment. The significant difference between the two regimes is that, in the case of a “should be SPA”, there is no access to the derogatory provisions of Art 6.4 of the Habitats Directive (transposed in Regs 62 and 66 of the 2010 Regulations). Accordingly, it is convenient to look more closely at the legal principles governing the assessment of impact, under Question B.

QUESTION B: SHERWOOD pSPA?

677. This question is a live one should the Secretary of State decide, contrary to NWT’s submission under Question A, that the Sherwood Site should not be regarded as a “should be” SPA, under *Santona Marshes/Basses Corbiere* principles.
678. The concept of a proposed SPA, as a policy tool, was first identified in PPG9 in 1994⁶⁶⁸. Paragraph 13 commenced:

⁶⁶⁷ WT2 Ref 16

⁶⁶⁸ WT2 Ref 17

“All National Nature Reserves (NNRs), terrestrial Ramsar Sites, Special Protection Areas (SPAs) and (in future) Special Areas of Conservation (SACs) are also SSSIs under national legislation. In addition, some SSSIs have been identified as potentially qualifying for SPA classification but are currently subject to further survey or consultation work before decisions can be taken about their classification. For the purpose of considering development proposals affecting them, potential SPAs should be treated in the same way as classified SPAs A location map and list of classified and potential SPAs and Ramsar Sites as at November 1994 is at Annex B.”

Paragraph C7 was to the same effect.

- 679. One of the pSPAs then listed was Thames Basin Heaths pSPA, which, as has been seen, in fact included land outside any then existing SSSI; and was eventually classified as an SPA in 2005.
- 680. PPS9 (2005) states, at paragraph 6: *“..... The Habitats Regulations do not provide statutory protection for potential Special Protection Areas (pSPAs) For the purposes of considering development proposals affecting them, as a matter of policy, the Government wishes pSPAs to be considered in the same way as if they had already been classified”*
- 681. This policy is reflected in the 2005 Circular, paragraph 5, which states: *“As a matter of policy, the Government has chosen to apply the procedures described below, unless otherwise specified, in respect of Ramsar sites and potential SPAs (pSPAs), even though these are not European sites as a matter of law. This will assist the UK Government in fully meeting its obligations under the Birds Directive and Ramsar Convention.”*
- 682. One of the obligations under the Birds Directive, which this policy will most obviously assist the Government to meet, is the second sentence of Article 4.4.
- 683. The decision whether to treat a site as a pSPA is, unavoidably, one for the Secretary of State (which in law means any Secretary of State), but the approach to any such decision should be consistent. PPS9, unlike PPG9, does not itself identify any pSPAs.
- 684. Some guidance can be derived from *Humber Sea Terminals*⁶⁶⁹. The Secretary of State for Transport made a Harbour Revision Order on the basis concisely recorded in paragraph H3 of the headnote to the case report. That involved the Minister in recognising an area of mudflats as being within a potential SPA, and applying the regime under Article 6 of the Birds Directive both to the pSPA (22 hectares of which would be lost) and to a nearby classified SPA, which would suffer an adverse impact.
- 685. The factual position on the classifications, and the Minister's approach to it, is explained in paragraphs 14 to 18 of the judgment. The Humber Flats, Marshes and Coast Phase 1 SPA had been classified in July 1994, but consultations on a proposed Phase 2, commenced in 1994, had seen changes in the contemplated area, notification of a SSSI which was withdrawn, and in January 2004 the submission of a brief to DEFRA for

⁶⁶⁹ WT2 Ref 10

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- various extensions to the SPA, including an area within which the new harbour works were proposed. The extension then proposed, taken as a whole, qualified in respect of Annex 1 species and Annex 2 migratory birds.
686. The application for a (HRO) Harbour Revision Order had been made in September 2001 (judgment paragraph 1) and the Minister authorised the making of the Order on 7 July 2004 (judgment paragraph 5).
687. The Minister approached that decision on the basis that the extended area under consideration for SPA status was a potential SPA, even though consultation procedures were incomplete, and, when the HRO was authorised, the area of the pSPA was not within a confirmed SSSI.
688. The approach of the Secretary of State in recognising a potential SPA, when considering whether to authorise the HRO under challenge in *Humber Sea Terminals*, was clearly a robust and practical one, unfettered by procedural niceties, and giving the term “potential”, in policy relating to a “potential SPA”, its plain and ordinary meaning.
689. On the known facts, the Sherwood Site clearly is a potential SPA. This legal submission is made on the footing that it would be perverse to deny it that description.

Consequences of pSPA status

690. In accordance with PPS9 paragraph 6, as a pSPA the Sherwood Site would, as a matter of policy, be considered in the same way as if it had already been classified. This requires the application of the Habitats Directive (Article 6.3 and 6.4) transposed in the 2010 Regulations (Regs 61, 62 and 66) to the determination of the present application. There has been no suggestion but that Reg 61 was and remains an acceptable transposition of Art 6(3); and in any case, not only should transposing legislation be construed in conformity with the relevant Directive if possible, but the Habitats Directive has direct effect in the UK.
691. Chapter 9 of the (ES) Environmental Statement⁶⁷⁰ makes reference to a Sherwood pSPA and, in paragraph 9.3.3, the formal scoping exercise is said to have highlighted, amongst the issues relevant to ecology and nature conservation impacts, “Implications for the proposed Sherwood nightjar SPA”. In the event, neither the ES nor Veolia’s evidence appear to consider the existence of the significant breeding populations of both nightjar or woodlark in the Sherwood area, and there is no further reference to either a proposed or a potential SPA.
692. As a result, the application and requirements of the Regulations (if to be applied as a matter of policy) have been ignored.
693. Regulations 61, 61 and 66 indicate a sequence of steps to be taken by the competent authority (here the Secretary of State), in respect of a European site before deciding to authorise a project, namely:
- Step 1 Under Reg. 61(1)(b), consider whether the project is directly connected with or necessary to the management of the sites? If not –

⁶⁷⁰ CD1

Step 2 Under Reg. 61(1)(a) consider whether the project is likely to have a significant effect on the site, either alone or in combination with other plans or projects (“the Significance Test”). If Yes –

Step 3 Under Reg. 61 (1), make an appropriate assessment of the implications for the site in view of its current conservation objectives. In so doing, it is mandatory under Reg. 61(3) to consult Natural England, and optional under Reg. 61(4) to take the opinion of the general public. Reg. 61(2) empowers the competent authority to require the applicant to provide information for the purposes of the appropriate assessment, or to enable the authority to determine whether such an assessment is required.

Step 4 Pursuant to Reg. 61(5) and (6), consider whether the project will adversely affect the integrity of the site, having regard to the manner in which it is proposed to be carried out, and any conditions or restrictions subject to which that authorisation might be given (“the Integrity Test”).

Step 5 In accordance with Reg. 61(5), but subject to Reg. 62, reject the project unless, it is ascertained that the project will not adversely affect the integrity of the site.

Step 6 If the project fails the integrity test in respect of one or more sites, consider, in accordance with Reg. 62(1), whether one is satisfied that there is no alternative solution; if not so satisfied, reject the project; but if so satisfied, proceed to steps 7 and 8.

Step 7 Consider, in accordance with Reg. 62(1), but subject to Step 6, whether one is satisfied that the project must be carried out for imperative reasons of overriding public interest.

Step 8 Consider whether one can secure that compensatory measures are taken which would be necessary to secure that the overall coherence of Natura 2000 is protected.

These steps are set out in the form of a flowchart in Figure 1 of the 2005 Circular.

694. This project is clearly unrelated to the management of a Sherwood pSPA.
695. The requirements of Articles 6(2) and (3) of the Habitats Directive were considered in detail by the ECJ in *Landelijke Vereniging tot Behoud van de Waddenzee, Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij C – 127/02* (“the Waddenzee case”)⁶⁷¹, and paragraphs 31 to 70 of the judgment provide authoritative guidance about the interpretation and application of those articles, including the relationship between the Significance Test (in the first sentence of Art 6(3)) and the Integrity Test in the second sentence; covering Steps 2 to 5 above.
696. The following points can be made about the tests created by Article 6(3).
697. The concept of whether a project is likely to have a significant effect on an SAC (or SPA) is addressed in *Waddenzee* in paragraphs 39 to 45. The

⁶⁷¹ WT2 Ref 18

central reasoning is in paragraph 44, read together with paragraph 43. Paragraph 43 states that the requirement for appropriate assessment comes into play if there is a “probability or risk” that the project will have significant effects. Paragraph 44 goes on to explain what is meant by “risk” in this context. It refers to the precautionary principle enshrined in Article 174(2) EC, and states:-

“such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in the case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised....”

698. Accordingly, Article 6(3) as interpreted by the ECJ in *Waddenzee* requires appropriate assessment unless objective information positively establishes the absence of significant effect.

699. The Court went on to consider what is meant by “significant effects” in paragraphs 46 to 49, and especially in paragraphs 47 and 48 of the judgment. These read:-

“So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

“Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site.”

700. Thus the concept of significant effect is firmly tied to the concept of conservation objectives. By “likely” in paragraphs 46 to 49, the Court means “likely” in the sense it has just explained in paragraph 44, ie a risk which cannot be excluded on the basis of objective information.

701. If appropriate assessment is required applying the test established by *Waddenzee*, then the plan or project can only be permitted to proceed by the competent authority if that authority has the information necessary to meet the test in paragraphs 50 to 61 of the judgment. This is a substantial requirement, as the (paragraph 58) reference to the precautionary principle and the language the Court uses makes clear. It refers to “having made sure that it will not affect the integrity of the site” (paragraph 55) and to the absence of reasonable scientific doubt as to the absence of such effects (paragraph 59). The passage is summarised in the following terms in paragraph 61:-

“....The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. This is the case where no reasonable scientific doubt remains as to the absence of such effects.”

702. This is a rigorous test. It is plain that the (potentially) two stage process is required to operate so as to
- “ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site.”*
(*Waddenzee* paragraph 34).
703. It necessarily follows that the Significance Test must be as rigorous as the Integrity Test, in the sense that it must not release from the requirement for an appropriate assessment any plan or project where it appears possible that it, might, on further assessment, fail the Integrity Test.
704. The following points are also important regarding the application of Reg. 61 in the light of Article 6(3):
- (1) For the purposes of Article 6(3) of the Directive, plans or projects include land use plans: see *Commission v UK, Case C-6/04*⁶⁷², in which judgment was delivered on 20/10/05.
- (2) The qualification “significant” is to be read forward from Reg 61(1) to 61(5); see *Waddenzee* paragraph 34.
- (3) The requirement to take into account “in combination” effects is similarly to be read forward: see *Waddenzee* paragraphs 53 and 54.
- (4) Article 6(3) and Reg. 61 are concerned with likely adverse effects: see *Waddenzee* paragraphs 44, 47 and 48.

Conservation objectives

705. As already seen, Reg. 61(1) requires the significance test to be applied “in view of that site’s conservation objectives”. PPG9 (Annex C paragraph C10) characterised those as “the reasons for which the site was classified or designated.” For a Sherwood pSPA based on the presence of breeding populations of nightjar and woodlark, the conservation objectives would be to this effect – to maintain in favourable condition the habitats for the populations of Annex 1 species, namely nightjar and woodlark, where to maintain implies restoration of any part of the habitat not currently in favourable condition.

Site integrity

706. The purpose of protection is to safeguard a site from the possibility of any adverse effect on its integrity. Although the term “integrity” is not legally defined, in either the Regulations or the Directive, the definition offered in Annex C, paragraph C10, of PPG 9, and now repeated in paragraph 20 of the 2005 Circular, is widely accepted. This is set out in the following paragraph.
707. “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,

⁶⁷² WT2 Ref 19

complex of habitats and/or the levels of populations of the species for which it was classified.”

708. Whilst Articles 6.3 and 6.4 of the Habitats Directive define a procedure applying to the specific circumstances of plans or projects, they must be read in the light of Article 6.2, which in respect of a European site requires not only the avoidance of “the deterioration of habitats and the habitats of species”, but also “disturbance of the species for which the areas have been designated”.
709. Thus the protection of a classified SPA involves both the protection of the habitat within the site itself and the avoidance of actions, which would threaten the species for which the site is designated. Such actions include any which threaten death or disturbance to birds, and so could impact adversely on the bird populations justifying SPA classification.
710. Accordingly, in the context of habitat protection, Article 1 of the Habitats Directive defines the favourable conservation status of a natural habitat as depending, amongst other criteria, on the favourable conservation status of its typical species. See in particular Article 1(e) and (i).
711. In the context of Article 6(3) and Reg. 61, it is therefore no surprise that PPG9 and now PPS9, in their definition of the integrity of a site, refer to the coherence of its ecological structure and function. The ecological function of a site necessarily includes the effective interaction of relevant species with their local habitat, including its other flora and fauna; and the disruption of those relationships arising from disturbance generated by external developments, must be taken into account. Otherwise the functional coherence of an SPA could be damaged without control and without compensation.

“alone or in combination”

712. The Significance Test, and the Integrity Test, have to be applied both to the instant project alone, and also to that project in combination with other plans or projects. This requires the identification of other plans or projects which could adversely affect a relevant European site. Relevant “projects” include any which have actually been proposed, whether or not they have been already authorised. The scope of “plans” is potentially wider, since it is now established (in *Commission v UK ECJ Case C-6/04 (20/10/05)*⁶⁷³, that these include land use plans, so that development provided for in, for instance, the adopted or emerging elements of the development plan, whether or not by site specific allocations, must be taken into account.
713. By this means a project which would not itself have a significant impact on a site will be constrained by Article 6 if there is a possibility that the combined effects of that and other plans or projects could be significant.

Consequences in this application

714. The evidence put forward by NWT identifies a number of potential adverse impacts on the Sherwood Site and the Annex 1 breeding populations who use it, ranging from direct loss through development of the application site

⁶⁷³ WT2 Ref 19

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- itself, to indirect impacts on the surrounding habitats and the nightjar and woodlark populations.
715. The Significance Test therefore needs to be applied, not only with reference to such impacts as might arise from the application project alone, but also from that project in combination with other plans or projects, which will themselves need to be identified for this purpose.
716. On the information available in the lead up to the inquiry, it is impossible to see how this application can pass the Significance Test, given the precautionary approach which the law requires. Indeed, *(the position prior to the inquiry was that)* since neither the ES nor Veolia's evidence have attempted to gather and assess information about impacts on the Sherwood Site as a pSPA, there is no discernable basis for a conclusion of no likely significant effect.
717. For similar reasons, *(the position prior to the inquiry was that)* there is no possibility that, on the evidence before the inquiry, the Secretary of State could conclude no adverse effect on integrity. In any event, the Integrity Test would need to be informed by an appropriate assessment, and Natural England would need to be consulted. It also seems inevitable that, for the purposes of making an appropriate assessment, the Minister would need to be pro-active in requiring further information from the applicant.
718. If, after due consideration, it proves impossible to conclude that this project would not, alone or in combination, have any adverse impact on the integrity of a Sherwood pSPA, it could only proceed if it can satisfy the exacting requirements of the derogatory regime in Regs. 62 and 66 (see Steps 6 to 8 under paragraph 693 above). *(The position prior to the inquiry was that)* further consideration of the issues which might then arise, is presently premature.

QUESTION C: STRIVING TO AVOID POLLUTION OR DETERIORATION OF HABITATS

719. Since the second sentence in Article 4.4 of the Birds Directive takes its flavour from the first sentence it is necessary to bear in mind the whole paragraph: *"In respect of the protection referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats."*
720. The duty under the second sentence has not been subsumed into, or replaced by, the provisions of the Habitats Directive, even for actually classified SPAs. The Secretary of State is bound to comply with this duty irrespective of the answers to Questions A and B. This is the case because of the information available about the Annex 1 bird populations in this area, and the location and extent of the habitats which support them.
721. Further, the available information makes it clear that the mosaic of habitats at Sherwood, and the numbers of Annex 1 breeding populations which depend on them, are such that de facto they form an important part of the network of nightjar and woodlark sites in the UK, along with other sites which are classified SPAs. Since the Secretary of State must "strive" (do his

best), to protect such habitats from pollution or deterioration, it is, obvious that the most appropriate way to fulfill this duty is in fact to treat the Sherwood Site as a pSPA. In short, this duty leads back to the issue under Question 2, and supports an affirmative answer.

722. In any event, given the precautionary principle which informs the Habitats Directive, and the duty to strive to avoid pollution or deterioration of the habitats used by Annex 1 species, striving to avoid such pollution requires, the rejection of any proposal where it is impossible to eliminate the risk of its causing or contributing to any such adverse impact.

Supplementary legal submissions provided during the course of the inquiry

723. These submissions supplement those above. They respond to new information provided, and new issues that have arisen, since the start of the inquiry. They are directed in particular at legal issues raised by the I-CA report and its associated documents.

WT2 QUESTION A: BREACH OF THE BIRDS DIRECTIVE?

724. There is now much more information before the inquiry, from the RSPB and Natural England, as well as new data provided or obtained by Veolia or gleaned from other sources (eg the Environmental Statement to the Lindhurst Mixed Use Development). This additional information lends force to NWT's earlier submission⁶⁷⁴ that Sherwood is a "should be" SPA, in light of the fact⁶⁷⁵ that ornithological studies other than IBA 2000 might serve as a basis for the classification of SPAs.

WT2 QUESTION B: SHERWOOD pSPA?

725. Following the earlier submissions (see paragraphs 632-722 above), there were exchanges between the parties on the question of whether the characterisation of a pSPA is a straightforward matter of applying policy guidance in PPS9 (paragraph 6) and the 2005 Circular (paragraph 5) to the known facts, or whether there is some further operative policy to qualify these and guide the decision: see for instance the letters WT6 and WT7. No further or other policy has emerged, only administrative practice unsupported by declared policy; therefore nothing which might qualify PPS9.
726. The question for the Secretary of State in this case (assuming that he does not find the existence of a "should be" SPA) is a straightforward one; giving the words of PPS9 and the 2005 Circular their normal meaning, is Sherwood a potential SPA? The answer to that question can only be yes. From that conclusion it follows that, as a matter of policy, the Secretary of State would take the same approach as if the pSPA were already classified.
727. In this connection, Mr Hankin says⁶⁷⁶: *"..... in terms of the overall approach to the application, the WPA considers it is important, so far as at all possible, to safeguard against the risk that the WPA would have to revoke any permission which the Secretary of State may decide to grant. While there is any realistic prospect that the appeal site and surrounding area*

⁶⁷⁴ WT2 para 38

⁶⁷⁵ WT2 para 29

⁶⁷⁶ CC15 para 6.2.20

might be designated as an SPA, the WPA considers that the most sensible way to safeguard against the risk is for the Secretary of State to make an appropriate assessment, as recommended by Natural England. In this sense, the WPA notes, but does not consider it necessary to engage in, the dispute between Veolia and NWT on the question of whether there is any legal requirement to make such an assessment. Whether or not there is any legal requirement to do so, the WPA considers it would be inappropriate to grant permission unless the Secretary of State is satisfied that, if an SPA is designated, the ERF would not have any significant effect upon its integrity."

728. There are two points to note here. The first is that in respect of a pSPA the application of the requirements of the Habitats Directive and the 2010 Regulations is prescribed by policy, not law. The second is that in this passage Mr Hankin is asking the Secretary of State, in a roundabout way, to apply what is already plainly and more concisely stated as government policy in PPS9 and the 2005 Circular. The operation of that policy achieves not only the interim protection of potential SPAs, but also guards against the risk of having to revoke permissions about which the WPA is concerned.
729. Given the information now available, it is necessary to consider how the boundary of a Sherwood pSPA might be characterised.
730. In the case of a classified SPA, there exists a precisely defined boundary whose location is important for a number of reasons when applying Article 6 of the Habitats Directive and Regs. 61, 62 and 66 of the 2010 Regulations: see paragraphs 737-741 and 781-796 below.
731. However, at the time when the competent authority has to decide whether there already exists either a "should be" SPA or a pSPA, *ex hypothesi* no precise boundary exists. This cannot and does not prevent addressing and answering those questions, nor the application and enforcement of the protective legislation which comes into play (as a matter of law or policy) if the answer to either question is in the affirmative. But, equally, this inevitably means that the competent authority must have some provisional area in mind, albeit one not precisely defined.
732. There are thus two separate, though related, questions. Similar questions arise under Questions A (should-be SPA?) and B (pSPA?) but for present purposes here, and subsequently, those questions will be addressed in the context of Question B.
733. The first question is whether Sherwood is a potential SPA. In order to answer that question it is not necessary to consider very closely the line of its likely boundary.
734. The second question arises if the Secretary of State decides that Sherwood is a pSPA, so that the provisions of the Habitats Directive and the 2010 Regulations are to be applied, as a matter of policy. Then, some of the conclusions arising from their application may depend on whether particular areas of land are considered to lie inside or outside the (as yet undefined) pSPA boundary.

The likely boundary of a Sherwood pSPA

735. An SPA boundary at Sherwood could be expected to include (1) all areas which nightjar or woodlark are known to use regularly for breeding or foraging (whether continuously, or intermittently as a result of forestry rotations) and (2) all contiguous areas under restoration to habitat suitable for nightjar or woodlark or subject to enforceable restoration conditions to such habitat and (3) contiguous areas whose inclusion is judged necessary to provide clear and defensible SPA boundaries.
736. In the present case NWT submits that the boundary of a classified Sherwood SPA would be very likely to include all the land within either the RSPB IBA boundary or NE's ICA, and that for practical purposes it would be reasonable to take this as the presumed extent of the pSPA, whilst noting the issues on which conclusions might differ if the boundary were drawn more narrowly.

Consequences of pSPA status

Site integrity

737. Given the lack of defined (p)SPA boundaries at Sherwood, it is to be noted that effects on mobile species, such as birds, which occur outside a European site but affect the species for whom the site was classified, may constitute adverse effects on that site. Two examples suffice, one relating to damage or destruction of habitat lying outside an SPA but used by SPA populations, and the other relating to disturbance of the birds outside the site.
738. In the Dibden Bay inquiry the relevant SPA (Solent and Southampton Water) included an intertidal area, but the proposed development of a new container port would have extended over not only that area, but also over mud flats below the mean low water mark also used by the relevant bird populations, and over a landward area (the Reclaim) adjacent to but outside the relevant SPA, used as feeding ground by two of those species, wigeon and teal. At inquiry the applicants conceded that the loss of the subtidal area and of the Reclaim, both outside the SPA, involved an adverse effect on the integrity of the SPA. Extracts from the Dibden Bay decision letter⁶⁷⁷ and from the Inspector's Report⁶⁷⁸ are provided. Particular reference is made to the Inspector's description of the case for the applicant⁶⁷⁹.
739. In the Islay Geese decision⁶⁸⁰, by the Secretary of State for Scotland, permission was refused for wind turbines on farmland, outside the Duich Moss SPA, but lying in the regular flight path of part of the population of Greenland White-fronted Geese for which the site was classified, because of the risk of goose fatalities from collision with the turbine structures.
740. The relevance of this principle is that, in respect of the ERF site itself and the sites of other proposals such as the UK Coal application, harm to the integrity of the pSPA arising from either habitat loss or damage, or disturbance of nightjar or woodlark, is not dependent on the location of any of those sites within a presumed pSPA boundary.

⁶⁷⁷ WT21 Ref 20

⁶⁷⁸ WT21 Ref 21

⁶⁷⁹ WT21 Ref 21 paras 3.180 and 3.893-898

⁶⁸⁰ WT21 Ref 22

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741. The presumed location of that boundary may however be relevant when considering whether, irrespective of their scientific justification, the offsetting measures proposed by Veolia could operate to avoid or mitigate possible harm to the integrity of the pSPA: see paragraphs 781-796 below.

“alone or in combination”

742. Article 6(3) of the Habitats Directive provides: *“Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”*
743. Waddenzee confirms, amongst other matters, that (1) the qualification “significant”, and (2) the requirement to take into account “in combination” effects, apply not only to the decision whether a project (the “target” project) is likely to have a significant effect, but also to the decision, following an appropriate assessment, whether it can be ascertained that the project will not adversely affect the integrity of the site. Waddenzee also makes clear (3) that Article 6(3) is concerned with likely adverse effects.
744. On the first point, see Waddenzee paragraph 34:
- “34. That provision [Art. 6(3)] thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site.”*
745. On the second point, see Waddenzee paragraphs 53 and 54:
- “53. None the less, according to the wording of that provision [Art. 6(3)] an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of the plan or project with other plans or projects in view of the site’s conservation objectives.*
- 54. Such an assessment therefore implies that all the aspects of the plan or project which can, individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field.”*
746. On the third point, see Waddenzee paras 44, 47 and 48. Paragraph 44 includes the following:
- “44. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in a case of doubt as to the absence of*

significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised”

747. The authority for these propositions is provided in order to demonstrate the consistent relationship between the different elements of the stepwise procedure consisting in the Significance Test, the Appropriate Assessment and the Integrity Test. The I-CA report indicates that the authors have misunderstood how the in-combination principle is required to operate across these three steps.
748. Although Veolia’s view is that the ERF project would not alone have a likely significant effect on the pSPA, NWT submits otherwise. That possibility is therefore included in the following analysis of the different situations that might arise. For this purpose, a simplified situation is assumed in which there are just two projects to consider, the project whose authorisation is at issue (project A) and one other potentially relevant project (project B).
749. If at the Significance Test stage it is clear, on the basis of objective information, both that there is no possibility of project A alone having a significant adverse effect on the European site, and there is no possibility of A and B combined having such an effect, no Appropriate Assessment will be required. If at that Stage it is clear that A would have no adverse effect on the site, even an insignificant one, then there is no need to consider B at all, because A would have no effect to contribute to any combined effect.
750. If at the Significance Test stage project A is judged as likely to have a significant effect alone (that is, in accordance with *Waddenzee* there is a risk of a significant adverse effect which cannot, at that stage, be excluded on the basis of objective information) then an Appropriate Assessment is required. That Assessment must include project B as well as A, unless it is clear at the Significance Test stage that B has no possible adverse effect (even one insignificant alone) to contribute to a combined effect. Otherwise there is a danger that, following an Appropriate Assessment confined to A, project A will be judged to pass the Integrity Test on the basis that it would have no significant adverse effect (alone) when, had B been covered by the Appropriate Assessment, it would not have been possible to ascertain no significant adverse effect in combination. To court that danger would defeat the purpose of the Directive, and be inconsistent with *Waddenzee* (see paragraphs 53 and 54 of that judgment).
751. If, at the Significance Test Stage, A is judged to have no Likely Significant Effect alone, but a Likely Significant Effect in combination with B, then again an Appropriate Assessment is required. Then all the possible effects of A and all the possible effects of B come under assessment. In practice, the task of Appropriate Assessment is the same as that described in the preceding paragraph.
752. Strictly speaking, the question of whether a project other than the target project would have a Likely Significant Effect alone is not a relevant one, since the question is whether the target project will “have a significant effect thereon, either individually or in combination with other plans or projects”.

753. The points made here are reflected in Habitat Regulations Guidance Note 4 - "Alone or in combination" - issued by English Nature in May 2001⁶⁸¹. The most relevant passages are as follows:
- "2.1 The purpose of the tests in the Directive and Regulations is to ensure that the integrity of a European site **is not** adversely affected by a plan or project. It is therefore logical that when applying the test of likely significance either alone or in combination with other plans or projects, "alone or in combination" should be treated as "alone and/or in combination". Where the plan or project:*
- alone is likely to have a significant effect; or*
 - alone is not likely to have a significant effect but in combination with other plans or projects is likely to have a significant effect;*
- an appropriate assessment will be required.*
- 2.2 Although the reference to alone or in combination is restricted to the likely significance test, having ascertained the need for an appropriate assessment it would be illogical and inconsistent with the purposes of the tests in the Directive and the Regulations, not to consider the appropriate assessment in the same context. The appropriate assessment of the implications of the plan or project for the site should be made alone or in combination with other plans or projects."*
754. The correctness of this approach is confirmed by the judgment of Ouseley J in Humber Sea Terminals⁶⁸², in which in-combination effects are considered at paragraphs 69 to 79. The following passage is included:
- "76. If an appropriate assessment is being carried out on a site which warrants one because of its stand-alone effects, it would, in my judgment, be very curious if combination effects had to be ignored and only taken into account for those developments which did not warrant an appropriate assessment by themselves. That would be to introduce a lacuna for which there is no purpose. The trigger for the appropriate assessment does not confine the content of the appropriate assessment which has to be carried out."*
755. In summary, once it is concluded that the target project might have a Likely Significant Effect (as defined by Waddenzee) either alone, or in combination with other plans or projects, the Appropriate Assessment must cover all relevant plans and projects whether or not the target project, or any of the other relevant plans or projects, is considered to have a Likely Significant Effect alone. Otherwise, projects might be allowed through which, properly assessed for their effects in combination, would not survive the integrity test.
756. Against this background, there are a number of errors of approach apparent or implicit in IC-A Report. These are addressed below.

THE I-CA REPORT

⁶⁸¹ WT21 Ref 23

⁶⁸² WT2 Ref 10

757. NWT disagrees with many aspects of this Report, for reasons many of which were communicated to Veolia before the Report was finalised⁶⁸³. Some of NWT's criticisms relate to issues of fact or scientific judgment, but some are matters of principle, and are additional to those already identified⁶⁸⁴. It is these which are considered here.

Steps 2, 3 and 4

758. A basic but important fault in the Report is that it fails to distinguish, and address sequentially:
- (1) The question of whether the risk that the ERF project will have significant effects on a presumed pSPA, either individually or in combination with other plans or projects, can be excluded on the basis of objective information. (The Significance Test)
 - (2) The provision of information to inform an appropriate assessment, should one be required, of the implications of the ERF project for the pSPA in view of that site's conservation objectives. (A "shadow" appropriate assessment)
 - (3) The question whether it can be ascertained that the ERF project will not, either individually or in combination with other plans and projects, adversely affect the integrity of the pSPA. (The Integrity Test)

Step 2

759. In light of the approach in the I-CA Report, it is necessary to stress that this is a single question. Unless at the preliminary stage one can exclude the possibility that the target project will have a significant adverse effect alone, and/or in combination, there must be an Appropriate Assessment. This is a preliminary stage, and it is not appropriate to curtail, or segment, subsequent investigation by making judgments about the interaction or cumulation of relevant plans or projects which cannot sensibly precede an Appropriate Assessment.
760. The significance test was described by Habitats Regulations Guidance Note 3⁶⁸⁵ as:
- "..... a coarse filter intended to identify which proposed plans and projects require further assessment. It is the first stage of the process, and is distinct from the appropriate assessment of 'adverse effect on integrity' that follows."*
761. This being a preliminary issue, where there is potentially a Likely Significant Effect in combination, it cannot be expected that the target can be released from further scrutiny at that stage. The Thames Basin Heaths housing cases provide an exception which in effect proves the rule, in that, because of the large numbers of housing proposals applied or planned for all around that large archipelago site, and the inevitable increased population pressure on the SPA to which any housing proposal might contribute, such a proposal in proximity to the site would fail both the Significance Test, and the Integrity

⁶⁸³ CD99, WT17 Appendix 3

⁶⁸⁴ WT2 paras 58-86

⁶⁸⁵ WT21 Ref 24

Test, unless matched with committed suitable alternative greenspace (SANGS) sufficient to ensure that a proposal would not give rise to any net increase in SPA visitor numbers; in which case it would (in the absence of any other possible adverse effects) pass the Significance Test.

762. The recent history of Thames Basin Heaths SPA is illuminating in the present case not merely because it is a similar site to Sherwood pSPA, but because English Nature/Natural England developed a carefully crafted policy towards that site (in the form of a document commonly known as the Draft Delivery Plan⁶⁸⁶), but also because that approach was applied by the Secretary of State and Inspectors, and upheld by the Court in *R(Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), [2008] 2 P&CR 16 (“Hart”⁶⁸⁷) and *Millgate Developments Ltd v Secretary of State for Communities and Local Government* [2008] EWHC 1906 (Admin) (“*Millgate*”⁶⁸⁸).
763. The Draft Delivery Plan addressed in particular the effects of housing development in the vicinity of elements of the SPA. Although indirect, the effects, including both damage to habitat and disturbance of the birds, would occur within the site. The key insight behind EN’s approach is exemplified at paragraphs 1.5.7 to 1.5.8 of the Plan (quoted in *Hart* at paragraph 62). The way forward is explained in paragraphs 1.5.17/18/19 of the Plan.
764. Para 1.5.17 of the Plan identifies examples of matters which should not be considered to offset potential adverse effects on SPA heathlands, as follows:
- “Previous planning decisions by the Inspectorate or Secretary of State in relation to development with the potential to have a significant effect on a heathland SPA have clearly stated that certain matters should not be considered to offset the potential adverse effects on this and other SPA heathlands. Examples of these matters include:*
- a. any indications of population increase for the Annex 1 bird species;*
 - b. recently improved habitat within the SPA as a result of good management;*
 - c. the proposal to improve management of the site as part of the development;*
 - d. the lack of records of breeding birds on the parts of the SPA closest to the proposed development;*
 - e. the presence of less suitable habitat, for example, coniferous plantations, on the parts of the SPA closest to the development; and*
 - f. the fact that nearby settlements are declining so that the new residential development would be offset by other population declines in the area.”*
765. Paragraph 1.5.18 of the Plan explains why it is likely that all residential developments near to the Thames Basin Heaths SPA would be judged likely

⁶⁸⁶ WT21 Ref 25

⁶⁸⁷ WT21 Ref 26

⁶⁸⁸ WT21 Ref 27

to have a significant effect in combination (even if not alone) and why the prospects of surviving the tests of the Habitats Regulations following an Appropriate Assessment would be very low.

766. Para 1.5.19 goes on to explain that it is necessary to ensure that when a planning application is submitted, sufficient avoidance measures are included to enable the Council to be confident that the proposal would not have any effect on the SPA; and thus no likely significant effect even in combination. Having set aside the sorts of offsetting proposals which do not help in this situation, the potential answer was suitable alternative greenspace (SANGS), as thereafter explained.
767. The two cases, *Hart* and *Millgate*, were both decided by Sullivan J. In *Hart* English Nature had withdrawn an objection to development on the basis that sufficient SANGS were secured; and in *Millgate* had successfully maintained an objection on the basis that they were not.
768. In relation to the present application, there are around the likely area of a Sherwood pSPA, as around the Thames Basin Heaths SPA, permissions and proposals for residential development which pose the same problem as in the Thames Basin. There are also, as it happens, a significant number of other types of plan and project, also with the potential to damage the habitat within the pSPA, and to disturb the Annex 1 birds which use it. Damage is damage and disturbance is disturbance, and there is in principle the potential for cumulative, in-combination, effects to which all these types of development may contribute.

Step 3

769. In *R (Akester) v Defra and Wightlink Ltd [2010] EWHC 232 (Admin)* ("*Wightlink*"⁶⁸⁹) Owen J (at paragraph 104) identified a number of reasons why an Appropriate Assessment would be open to challenge, one of which is "its conclusion is based on a partial (in both senses of the word) assessment of the evidence".
770. The same principles must apply in the case of a report intended to inform an Appropriate Assessment, such as the I-CA Report⁶⁹⁰.
771. One aspect of the need to be comprehensive is ensuring that no plans and projects, which on assessment might be seen to make a potential contribution to a cumulative significant adverse impact together with the target project (and possibly others), are excluded at the Significance Test stage before they are adequately assessed.
772. It is not easy to separate out those parts of the I-CA Report which might be said to be part of material for an Appropriate Assessment, because of the confusion of the three steps under consideration. But taking the most inclusive view possible of the contents of the report, as a report to inform an Appropriate Assessment, it can be seen to be incomplete. There are two main reasons for this; a defective methodology and a deficiency in information and analysis.

⁶⁸⁹ WT21 Ref 28

⁶⁹⁰ VE22

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773. As regards methodology, the main defects, which appear in various combinations throughout the report, can be summarised as follows.
- (a) The Report fails to embody and apply the precautionary principle as embodied in Article 6(3) of the Habitats Directive and explained in the *Waddenzee* case.
 - (b) The Report fails to respect the fact that Article 6(3) protects the integrity of the pSPA as such, not merely the populations or levels of populations of the species for which it might be classified.
 - (c) Some relevant projects are omitted from consideration.
 - (d) The assessment of effects is restricted, in the main, to projects local to the ERF site.
 - (e) "In combination" effects are treated as restricted to those involving some common operation or interaction of the ERF with another project or projects.
 - (f) "In combination" effects are treated as restricted to those arising from plans or projects which are regarded as having a "sphere of influence" overlapping with that of the ERF.
 - (g) The Report makes a series of separate assessments of the effects of the ERF with single other projects, rather than addressing the possible combined effects of the ERF and all other relevant plans or projects
 - (h) The Report reaches conclusions about the significance of "in combination" effects by reference to specific types of effect separately, rather than by reference to the possible cumulative effect from all causes and types.
 - (i) When assessing "in combination" effects, the Report limits those potentially arising from the ERF to those considered not to be significant alone.
 - (j) The Report limits the potential effects contributed by other projects by assuming that they would themselves only be permitted if their effects "alone" would be insignificant.
774. The limitation and fragmentation of an Appropriate Assessment in these ways is inconsistent with the comprehensive and precautionary approach of the Habitats Directive. It also renders the Report partial in its second sense, in that all these methodological errors operate by make it easier to reach an overall conclusion which favours Veolia.
775. The way in which Veolia approach "offsetting" measures, which is relevant to the reasoning and conclusions of the Report, is also open to criticism. This too is a matter of methodology, which is dealt with separately below.
776. The widely accepted definition of "integrity" is:
- "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."*

777. It is clear from this definition itself that, in order to protect site integrity, it is necessary to avoid harm, whether arising from one or more separate developments or mechanisms, to the coherence of a site's ecological structure and function across its whole area. This approach is exemplified in the approach of Natural England to the Thames Basin Heaths SPA, which depended on the recognition that separate visitor impacts, damaging habitat and disturbing birds in all and any parts of the extensive site, would in combination have an adverse effect on integrity.
778. Even if the flaws of methodology are set aside, the conclusions which the Report asserts about the effects, or lack of effects, of various individual projects or groups of projects, are not supported by sufficient description of the projects or analysis of their potential effects.

Step 4

779. If the SoS decides that Sherwood is at least a pSPA, then, unless the derogatory regime could be successfully invoked, he would have to be able to ascertain that the ERF, alone or in combination with other plans and projects, would not have a significant adverse impact on the integrity of the pSPA.
780. The flaws in the Report as regards Steps 2 and 3 are such that its contents cannot support the conclusion Veolia require. If based on the contents of this Report, such a conclusion would be perverse.

MITIGATION AND COMPENSATION

781. In view of the "offsetting" measures now proposed, and the claims made for them, it is necessary to emphasise the importance of distinguishing between mitigation and compensation when applying Articles 6(3) and (4) of the Habitats Directive and the corresponding parts of the 2010 Regulations. Dr Day has already referred to this in section 11 of his proof⁶⁹¹.
782. Under the statutory scheme, compensation only becomes relevant under Regulation 66, in circumstances where a project has failed the integrity test but the deciding authority is, pursuant to Regulation 62, satisfied that there are no alternative solutions and that the project must be carried out for imperative reasons of overriding public interest.
783. It is therefore necessary to draw a clear distinction between measures that are or may be mitigation of the effects of the project on a European site, and measures that are or may be compensation for unavoidable adverse impact on the integrity of the site. Otherwise there is the clear risk that the protection intended by the EU and domestic legislation will be by-passed by putting compensatory measures into the balance when conducting the integrity test.
784. This risk is recognised by "Managing Natura 2000 Sites" at paragraph 5.4.1 in the following passage:

"The compensatory measures should be considered only after having precisely ascertained a negative impact on the integrity of a Natura 2000

⁶⁹¹ WT11

site. Proposing compensatory measures from the beginning could not exempt from the need to respect beforehand the steps described in Article 6, in particular the study of alternatives and the comparative assessment of the interest of the project/plan in relation to the natural value of the site."

785. Both the Habitats Directive (Article 6(4)) and the 2010 Regulations (Regulation 66) speak of "compensatory measures" in only one sense, and identify for such measures only one role, "to ensure that the overall coherence of Natura 2000 is protected". It is implicit in the structure and language of the Directive and the Regulations, that one cannot deflect an adverse judgment under regulation 61(5) by bringing into the balance at that stage measures, which, though they might compensate for unavoidable negative effects on the integrity of the site, do not minimise or cancel them.
786. Thus, the stringency of the integrity test cannot be avoided by including within the project measures which are in substance compensation and calling them mitigation. Potential compensatory measures must be excluded from consideration at that stage.
787. The distinction between mitigation and compensation is a real one (notwithstanding that there may be borderline cases), which must be maintained irrespective of the genesis of the measures under consideration.
788. This distinction between "mitigation" and "compensation" is not confined to the Habitats Directive and the 2010 Regulations, but is one well understood in the general context of development decisions and biodiversity; as in the RTPI's Good Practice Guide "Planning for Biodiversity", referred to by Dr Day at WT11.
789. The distinction between mitigation and compensation can only be made and maintained with reference to a particular project and, in the context of Regulation 61 of the 2010 Regulations, its effects on a particular site, here the pSPA. Then, it is both possible and necessary to distinguish between measures which avoid or reduce harm to the integrity of the site, and measures which will or might compensate for harm or potential harm which cannot with certainty be avoided.
790. The same distinction is also drawn in Managing Natura 2000 sites at paragraph 4.5.2⁶⁹²:

"As regards mitigation measures, these are measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

Mitigation measures are an integral part of the specifications of a plan or project. They may be proposed by the plan or project proponent and/or required by the competent national authorities.

Mitigation measures are distinguishable from compensatory measures strictu sensu (see section 5.4). Of course, well-implemented mitigation measures limit the extent of the necessary compensatory measures by reducing the damaging effects which require compensation."

⁶⁹² WT21 Ref 29

791. The distinction between mitigation and compensation was crucial to the Harwich decision (ref. MNA 152/135R/6)⁶⁹³, as appears from paragraph 38 of the decision letter:

“38. English Nature’s advice that the project, including the total package of mitigation, managed re-alignment and monitoring, will not have an adverse effect on the integrity of the SPAs, is accepted completely in respect of Hamford Water SPA. In respect of the Stour and Orwell SPA English Nature’s advice is accepted insofar as it relates to their scientific view of the way the estuarial system will continue to operate as an ecologically functioning whole. The Department considers that there may be cases where action taken outside existing site boundaries will contribute to a mitigation package which overall maintains the integrity of the functioning of the site. However English Nature’s conclusion in this case is based on the requirement that 16.5 ha of additional land, outside the existing SPA boundary, is needed to replace the net losses of intertidal area which will occur in the short-term as a result of the additional erosional effects of the dredge before the sediment recharge reaches full mitigation levels. The Department takes the view that, because the redressing of the immediate damaging effects of the project relies so firmly on the provision of permanent replacement habitat outside the existing site, it is not possible to conclude that the habitat creation element of the package can be considered a mitigatory measure to remove the adverse effects of the project on the Stour and Orwell SPA. Rather we conclude that it must be considered as a compensatory measure to ensure that the overall coherence of Natura 2000 is protected, following a consideration of whether the project can be justified for imperative reasons of overriding public interest, in the absence of alternatives.”

792. The same approach was evident in the Dibden Bay decision. See the Inspector’s Report⁶⁹⁴ at paras 36.161 to 36.189, within which are the following passages:

36.169 “In making their appropriate assessment, ABP adopted a “functional” approach, in which the beneficial effects of proposed habitat creation measures outside the European sites were weighed against the adverse effects caused by the destruction of protected habitat [3.172]. Such an approach enabled ABP to conclude that their proposals would not adversely affect the integrity of the protected sites, so long as the benefits of habitat creation were equal to (or greater than) the damage caused by habitat destruction.”

36.170 “I consider this approach to be fundamentally wrong. The classification of a SPA is designed to protect bird habitat as well as the birds that use that habitat. This is clear from the terms of the Birds Directive and from the Santana Marshes judgment [7.26].”

36.171 “In my view, the destruction, on a significant scale, of the protected habitat within a European site would be likely to have an adverse effect [on] the integrity of that site.”

⁶⁹³ WT21 Ref30

⁶⁹⁴ WT21 Ref21

.....

36.176 *“In my view, the creation of new habitat outside a classified site cannot avoid or reduce the damage to the integrity of that site that would result from the destruction of existing protected habitat”*

36.182 *“Unless a clear distinction between mitigation and compensatory measures is observed in this way, protected habitat could be destroyed without consideration being given to the availability of alternative solutions; and without reference to a project being justified by imperative reasons of overriding public importance. The protective regime established by the Habitats Directive and the Habitats Regulations would be undermined.”*

793. The need to focus on the specific European site and the proper distinction between mitigation and compensation, justify the propositions that :
- (1) Loss of or damage to habitat, or the disturbance of birds, within an SPA (or pSPA) can normally (that is, subject to (3) below) only be avoided or mitigated by measures which prevent that damage or disturbance from occurring or reduce its occurrence;
 - (2) Loss of or damage to habitat, or the disturbance of birds, within an SPA (or pSPA) cannot be avoided or mitigated by the provision or improvement of habitat outside the site; and
 - (3) It is in principle possible that the unavoidable loss of or damage to habitat, or the disturbance of birds, within an SPA (or pSPA) can be mitigated, so as to justify a finding of “no significant adverse effect” under regulation 61(5), by the provision of new habitat within the site; but this is difficult to achieve in practice.
794. The A11 case, relating to Breckland SPA, provides an example of this last result being achieved, and illustrates the conditions to be satisfied to justify the conclusion of no adverse effect on integrity⁶⁹⁵. In the present context two points may be noted; first, the rigorous investigation which underpinned the findings in CD98, and secondly, the possibility, within that enormous site, of creating truly new suitable habitat for the relevant species.
795. These principles are relevant when considering whether and to what extent the different elements of Veolia’s proffered offsetting measures could operate to mitigate adverse effects of the ERF on the pSPA.
796. Veolia, in the I-CA Report and in their evidence, treat their claimed offsetting measures as if they negate actual or possible adverse effects of the ERF on the (p)SPA, when such measures, even if they would have the effects claimed for them, do not negate or cancel those effects. Golf Course Plantation is already within the ICA identified by Natural England (let alone RSPB’s IBA boundary); the Rainworth Water site is outside any suggested pSPA both boundary; and No Man’s Land is within the ICA boundary but outside the IBA boundary.

Second supplementary legal submissions provided during the course of the inquiry

⁶⁹⁵ VE12.3 CD98

ALTERNATIVES

797. The availability of alternative sites for a proposed development is not usually a material consideration in determining a planning application or appeal. If a proposal is acceptable in planning terms, the fact that there might be an even more acceptable alternative site is irrelevant. If a proposal is subject to a serious planning objection, the fact that there is no alternative site will not normally save it.
798. Although there is a substantial body of case law on this subject, the main principles are settled, and are concisely explained in Volume 2 of the Planning Encyclopedia in paragraphs P70.32 to P70.35 inclusive. Two of the leading cases are *Trusthouse Forte Hotels Ltd v SSE (1987) 53 P&CR 293*, *Simon Brown J and R (Jones) v North Warwickshire BC [2001] 2 PLR 59, CA*⁶⁹⁶.
799. The main principles of approach can be discerned in the first paragraph of commentary on this subject, in paragraph P70.32, as follows:
- “Where, however, the proposed development is bound to have some adverse environmental effects and where a major argument for the development is that the need for it outweighs those disadvantages, then it may well be relevant and indeed necessary to consider whether there is a more appropriate site elsewhere: It is not, however, possible as a matter of law to say that the existence of an alternative site is decisive in any given case where environmental need points against the grant of permission; it is a question for the local planning authority or the Secretary of State in the first instance as to whether or not the situation requires alternative sites to be considered, and only if the view taken is unreasonable will the courts interfere: Simon Brown J suggested in Trusthouse Forte that instances of this sort might include airports, coalmining, petro-chemical plants, nuclear power stations and gypsy encampments; but not normally dwellinghouses, offices or superstores”*

Response to Veolia's legal submissions

800. Veolia have now joined NCC in inviting the SoS to adopt a “risk-based” approach and follow the stepped procedure set out in Regulation 61 of the 2010 Regulations. Although this is in a sense welcome, it is underlain by the express assertion (paragraph 315) that in these circumstances the law relevant to the “should be” SPA issue ceases to be of relevance, and the implied assumption that this course should be adopted merely as a convenient way of taking a “risk-based” approach, rather than in compliance with government policy in paragraph 6 of PPS9 following a determination that Sherwood is a potential SPA. This implication seems clear, in view of the formula “as if the Sherwood Forest area was a potential SPA” in (paragraph 313) Veolia's submissions.
801. The SoS should resist any temptation to take a short cut and move directly to the suggested approach as a matter of free discretion. It remains necessary for the SoS to address the questions raised by and pursuant to the European Directives, as explained in paragraph 636; in short, (A)

⁶⁹⁶ WT35

Should Sherwood already have been classified? and if not (B) Is Sherwood a potential SPA? The answers to these questions will determine the basis for the SoS's appraisal of "SPA" issues.

802. Whilst there is now unanimity between the parties as to the approach to be taken if the answers to Questions A and B are both in the negative, those questions cannot properly or safely be avoided, for several reasons.
803. First, it is in principle necessary to establish the legal position before recourse is had to policy. If, on the application of the law as declared by the European Court, Sherwood is a "should be" SPA, the requirements of the Birds Directive will apply to the application as a matter of law. If not, neither Directive will apply as a matter of law.
804. Secondly, should the SoS's decision (whatever it is) be challenged in the High Court, the issues then arising cannot be predicted and the court must not be faced with the possibility that the Secretary of State will have failed to make a finding on a relevant issue.
805. Thirdly, the decision on this application will certainly be regarded as at least provisionally determinative of the status of Sherwood as a "should be" or pSPA, and a failure to determine that, by by-passing the relevant questions (A and B above) would seriously impede development control decisions (and plan preparation) in Nottinghamshire.
806. On this last point, it is the case that the main practical difference between control under the Birds Directive, and control under the Habitats Directive and 2010 Regulations, is the availability of access to the derogatory regime under Article 6(4), and that difference has been rendered irrelevant in the present case because Veolia has now disclaimed reliance on derogation. In another application the possibility of derogation might be relevant and even decisive.

The Case for Natural England

The material points are as follows.

807. Natural England (NE) has given evidence to this inquiry on two broad areas. Firstly, the process by which a site can be classified as a SPA, the way in which the particular area at Sherwood Forest is being considered, the stage that the consideration of the ornithological interest of this area has reached and whether on the basis of NE's understanding of current practice an area at Sherwood Forest is a pSPA for the purposes of PPS9. NE has provided its evidence to the inquiry on this question and it is a matter for the SoS to decide whether there is a pSPA and if so, what its boundaries should be.
808. Secondly, NE has given evidence on what in its view the likely effects of the proposed ERF would be. This is in order to inform the SoS's consideration of how the assessment and decision-making process provided for by Regulation 61 of the Conservation Regulations 2010 should be applied in the event that the SoS is satisfied that there is a pSPA to which the policy stated in PPS9 should be applied.
809. In the light of evidence provided at the start of the inquiry, NE advised the Inspector (February 2010) that Sherwood Forest appeared to satisfy the Stage 1 criteria for selection of an SPA and that a risk-based approach

towards development of the application site might therefore be appropriate.⁶⁹⁷ Then, in June 2010, NE wrote to those local planning authorities whose areas of responsibility lie within or close to Sherwood Forest. This letter explained that, whilst NE understood that the Forest was not a pSPA, there remained the possibility that part of it would be recommended for classification as an SPA. It went on to advise the authorities that, until there is more certainty regarding the potential for classification, they might wish to adopt a “risk based approach” to their consideration of land allocations and policies, affecting the Forest, and to their determination of planning applications here. Such an approach would seek to minimise the potential for harm to breeding woodlark and nightjar. It would also provide a robust response to any future need to review outstanding permissions, under the terms of the 2010 Regulations.⁶⁹⁸

Process of SPA Classification

810. There are two stages involved in the selection of SPAs. The first seeks to identify those areas most likely to qualify; these would include areas that are regularly used by at least 1% of the Great Britain population of species listed in Annex 1 of the Birds Directive⁶⁹⁹, in any season. In the second stage, consideration is given to which territories are most suitable for designation on the basis of factors such as the history of occupancy and breeding success in the area; the number of protected species in the area; and, the nature and value of the habitats that the area supports.⁷⁰⁰
811. National survey data suggest that Sherwood Forest supported 1.88% of the UK's breeding nightjar population, in 2004, and 2.51% of the UK's breeding woodlark population in 2006. The Forest also seems to function as a single ecological site. On this basis, it appears that the Forest satisfies the first stage of the SPA selection regime. Indeed, the RSPB have identified Sherwood Forest as a possible addition to the list of SPAs.⁷⁰¹
812. The first phase of the 2009-2010 UK SPA review process is not due to report until March 2011 and Natural England has yet to form a view as to whether a site in Sherwood Forest would be one of the “most suitable territories” for designation. The second phase will be completed as soon as possible. The third phase, involving a formal review of the SPA citations, is expected to take no longer than a further year.⁷⁰²
813. Past practice in the UK suggests that sites become pSPAs in one of two ways; either by announcement of a formal public consultation on the site, or by a ministerial announcement that a site, or list of sites (such as that resulting from an SPA review) have been accepted as pSPAs.⁷⁰³
814. Nevertheless, the government has not issued any formal policy statement on the point at which a site, which is being assessed against SPA selection guidelines, becomes a pSPA for the purposes of policy as set out in PPS9

⁶⁹⁷ NE3

⁶⁹⁸ CD108

⁶⁹⁹ 79/409/EEC as amended

⁷⁰⁰ NE10

⁷⁰¹ NE6 p3

⁷⁰² NE12

⁷⁰³ NE6 p5

(paragraph 6) and ODPM Circular 06/2005 (paragraph 5).⁷⁰⁴ Indeed, the Nene Valley gravel pits provide an example of development pressure resulting in a pSPA being identified before the SPA review process was completed.⁷⁰⁵

Boundary of an SPA

815. Two possible areas have been identified for consideration as a pSPA. Both have been provided in order to assist the inquiry, but neither represents a precise or definitive recommendation for the purposes of recommending classification of a pSPA.⁷⁰⁶
816. NE identified an (ICA) Indicative Core Area⁷⁰⁷ based on their view of the optimal breeding habitat for nightjar and woodlark territories that were recorded in the 2004 and 2006 national survey years⁷⁰⁸. However, that identification takes no account of stakeholders' views or of other Annex 1 species (honey buzzard) territory in the north. As delineated, the ICA does not include the application site.
817. The other area, known as the Important Bird Area (IBA), was identified by the RSPB. This is based on an amalgamation of areas of potential interest for woodlark and nightjar that had been identified in advance of seeing the results of the 2004 and 2006 surveys.⁷⁰⁹
818. NE regard the ICA as being the more appropriate, of the two, for the purposes of any Conservation Regulations' assessment that might be required now⁷¹⁰. Having said that, it is likely that if a pSPA were to be identified, its boundaries would not be narrower than the ICA, but might be broader. Identification would be based on more than just the 2004 and 2006 data and further survey work might even be required.

Impact of the ERF on an SPA

819. In order to assist a Regulation 61 assessment, should one be made, NE have issued provisional conservation objectives for breeding nightjar and woodlark populations of the Sherwood Forest Area⁷¹¹. These set targets that seek both to maintain the breeding population of nightjar and woodlark at or above the baseline populations (64 nightjar and 39 woodlark) and to maintain the area of habitat that is suitable for these breeding birds. For breeding nightjar, the habitat is open heathland or coniferous plantation woodland with a mosaic of bare ground and low vegetation amongst young scrub, scattered trees or dense stands of young conifer trees. For breeding woodlark, the habitat is open heathland or coniferous plantation woodland containing a mosaic of short vegetation and patches of bare ground amongst sparse scrub (<20% cover), scattered trees or dense stands of young conifer trees.

⁷⁰⁴ NE8 para 4.1

⁷⁰⁵ Mr Clifton's answer to the Inspector's question

⁷⁰⁶ NE5.2 para 1.11

⁷⁰⁷ NE7

⁷⁰⁸ NE6 p4

⁷⁰⁹ CD90 paras 2.8-2.10

⁷¹⁰ NE5.2 paras 1.5 and 1.11

⁷¹¹ NE14

820. When assessing the effect of a project, on an SPA, the competent authority needs to distinguish between mitigation and compensation.
821. Mitigation measures, that form part of a project, can be taken into account when considering the Regulations' "significance test". If the likelihood of a significant effect cannot be ruled out, further mitigation measures can be applied which may lead to the conclusion of no adverse effect on integrity, at the appropriate assessment stage.
822. However, compensatory measures can only be considered after it has been established that the project would have a negative impact on the integrity of the SPA. Even then, the project can only go ahead if there are no alternatives to it and there are imperative reasons of overriding public interest why the project should proceed.
823. Measures that do not reduce or avoid effects on an SPA are compensatory, irrespective of their effect on the wider population of the species in question. It follows that the creation of new habitat outside an SPA must be compensation, not mitigation.
824. In principle, the provision of new habitat within any pSPA is capable of mitigating for the loss of or damage to habitat, or the disturbance of birds within it. In practice, this is difficult to achieve. That is, it is difficult to replace the lost habitat by creating "functional habitat" from "non-functional habitat" within the site in sufficient quantity, and of sufficient quality, and with the degree of certainty of success required to conclude that any likely adverse effect on the site will be avoided.

Golf Course Plantation (GCP) proposals for Habitat Offset and Enhancement

825. Natural England's view on the habitat offsetting and enhancement proposals at the GCP remain as set out during the inquiry⁷¹².
826. The GCP lies within the ICA and the IBA. There are no extant planning conditions on the land. The S106 undertaking seeks to offset the loss of breeding and feeding habitat on the application site, which is within the IBA, by the creation of suitable open habitat within an area of coniferous plantation woodland. It also seeks to offset the likely disturbance of birds in both the IBA and ICA.
827. NE are satisfied that, once this new open habitat is in place, it would provide appropriate compensation for disturbance from the effects of construction⁷¹³.
828. The GCP proposals are ecologically sound and capable of restoring heathland. There is however a risk of disturbance, which would limit the area's use by woodlark and nightjar; S106 based measures proposed to reduce this disturbance are therefore welcome.
829. In NE's view, the ERF alone would be unlikely to have a significant effect on the qualifying interest features (woodlark and nightjar) of the ICA⁷¹⁴. The development would not result in loss of habitat and the GCP offset measures

⁷¹² NE15

⁷¹³ Mr Clifton's response to the Inspector's question

⁷¹⁴ NE5.2 para 1.4

would avoid a reduction in the birds' populations provided that the S.106 would secure:

the improved GCP habitat in time to avoid adverse effects from the ERF and would maintain that habitat for a sufficient period;

suitable control over access to the GCP;

a programme to monitor the effectiveness of the measures, for woodlark and nightjar, for the first five years after the improved GCP habitat has been created and thereafter as agreed; and

continued funding (along with other stakeholders) of Operation Nebraska, which aims to control unlawful access and recreation across the wider area.

830. To the extent that the GCP proposals form part of the project for consideration by the SoS, they can be relied on to conclude that the ERF is not likely to have a significant effect on the ICA either alone or in combination, by reason of habitat loss or disturbance⁷¹⁵.
831. However the IBA includes the application site, where woodlark are known to breed, and the effect of losing this habitat, in itself, is likely to be significant if a pSPA were to follow the IBA boundaries⁷¹⁶. Indeed, it is reasonable to assume that the application site would be suitable for nesting if it were to be restored under the terms of the extant planning conditions. The GCP proposals might avoid a reduction in the population of birds within the IBA but, despite the claim that new functional habitat would be created, it cannot be ruled out that there would be an overall permanent reduction in the area of suitable habitat within the IBA.
832. The applicant assumes that the GCP area (which is within both the IBA and the ICA) is not functional habitat and that it would not become so if the area were to be designated as an SPA. However, it is not safe to assume that it is not currently functional habitat. Also, the applicant's assumptions about the extent and quality of the habitat are based on a Forest Design Plan⁷¹⁷ that was prepared in the absence of an SPA. That Plan might well change if the site were to become an SPA.
833. The case of the proposed improvements to the A11 trunk road between Fiveways and Thetford has been referred to. That case illustrates an acceptance of the principle that the provision of new habitat within a pSPA is capable of mitigating harm caused to habitat or disturbance caused to birds. However in that case, so far as nightjar and woodlark were concerned, the loss was of potential habitat. At Rufford, the loss is of habitat known to be used by birds by reason of which the site would be considered a pSPA (if the SoS finds that to be the case) and with the expectation that that use would continue if restoration conditions are met. Further, it is clear from the A11 case, that the mitigation measures anticipated there would have involved the creation of habitat from areas within that SPA that were not, at the time, contributing to its conservation objectives. That cannot safely be

⁷¹⁵ NE15 p3

⁷¹⁶ NE5.2 para 4.3

⁷¹⁷ CD89

concluded here on the basis of what is known about current and future use of the GCP by nightjar and woodlark.

834. In Natural England's view the evidence, in relation to the GCP, has highlighted a lack of certainty about whether there would be habitat gain within the site of a scale and quality to avoid any likely adverse effects.

In Combination Assessment (I-CA)

835. NE agree with much of the methodology used by Veolia in the I-CA. Nevertheless, despite the fact that Veolia accepted the sensible precaution of considering projects and plans within 5km of the combined ICA/IBA boundary⁷¹⁸, and suggested that the IBA/ICA boundary would define the extent of effects to be considered⁷¹⁹, the actual assessment of effects was limited to the ICA alone⁷²⁰. As a result, no account is taken of the direct loss of breeding woodlark habitat that is known to have existed on the application site and on the wider BP site, from surveys carried out in 1998, 2000, 2009 and 2010⁷²¹. Also, further consideration should be given to the fact that this sparsely vegetated land is likely to be particularly susceptible to the harmful effects of aerial emissions.⁷²²
836. It is reasonable to assume that, with an SPA/pSPA in place, future plans and projects would be controlled so as not to have a significant effect on woodlark and nightjar⁷²³. Meanwhile, NE can only encourage local planning authorities to take a risk based approach to their consideration of schemes; there is no requirement for them to do so. Any permissions granted in the interim may be subject to review.⁷²⁴
837. However, the I-CA report does not fully or clearly distinguish the relevant and residual effects of a number of plans and projects and the likely significance of those effects when added to the residual effects of the ERF. The report needs to provide greater clarity on the likely effects of these plans and projects on their own and their capacity for mitigation; and then to assess more fully the likelihood of those residual effects combining with residual effects from the ERF to become significant.⁷²⁵
838. As set out in the report⁷²⁶, the "whole site" methodology for screening the long list of projects does not appear to have been followed. Projects which would have an effect that is not significant in itself, need to be considered in combination with the residual effects of other projects, even if the sphere of influence would not overlap.
839. Also, the short list of projects that are screened in for specific attention, within the assessment, does not include those projects which are likely to generate relevant effects elsewhere within the ICA. Projects in this category include Sherwood Pines Holiday Park (project 3), Warren Farm residential

⁷¹⁸ VE22 Appx A para 2.3

⁷¹⁹ VE22 paras 4.64 and 4.97, SOCG 12 paras 2.1.2 and 2.1.5

⁷²⁰ VE22 Appx A paras 2.4 and 2.14

⁷²¹ VE9.11, VE9.12, VE21

⁷²² NE5.2 para 4.2

⁷²³ VE22 paras 2.23-24

⁷²⁴ SOCG12 para 2.1.6

⁷²⁵ NE5.2 para 3.1

⁷²⁶ VE22 Appx A para 2.14

development (project 20), the Annesley Wind Farm (project 28) and the various individual holiday and housing accommodation schemes listed in paragraphs 4.45-4.48 of the report.⁷²⁷

840. An example of the shortcomings in the applicant's approach to I-CA is provided by the Sherwood Pines Forest Park. This development has been approved, but the residual effects of recreational activities associated with it should be considered. Indeed, NE do not agree that the current strategy for managing visitor activities, associated with the Park, has been fully satisfactory in terms of protecting the birds.⁷²⁸ The disturbance caused would not necessarily overlap with the sphere of influence of the ERF, but the combination of disturbance effects could have a significant effect on the overall area that is suitable for breeding.⁷²⁹
841. NE broadly agree with the I-CA report's findings in relation to noise, insofar as it considers effects on the ICA⁷³⁰. However, assessment of the aggregated effects of recreation associated with the various housing and holiday schemes is limited; it ignores the residual effects of development outside the ERF's sphere of influence.⁷³¹ Also, no account has been taken of people who would drive to the Forest, for that recreation, rather than walk there.
842. Nor has adequate consideration been given to the possible negative effects of unauthorised access and recreational activities being displaced by enhanced security at the ERF site and at the site of the proposed BP.⁷³²
843. In addition, a far more detailed examination of the Forest Design Plans for Sherwood Pines Forest Park and Rainworth Forest is needed, given their relevance to areas within the ICA and the potential for overlap between the effects of the latter and the ERF.⁷³³
844. NE's detailed comments on the I-CA report are set out in evidence⁷³⁴ and in a supplementary statement of common ground between Veolia, NWT and NE⁷³⁵. So far as that report and any in combination assessment based on it is concerned, Natural England remains of the view that it does not support a conclusion that the likelihood of a significant effect on the pSPA (if there is found to be one) can be ruled out. On that basis, there needs to be an appropriate assessment of the implications for the pSPA.⁷³⁶

Appropriate Assessment

845. The provisional conservation objectives for the protected Area may inform the scope and nature of the appropriate assessment, but this assessment also needs to take issues specific to the ERF into account, including its size

⁷²⁷ SOCG12 para 2.1.8.3

⁷²⁸ SOCG12 p8

⁷²⁹ VE22 para 4.19 and SOCG12 p6 and p8

⁷³⁰ NE5.2 para 3.2

⁷³¹ SOCG12 p7 and p8

⁷³² NE5.2 para 3.3

⁷³³ SOCG12 p9

⁷³⁴ NE5.2

⁷³⁵ SOCG12

⁷³⁶ NE16

and location⁷³⁷. Sufficient information is before the inquiry to enable such an assessment to be made⁷³⁸.

Integrity Test

846. Following the appropriate assessment, the SoS will need to consider the effects on the pSPA's integrity, which is the coherence of its ecological structure and function. In doing so, it needs to be borne in mind that such effects may take some time to manifest themselves.⁷³⁹

The Case for PAIN (People Against Incineration)

The material points are as follows.

847. Veolia's application is neither plan-led nor policy-led. It is underpinned by neither national nor local waste strategies. Neither can this application possibly be described as "community-led". Instead, this proposal is for a waste incinerator, in the heart of Sherwood Forest, that has been led by a contract (contract B) which pre-dates, and is inconstant with, Waste Strategy 2007 and the PPS1 Supplement on Climate Change. Despite prolonged and concerted efforts, Veolia have yet to allow the release of an unredacted copy of this contract.
848. The construction and operation of this proposed incinerator would have perverse outcomes, including the burning of recyclable and compostable material. By contrast, the refusal of permission for this application would result in significant social, economic and environmental benefits.
849. There is a positive plan for the former Rufford Colliery site. The site should be restored to heathland and woodland in line with its restoration conditions which require it to be restored; the promises made to the community that it would be restored; and, the clearly expressed wishes of local residents that it should be restored.
850. Veolia's application relies on a deeply flawed site selection process that failed to take account of either the site's greenfield status or the true ecological value of the proposed development site.
851. Similarly, the application is based on waste predictions which are already vastly different from the actual data and which, year on year, become increasingly out of step with reality. Furthermore the application depends on a technology that is not the most suitable to handle the feedstock upon which the proposed incinerator would rely – and which has not been demonstrated to be appropriate for commercial and industrial wastes in the unlikely event that any arisings suitable for incineration were to be secured.
852. Regardless of whether contract B (for the incinerator) seemed like the best way of achieving the aims of the Waste PFI at the time, based on what was then known about the site status and the waste arisings, since then things have moved on and the application should be refused as it is not a justifiable departure from the Development Plan, and as it conflicts with the objectives of local and national policies.

⁷³⁷ NE14

⁷³⁸ NE16

⁷³⁹ NE14

Call-in issue (a) Whether the proposed development accords with the development plan for the area

853. The WPA notes, in the Planning Officer's report, that: "The development is identified as having an impact on the landscape and therefore would intrude on the openness of the surrounding countryside, thus conflicting with criteria (2) of NSLP Policy E17"⁷⁴⁰, and that "...the development fails to comply with a number of landscape protection policies the most relevant of which are NSLP Policies NE8 & NE9 & WLP Policy W3.3"⁷⁴¹.
854. Veolia's Planning Supporting Statement acknowledges that: "The proposal site is not identified within the Development Plan as a site for waste management development..."⁷⁴².
855. This is quite unlike the position at Eastcroft where saved Policy W6.1, of the Waste Local Plan, supported an increase in capacity because this would result in more of the county's waste being managed higher up the waste hierarchy⁷⁴³. As the SoS noted at the time, the existing incinerator and its expansion was firmly embedded in local policy.⁷⁴⁴ Indeed, this was acknowledged, in cross examination, by Mr. Hankin who also accepted that the Rufford proposal does not benefit from such policy support.
856. According to Veolia's witness Mr. Standen: "Policy NE1 provides that planning permission will not be granted for development in the countryside except for: agricultural, forestry and associated activities, recreation and tourist uses; utility installations; change of use of rural buildings; roadside services or dwellings for agricultural purposes. The ERF does not meet the exceptions listed and the proposal is a departure from this policy..."⁷⁴⁵.
857. EMRP Policy 38 looks for larger (new) waste management facilities, in the Northern Sub-Area, to be sited on brownfield land. Here, there is no evidence to show that priority was given to the use of such land. Indeed, Mr Standen conceded in cross-examination, that he had not given priority consideration to the re-use of previously developed land as part of his most recent alternative site appraisal. The evidence suggests that Veolia had initially presumed that the Rufford site was brownfield and only later realised that this was not the case.
858. There is no difference, in practice, between "previously used" land, "previously developed" land and "brownfield" land. All parties now agree that the application site is properly classified as a greenfield site.
859. The WPA recognises that the application site is within the open countryside, on land which (because of the restoration conditions attached to the current permission) cannot be regarded as brownfield⁷⁴⁶.
860. The East Midlands Regional Plan Sustainability Appraisal Statement clearly indicates that if a site is subject to restoration conditions, as is the case with

⁷⁴⁰ CD4 para 12.34

⁷⁴¹ CD4 para 15.13

⁷⁴² CD1 para 9.46

⁷⁴³ CD61 IR 53, 252, 253

⁷⁴⁴ CD61 para 15 of SoS decision

⁷⁴⁵ VE19.2 para 4.78

⁷⁴⁶ CD94b para 14

the former Rufford colliery, then this would rule it out from consideration for housing or employment. NCC seem to suggest that this advice does not form part of the development plan. PAIN disagree with this, but were unable to cross examine Mr Hankin on the point as it was irrelevant following the SoS's revocation of RSS and only regained relevance following the close of the inquiry.⁷⁴⁷

861. PAIN's view is underpinned by the EMRA statements⁷⁴⁸ that "In terms of the sustainability appraisal (SA), the SA forms part of the development process in terms of shaping the final RSS and the advice that it provides forms part of the final plan. The adopted RSS March 2009 is the document that is used to assess general conformity with plans at the sub-regional level" and that "During the drafting of an RSS and the various different stages of consultation etc. the SA appraisal develops as part of the process. When the Plan gets to the Proposed Changes stage then GOEM take responsibility for the latter stages of RSS development and thus also the SA appraisal."⁷⁴⁹
862. The SA process provides the means for ensuring compliance with the Strategic Environmental Assessment Directive. It would therefore be odd to interpret the EMRP in a manner that is inconsistent with the SA whilst relying on the SA to demonstrate the legitimacy of the EMRP. In order to assess sub-regional conformity with the EMRP, it is not normally necessary to look beyond the EMRP. But in cases where greater clarity is required, one should look to the SA for advice.⁷⁵⁰
863. Even if the application site is considered to be previously used land and, as such, within the ambit of EMRP Policy 38, this in itself does not transform what is clearly an unsuitable site into a suitable one. Nor does it fulfil the PPS10 requirement to give priority to the re-use of previously developed land.
864. NCC appear to suggest that the RSS regards the existence of restoration conditions as immaterial, on the basis that Policy 38 does not differentiate between land with or without such conditions. However, as the EMRA point out, "this is a matter for the WPA to determine".⁷⁵¹
865. Furthermore, NCC's argument that Policy 38 would be inapplicable to any colliery land, if restoration conditions were to preclude it, is not correct. The former Clipstone Colliery pithead area is not subject to restoration controls.
866. NCC refer to the ERF application as one for employment⁷⁵². However, as the EMRA have pointed out, the existence of restoration conditions for the Rufford site rules it out for such a use. In the circumstances, these proposals cannot have the support of EMRP Policy 38.
867. Indeed, the anticipated restoration of the site to heathland and woodland would be entirely consistent with EMRP Policy 7 which seeks to encourage

⁷⁴⁷ PA81

⁷⁴⁸ Statements by Bryn Walters (EMRA Policy Advisor for Waste and Minerals) which were included in NCC's evidence as CC3, before revocation of the RSS

⁷⁴⁹ PA81

⁷⁵⁰ PA81

⁷⁵¹ PA82 section 5

⁷⁵² CD4 para 12.38

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- regeneration of the Northern Sub-Area by promoting environmental enhancement and by protecting and enhancing the Area's natural assets.⁷⁵³
868. Waste Strategy 2007, PPS10, and the Development Plan form the "Article 7 plan" of the "Waste Framework Directive"⁷⁵⁴.
869. Despite Veolia's rather bizarre assertion in their planning application⁷⁵⁵, under cross examination Mr. Mitchell conceded that the waste PFI contracts between Nottinghamshire County Council and Veolia Environmental Services do not in fact "effectively replace" the Municipal Waste Management Strategy for Nottinghamshire. He did however argue that the contracts supersede that strategy. He also acknowledged that there was no evidence to show that the waste disposal authority consulted on the terms of the contract before it was signed.
870. During the period when the EMRP had been revoked, the Revocation Guidance indicated that evidence which informed the preparation of the revoked Regional Strategies "may" also be a material consideration, depending on the facts of the case⁷⁵⁶.
871. PAIN's position is that one should not confuse the underlying reports (which looked at a number of possible scenarios), the underlying data (which does not reflect current waste trends), and the decision to project future waste arisings based on a specific scenario tied to specific data.
872. As Mr. Kondakor explained in his oral evidence, one of the reports⁷⁵⁷ that informed the Regional Spatial Strategy and Regional Waste Strategy outlined four different waste growth scenarios for the East Midlands, including a no-growth scenario. With reference to the latest East Midlands waste data⁷⁵⁸ he noted that the no-growth scenario was very close to the current waste arisings data for the Region, whilst the scenario reflected in the Regional Spatial Strategy and the Regional Waste Strategy has proved demonstrably inaccurate.
873. The East Midlands Regional Assembly recognised the need to revisit these scenarios in light of more accurate waste data becoming available showing a departure from the anticipated upward trend⁷⁵⁹:
- "The PPS10 companion guide emphasises the need for 'monitoring and regular review' to ensure that waste data used is robust and up-to-date. This requirement is particularly pertinent to the case of MSW arisings, for which, since 2003, there has been a marked departure from the steady historical upward trend. As depicted in Figure 6-1, this is true for both the East Midlands, and England as a whole. If MSW arisings data for future years continues to exhibit this feature, it is arguable that arisings forecasts should be re-evaluated to reflect the downturn".*

⁷⁵³ VE4.2 para 3.38

⁷⁵⁴ CD50, PA23 para 22

⁷⁵⁵ CD1 para 5.25

⁷⁵⁶ SOCG11 para 2.1.1.12

⁷⁵⁷ PA62

⁷⁵⁸ SOCG8

⁷⁵⁹ CD96 para 6.2

874. Mr. Kondakor noted in his oral evidence that waste arisings have continued to exhibit the feature of departing from the historical upward trend.

Call-in issue (b) Whether the appraisal of alternative sites is robust

875. In terms of the appraisal of alternative sites, every one of Veolia's processes, from Veolia's original site selection through to their most recent appraisal of alternatives, has been shown at the inquiry to have been far from robust.
876. PAIN agrees with Monsieur Mazaud and Defra's Designing Waste Facilities guidance⁷⁶⁰ that "Good site selection is fundamental and many design considerations stem from this core decision".
877. The consultation response from NCC's Spatial Planning Team dated 25 February 2008 recognises that: "A key issue in the consideration of this application is whether the location of the site is acceptable" and that "the selection of this site is not in accordance with the sequential approach" and that "The criteria used in Stages 1 and 2 of the appraisal are largely supported, particularly the emphasis on previously developed land in Stage 1 which reflects the high priority given to this in PPS10"⁷⁶¹.
878. PAIN believes that the successful Judicial Review by Capel Parish Council and the decision of Collins J in *Capel Parish Council v Surrey County Council* [2009] EWHC 350 (Admin) (5th March 2009) (England and Wales High Court (Administrative Court) 2009)⁷⁶² is relevant to this case as it highlights the importance of robust site selection.
879. The Companion Guide to PPS10 (Paragraph 8.13) emphasises that the PPS: *"sets out a plan-led approach to the delivery of the waste management facilities. There is considerable emphasis on the identification of sites and areas suitable for waste management so as to secure confidence for industry and local communities in the forward planning process and to deliver obligations arising from the Waste Framework Directive"*.
880. PPS10 (Paragraph 21) notes: "In deciding which sites and areas to identify for waste management facilities, waste planning authorities should... (ii) give priority to the re-use of previously-developed land, and redundant agricultural and forestry buildings and their curtilages". Contrary to the guidance, priority has not been given to the re-use of previously developed land here.
881. Planning policy at all levels indicates that the use of previously developed land should be prioritised. This is accepted in the application, which proceeded to select sites on the incorrect basis that the Rufford site was brownfield. The consequences that follow from the site being greenfield are that this process, and the conclusions that are drawn from it, are fatally flawed.
882. This is not to say that greenfield land is completely ruled out for use for waste related uses or any other form of development. However, greenfield

⁷⁶⁰ CD102 p30

⁷⁶¹ CD5.w

⁷⁶² Annex to CD116e and PA23 paras 165-173

land should be used only if previously developed land is not available to meet the need. This is made clear in the paragraphs of PPS7 of interest to the SoS, and also of the Companion Guide to PPS10 (paragraph 7.33) which urges Local Planning Authorities to “avoid turning unnecessarily to greenfield locations” and “to give preference to suitable sites that are previously-developed land”.

883. No ‘robust justification’ has been provided to explain why the Rufford site, which is in open countryside, is not co-located with other facilities and is in a location which is completely unsuitable for CHP operation should be favoured over alternative urban brownfield sites allocated for industrial use.
884. Veolia seemed content to accept and embrace the Government’s preference for reusing previously developed land all the way through the process until some point after the application was submitted and prior to the Opening Submissions of this inquiry, when Veolia finally lost confidence in the notion that their proposed development site was brownfield.
885. Veolia’s newfound disregard for giving appropriate weight to the Government’s preference for the reuse of brownfield sites is reflected in their Opening Statement, where they assert that: “Much ink has been expended in the evidence about the meaning of previously developed and previously used land. It matters not...”⁷⁶³.
886. It is significant that one of the key filters used at the first stage of Veolia’s alternative site assessment⁷⁶⁴ was based on the emphasis given in PPS10 to the need for Local Authorities to give priority to the identification of waste management facilities on previously developed land. The Stage 1 analysis therefore retained only those sites: “which could be considered to be previously developed or allocated for employment / industrial development”.
887. In response to questions from the Planning Inspector both Mr. Hankin and Mr. Standen conceded that, due to the Rufford site’s greenfield status, the site should have been screened out at the earliest stage of this site selection process.
888. If the SoS agrees that the Rufford Colliery site is greenfield then it follows that the approach adopted by the applicant in relation to the screening of the Rufford site at the Stage 1 analysis was flawed. It is wrong to treat a greenfield site as previously developed land or as land allocated for employment / industry for the purposes of the assessment. The Rufford site should have been de-selected and not taken into the second stage of the selection process.
889. The failure of the applicants and their consultants to recognise the significance of the restoration conditions on this site has therefore seriously prejudiced the site selection process. It follows that the conclusion reached in the application that “there are no better available sites for the proposed ERF” is not sound – by the correct application of their own selection criteria, each of the three alternative sites shortlisted in Stage 3 would have been better locations for an incinerator. To favour this greenfield site over the

⁷⁶³ CD94a para 10

⁷⁶⁴ CD1 vol2 Appx 5.1 para 2.17

three brownfield options it would need to be established that: i) the brownfield sites performed much worse than the greenfield site; and ii) no other greenfield sites (which had been screened out at the first stage filter) might be better than this site.

890. In addition, as highlighted by the Inspector's questions to Mr Standen, it seems odd that the Rufford site, which is not allocated for development, was scored "neutral" against the criterion of site specific allocation; that it was considered to be "good" in terms of transport by rail and water when Veolia have no plan to reinstate the colliery railway and yet the Portland site which is alongside a working railway and had a siding link as recently as 1996⁷⁶⁵, achieved the same score; that both of these sites' scores were downgraded to neutral, in the 2010 update, simply because Veolia were not interested in a rail link regardless of the site; and that despite the potential for heat to be provided to existing development close to the Portland site, and to the nursing home, hotel and other development expected alongside the Newark Road site, Veolia precluded the possibility that these sites might score "good" against the energy utilisation criterion by not asking potential customers whether they had an interest in using waste heat from the ERF. In fact these other sites perform well – especially when allowance is made for the anomalous marking of the Rufford site⁷⁶⁶.
891. Further detail of PAIN's critique of Veolia's site selection / appraisal of alternative sites is included within the evidence.⁷⁶⁷
892. Rainworth was not Veolia's first or second site for an ERF that was intended to serve Nottinghamshire as a supplement to Eastcroft. On 16 May 2005, Veolia submitted a bid that relied on Crown Farm Way, Forest Town, Mansfield as their incinerator site. The very next day site owners Mansfield District Council resolved not to sell the land for a waste incinerator. Veolia therefore needed a land owner prepared to sell or lease an alternative large plot in a hurry⁷⁶⁸.
893. As Mr. Mitchell says, Rufford was chosen because the site could be secured "in the agreed timeframe"⁷⁶⁹, and "the alternative Rufford site was identified and accepted in time for PFI credits to be awarded"⁷⁷⁰. These references to the timeframe for PFI credits lends further support to PAIN's understanding that the time pressures bearing down on Veolia adversely affected the quality of Veolia's site selection process.
894. According to the 2006 Updated Revised Best and Final Offer report⁷⁷¹, following the withdrawal of the Crown Farm, Forest Town, Mansfield site Veolia's site assessment failed to look beyond their (by then outdated) shortlist to determine whether or not any new sites had become available that could have been considered suitable.

⁷⁶⁵ PA37 p8

⁷⁶⁶ The original matrix is contained within CD1, Volume 2, Appendix 5.1, Table 3.3.1 which is reproduced in PA23 Para 159.

⁷⁶⁷ PA23 paras 160-164, PA35 paras 64-70 and PA39

⁷⁶⁸ PA38 Paras 16 – 19, supported by CD43, CD70 – CD77, VE1.3 Paras 3.1 and 3.3, and PA64

⁷⁶⁹ VE1.3 Paragraph 3.1

⁷⁷⁰ VE1.3 Paragraph 3.3

⁷⁷¹ CD 76 and 77

895. This point in time, early in 2006, seems to have been a crucial juncture in the site selection process. Veolia had a shortlist of 5 sites, only one of which they were confident would be available. PAIN contends that at this point Veolia should have opted to ascertain whether there were additional sites that were suitable for inclusion in a revised long-list (such as the Portland Industrial Estate, Kirkby-in-Ashfield) and then examine this revised long-list to create a revised shortlist of available sites.
896. Veolia decided to effectively allow the Rufford site to be selected by default. PAIN does not consider a site selection process that fails to fully explain its rationale, that fails to make a reasonable effort to identify suitable sites for its long-list, and that fails to ensure that its shortlist consisted of more than one available site, could possibly be considered robust – and is certainly not sound.
897. Veolia's Updated Revised Best and Final Offer report described the development of an incinerator on the Rufford site as according with "the locational criteria as set out in PPS10, in particular the re-use of previously-developed land"⁷⁷².
898. This incorrect view of the Rufford site as a brownfield site influenced Veolia's site selection, and was subsequently cited by Veolia on numerous occasions to explain their choice of site.
899. PAIN does not consider that a site assessment containing significant factual errors, misleading statements and fundamental omissions could possibly be considered robust. Based on all of the information currently available to PAIN, we conclude that neither Veolia's site selection process nor the site assessment which purportedly informed the site selection could reasonably be considered to have been robust.
900. Mr. Downen updated his evidence⁷⁷³ to include the adverb "purportedly" because Monsieur Mazaud gave oral evidence in cross examination that whilst S'PACE was appointed by Veolia in November 2005 to provide incinerator proposals for the Rufford site, S'PACE was not appointed to provide incinerator proposals for all of the other sites short-listed in the Revised Best and Final Offer report. This is significant because the Rufford site had not been selected through the recorded site selection process at that time (i.e. November 2005). It was not until the February 2006 Updated Revised Best and Final Offer report that Rufford was identified as the preferred site⁷⁷⁴.
901. The evidence shows that had Veolia approached the site selection process in a rigorous way, without the time pressures generated by the contractual arrangements, then this greenfield site (i.e. Rufford) would never have been chosen.

Call-in issue (c) The extent to which the proposed development is consistent with Government policies in PPS10: Planning for sustainable Waste Management, including the need for the proposal given that preparation of new waste development plan documents (DPDs) is at an early stage

⁷⁷² CD77 Para 6.14

⁷⁷³ PA39 para 68

⁷⁷⁴ CD76 Para 5.1

902. Despite Veolia's recognition⁷⁷⁵ of the PPS10 (paragraph 21) criterion "to give priority to the re-use of previously-developed land..." as "relevant to the consideration of a planning application's suitability against the policies of PPS10", Veolia failed to give priority to the reuse of previously-developed land.
903. There is a difference between the legal definition (as disposal) which derives from the Waste Framework Directive and the policy definition (as recovery) in the English waste hierarchy. As it is the legal definition which gives rise to particular obligations, then clearly this is the most relevant. DEFRA acknowledges⁷⁷⁶ that the existing Waste Framework Directive (2006/12/EC) (European Parliament and Council 2006) classifies "incineration on land" (at Point D10 of Annex IIA) as a disposal operation⁷⁷⁷.
904. PAIN's position is that the proposed facility should be treated solely as a disposal operation (also see call-in issue (g) below). However, if the proposed facility is to be treated as a recovery operation then it would still not be a justifiable departure from the Local Plan, and PAIN contests that various policies relating to disposal would still be relevant.
905. Veolia has no basis for claiming that the proposal would move waste up the waste hierarchy, or that their proposed facility would adhere to the waste hierarchy. The facility would effectively drive waste down the waste hierarchy; as explained in relation to call-in issue (g) below.
906. PPS10 Companion Guide lays the foundations for the sequential approach to the waste hierarchy in the context of paragraphs 3, 6 and 16 of PPS10. Paragraph 3.7 of the Companion Guide advises that: *"In developing regional and local planning strategies, consideration should be given to all the levels of the waste management hierarchy. It will be helpful for these to be dealt with sequentially and to be linked, in order to address the Key Planning Objective of driving waste management up the waste hierarchy and addressing waste as a resource. Policies will need to be particularly supportive of the upper end of the hierarchy if they are to be effective in practice"*.
907. This is supplemented by the additional commentary at paragraph 3.43 of the Companion Guide: *"It will be helpful for the tiers of the hierarchy to be dealt with sequentially, starting from the top, in order to address the Key Planning Objective of driving waste management up the waste hierarchy and addressing waste as a resource"*.
908. The sequential approach therefore follows the hierarchy of the supporting text. WS 2007 (paragraph 21) states that:

The most effective environmental solution is often to reduce the generation of waste – prevention;

⁷⁷⁵ CD1 vol1 chapter 3 para 3.5.15

⁷⁷⁶ Stage One: Consultation on the transposition of the revised Waste Framework Directive (Directive 2008/98/EC) A consultation document issued jointly by the Department for Environment, Food and Rural Affairs and the Welsh Assembly Government July 2009.

⁷⁷⁷ PA23 paras 513-536

Products and materials can sometimes be used again, for the same or different purpose – re-use;

Resources can often be recovered from waste – recycle or compost;

Value can also be recovered by generating energy from waste – energy recovery; and

Only if none of the above offer an appropriate solution should waste be disposed of.

- 909. Veolia's arguments are based on a "bottom up" approach, i.e. that recovery (which PAIN contends this incinerator is not) is higher in their simplistic interpretation of the waste hierarchy (ignoring per-stream and life cycle thinking) than landfill. However Veolia have failed to demonstrate that the discarded material would otherwise be landfilled and not recycled, composted, reused or reduced. The sequential approach must be applied from the "top down" and not from the "bottom up".
- 910. PPS10 (paragraph 4) warns against over-provision of disposal options where these would undermine movement up the waste hierarchy.
- 911. PPS10 goes on to state (paragraph 25) that: *"In the case of waste disposal facilities, applicants should be able to demonstrate that the envisaged facility will not undermine the waste planning strategy through prejudicing movement up the waste hierarchy"*. In order to consider whether there may be such overprovision it is necessary to consider the 'need' for the facility.
- 912. Veolia claim that this incinerator is a recovery operation and that these comments of PPS10 do not apply. This is an incorrect interpretation in law – as acknowledged by the confirmation to Mr Hankin from DEFRA, the Environment Agency, and in the legal advice from Counsel contacted before the Planning Committee meeting of 9 January 2009⁷⁷⁸. The implications of the operation being properly classified as disposal rather than recovery, which include a requirement to consider the proximity principle, are expanded in Mr Watson's written evidence⁷⁷⁹.

Call-in issue (d) Whether the application would deliver a sustainable form of development, as outlined in PPS1: Delivering Sustainable Development, with particular regard to policy in the Planning and Climate Change Supplement to PPS1 on renewable and low-carbon energy generation, and on the approach to determining planning applications before DPDs have been prepared to reflect the Supplement

- 913. Predicating this application on a dependence upon an increase in future waste arisings and depressed recycling and composting levels over the lifetime of the proposed incinerator is inherently unsustainable, and is incompatible with One Planet Living.
- 914. PAIN agree with Veolia that: "waste cannot be considered a truly renewable resource as ultimately it is produced from finite material resources"⁷⁸⁰.

⁷⁷⁸ CC1

⁷⁷⁹ PA23 Paras 510 - 523

⁷⁸⁰ CD1, Environmental Statement Volume 2, Appendix 5.3, Table 2

915. Waste Strategy 2007 (paragraphs i and 1) emphasises the goal of One Planet Living as follows: *"As a society, we are consuming natural resources at an unsustainable rate. If every country consumed natural resources at the rate the UK does, we would need three planets to live on. The most crucial threat is from dangerous climate change. Our goal is to make the transition towards what the WWF and BioRegional call 'One Planet Living'".*
916. Low carbon and renewable energy are explored in Mr. Watson's written evidence⁷⁸¹. Paragraph 20 of PPS1 Supplement on Climate Change says: *"In particular, planning authorities should not require applicants for energy development to demonstrate either the overall need for renewable energy and its distribution, nor question the energy justification for why a proposal for such development must be sited in a particular location".*
917. This paragraph refers specifically to applicants not needing to demonstrate the "overall need for renewable energy" and not needing to demonstrate the "energy justification" for siting. It does not remove the requirement to demonstrate that any waste that would be burned would be available without impacting on options higher up the waste hierarchy, or in the case of a disposal operation, having to travel long distances.
918. The paragraph is also silent on "low carbon energy" and removes neither the need to demonstrate the need for this energy, nor the need to demonstrate that the waste use would be consistent with waste policy. Nor does it remove the need to demonstrate whether it would secure the highest viable resource and energy efficiency and reduction in emissions. Had DCLG intended such exemptions to cover "low carbon" energy then the supplement would have said so.
919. The Glossary of the PPS1 Supplement makes it clear that 'renewable' energy and 'low-carbon energy' are different. Renewable energy: *"covers those energy flows that occur naturally and repeatedly in the environment – from the wind, the fall of water, the movement of the oceans, from the sun and also from biomass"*. Fossil fuels are, for practical purposes, finite and would be excluded from this coverage. Therefore processes which rely on fossil fuels or materials derived from them would not be consistent with this definition. Low carbon technologies are, more generally, all those *"that can help reduce carbon emissions"*. This would include all the technologies listed – including energy-from-waste, which (subject to conditions relating to sources, technology, and efficiency) can reduce carbon emissions.
920. Anaerobic digestion, for example, is an "energy from waste" technology which provides a low carbon treatment for food wastes. Anaerobic digestion is supported by the Government in Waste Strategy 2007 and was described by the then Minister as the best option for food waste⁷⁸².
921. In her oral evidence Ms. Demmar confirmed that this proposal is not for renewable energy and therefore it does not benefit from policy support afforded to renewable energy.

⁷⁸¹ PA23 paras 554-584

⁷⁸² PA23 Para 561

Call-in issue (e) The extent to which the proposed development is consistent with Government policies in PPS7: Sustainable Development in Rural Areas, including the principles at paragraph 1 (iv), (v) and (vi)

922. Veolia state that: *"The restoration of the coal stocking yard and surrounding colliery area would have gone a long way to restoring the traditional Sherwood characteristics, in line with the current planning consent. The development proposed would therefore have a detrimental effect on the restoration and landscape character of the former colliery site, dominating what would have become an open area of heathland, surrounded by woodland"*⁷⁸³.
923. The consultation response dated 10 December 2007 from NCC's Urban Design Officer records that: *"I still have worries about the height of the building. It is now 39m in the highest point which I think is an increase from the 33m we've been looking at in pre application stage. The chimneys are 79m tall which is very high. The visuals cleverly make the chimneys look lower but in reality they will be very high in the landscape. To me the ideal site for this development would be in a disused quarry. The main central section of the building section, looking like a telephone hand set, is going to be massive in the landscape..."*⁷⁸⁴.
924. The consultation response dated 9 April 2008 from NCC's Landscape and Reclamation Team, states that: *"The proposed development would be a large alien feature in the countryside"*⁷⁸⁵.
925. In their consultation response of 13 November 2008 Natural England state: *"Natural England continues to believe that the development will cause significant adverse affects on an essentially rural landscape and that plume visibility will significantly increase the distance from which the facility will be noticeable"*⁷⁸⁶.
926. Veolia themselves recognise that *"the surrounding character of the landscape...is of a high sensitivity, being particularly sensitive to tall development"*⁷⁸⁷.
927. The application therefore offends the requirements of PPS7 (Paragraph 1(vi)) that any development should be *"inclusive, in keeping and scale with its location, and sensitive to the character of the countryside and local distinctiveness"*.
928. Paragraph 1(iv) of PPS7 was cancelled by PPS4. PPS4 EC6.1 and EC6.2(a) cover some of the same ground, as follows:
- EC6.1 – *Local planning authorities should ensure that the countryside is protected for the sake of its intrinsic character and beauty, the diversity of its landscapes, heritage and wildlife, the wealth of its natural resources and to ensure it may be enjoyed by all.*

⁷⁸³ CD2, Appendix 23 Para 8.4.6

⁷⁸⁴ CD5.x, Paras 3 and 4

⁷⁸⁵ CD5.v

⁷⁸⁶ CD5.p

⁷⁸⁷ CD2, Appendix 23 Para 8.4.7 and PA23 Para 126

EC6.2(a) – *In rural areas, local planning authorities should strictly control economic development in open countryside away from existing settlements, or outside areas allocated for development in development plans.*

929. There can be no dispute that this proposal is in “the open countryside away from existing settlements”. Nor is the site allocated for development in the development plan. It follows that any proposals for development should be strictly controlled.
930. Furthermore, the restoration conditions mean that the appropriate comparator for the “intrinsic character” and the “beauty”, “diversity”, “heritage”, “wildlife” and “wealth of natural resources” of the landscape is not the current condition of the land, but the restored landscape.

Call-in issue (g); matter raised by the Inspector - The need for an energy from waste facility of this capacity, given the importance of treating waste as close to its source as possible and bearing in mind the Secretary of State's recent (12 February 2009) decision to grant planning permission to Waste Recycling Group Ltd for an additional 100,000 tonne capacity at the Eastcroft combined heat and power plant in Nottingham. In this respect, I will want to understand what opportunity exists to make greater use of the Eastcroft facility, given the Council's PFI contract with Veolia, and how this might affect the arrangements for managing residual waste that are set out in Table 3 of the officer's report to the 9 January meeting of the Planning and Liaison Committee

Flexibility of contractual arrangements and the Eastcroft permit

931. The contractual arrangements relating to the Nottinghamshire Waste PFI and to WRG's Eastcroft facility, along with the Environment Agency permit for the Eastcroft facility, are sufficiently flexible to allow greater use of Eastcroft to manage the County's residual municipal waste than the (approximately) 60,000 tpa currently sent to Eastcroft by NCC⁷⁸⁸.
932. PAIN's understanding, based on NCC's PFI Outline Business Case⁷⁸⁹ submitted to DEFRA on 6 June 2003, is that the Eastcroft expansion (the third line) was originally intended primarily for Municipal Waste. Out of the 100,000 tonne expansion, 50ktpa was to have been allocated for Nottinghamshire's MSW and 40ktpa to Nottingham City's MSW. This was explained as follows.
933. *“It is proposed that this [new capacity] be achieved by expanding capacity at the existing Eastcroft Energy from Waste plant, from the current level of 150,000 tonnes per annum to 250,000 tonnes per annum. An expansion of the plant will be considerably cheaper than building a new plant. However, the County will only have some 50,000 [additional] tonnes available from the Greater Nottingham area [of the County of Nottinghamshire]. Accordingly we would have to let a joint contract with the City who also require a new facility for some 40,000 tonnes of waste”⁷⁹⁰.*

⁷⁸⁸ SOCG8 para 4.1.36

⁷⁸⁹ CD43

⁷⁹⁰ CD43, Outline Business Case Para 2.1.4 and PA23 Para 229

934. Appendix A of the Report to Nottinghamshire County Council's 27 July 2005 Cabinet meeting, entitled *Recommendation of a Preferred Bidder For The Waste PFI Contract*⁷⁹¹ includes the following contract proposal from the Waste Recycling Group who operate the Eastcroft incinerator:

"100ktpa extension to the existing Eastcroft Energy from waste plant in the city of Nottingham of which NCC is offered 50ktpa by way of a 'Key subcontract'"
935. According to the Eastcroft Inspector's Report: "...The waste that would be accepted at the extended facility would be non-hazardous MSW and C&I waste. No restriction is being sought on the proportions of MSW and C&I waste that would be treated, within the overall 100,000t of new capacity per annum..."⁷⁹². In the event no conditions were attached to limit either the type of waste or the area from which it could be sourced.
936. The permit for Eastcroft allows for 160,000 tonnes of Mixed Municipal Waste to be burned per year at present and 260,000 tonnes per annum to be burned after the third line commences operation⁷⁹³.
937. Veolia has used excess capacity for waste disposal at the Eastcroft incinerator for "non-Eastcroft" waste, outside the contract between NCC and WRG⁷⁹⁴.
938. In cross-examination, Mr Mitchell revealed that around 2,500 tonnes of Eastcroft capacity, freed up by increased recycling in the City, was given to the County; this was provided free of charge to Veolia.
939. It is also worth noting that in 2007/08 MSW from NSDC was sent to Eastcroft for incineration. This fell outside the definition of "Eastcroft Waste" contained within the Waste PFI contract⁷⁹⁵ definitions, and fell outside the area historically agreed between NCC and WRG as the minimum anticipated waste catchment area for waste to be sent to Eastcroft; namely Broxtowe, Gedling and Rushcliffe Borough Councils⁷⁹⁶.
940. Mr Kondakor's supplementary evidence regarding "*Flexibility in relation to sending more waste to Eastcroft and/or for anaerobic digestion*" demonstrates that more than 60,000 tpa can be sent to Eastcroft, if necessary, to treat Nottinghamshire's MSW⁷⁹⁷.
941. The Nottinghamshire Waste PFI contract allows waste which would otherwise have gone to a Veolia incinerator to be sent to WRG's Eastcroft incinerator should contract B become null and void if, for example, Veolia should fail to secure planning permission⁷⁹⁸.

⁷⁹¹ PA64

⁷⁹² CD61 para 39

⁷⁹³ p2 PA65

⁷⁹⁴ PA40 Paras 2.1.3 and 10.4

⁷⁹⁵ CD43, Contract A Schedule 1

⁷⁹⁶ CD43, Contract A Schedule 1 and PA40 Paras 10.9 – 10.11

⁷⁹⁷ PA40 Para 2.1.3 and Paras 10.1 – 10.21

⁷⁹⁸ CD43, FBC Section 8.1, page 32, and CD43, Contract A, Schedule 1 – Definitions, definition of "ERF" and PA40 Paras 2.1.4, 10.12 and 10.15

Future availability of capacity at Eastcroft

942. When considering the need for a new incinerator in Nottinghamshire, the existing capacity at the Eastcroft incinerator is clearly important. Not only has a large extension of that facility recently been approved, some capacity from which would almost certainly be available to the County, but the potential increase in future availability of incineration capacity (as the City of Nottingham increases recycling levels and thus reduces the local demand for incineration capacity) must also be considered⁷⁹⁹.
943. Sufficient capacity already exists in Nottingham, particularly taking into account the already approved extension of Eastcroft. The barrier to the use of this capacity appears to be purely a competition issue between Veolia and WRG. This is not an adequate reason to allow a new development which would demonstrably cause harm to open countryside.
944. The existing capacity of Eastcroft is 160,000 tpa. This would increase to 260,000 tpa permitted for municipal waste per annum once the third line becomes operational.
945. The 260,000 tonne figure represents 83% uptime at nominal capacity for three lines⁸⁰⁰.
946. Assuming 100% uptime the facility would be able to process 315,000 tpa based on the nominal capacity for three lines (assuming the permit was varied to allow for this).
947. At the 92% theoretical capacity outlined in SOCG1 the facility would be able to process 290,131 tpa (assuming the permit was varied to allow for this).
948. The Eastcroft incinerator had spare capacity in 2008 that resulted in waste being received from Derby for the first time⁸⁰¹.
949. In 2010 the Eastcroft incinerator should have increased availability and may need a permit change to allow it to burn more than 160,000 tonnes on its modernised two original lines⁸⁰².
950. In June 2010 Nottingham City Council released a draft Municipal Waste Management Strategy entitled "A Waste-Less Nottingham: Waste Strategy 2010-2030"⁸⁰³ for consultation. Nottingham City Council subsequently released the underlying data used to prepare the draft strategy⁸⁰⁴, including the City Council's estimates for anticipated waste arisings, treatment capacity and treatment method. These show the City Council expects to massively increase recycling and composting and to use anaerobic digestion for food waste⁸⁰⁵.

⁷⁹⁹ PA22 Paras 2.1.6, 5.12.1 and 5.12.2

⁸⁰⁰ PA40 para 9.2

⁸⁰¹ PA40 p22 Table 6 and para 9.9

⁸⁰² PA40 Para 9.10

⁸⁰³ CD115

⁸⁰⁴ PA59 and 60

⁸⁰⁵ PA52 paras 5.1-5.3

951. The chart from Nottingham City Council's draft strategy shows residual household waste falling from 75,600 tonnes in 2009/10 to 48,974 tonnes in 2029/30⁸⁰⁶.
952. The draft waste strategy, for the City, states that: "*The impact of the measures outlined in this draft strategy will dramatically reduce the amount of both household and municipal (including trade and non household wastes) left over for residual waste treatment and disposal...*"⁸⁰⁷.
953. Nottingham City Council is projecting a drop in non-household waste from 39,838 tonnes in 2009/10 to 30,345 in 2029/30. They aim to recycle or compost at least 55% of trade waste and at least 50% of in-house waste in 2029/30⁸⁰⁸.
954. The combined tonnage of MSW (comprising Nottingham City's households and trade waste) available for landfill or incineration would therefore drop to around 63,000 tonnes⁸⁰⁹.
955. The City's waste strategy would therefore free-up capacity on the existing two lines at the Eastcroft incinerator for around 100,000 tonnes to be incinerated from the County Council.
956. This waste strategy demonstrates that higher recycling and composting rates in the City of Nottingham are expected to result in additional capacity for Eastcroft to accept more waste from the Count.

The need or otherwise for the proposed Rufford facility

957. The Waste PFI contract and Veolia's application were based on a set of flawed assumptions:

That Nottinghamshire's MSW would rise to 513,806 tonnes by 2019/20 (rising from 498,253 tonnes predicted for 2009/10);

That no more than 60,000 tpa would ever be sent to Eastcroft; and

That recycling would never exceed 52%⁸¹⁰.
958. More recently, NCC have claimed that the size of the ERF has been designed to take account of zero waste growth by 2015.⁸¹¹ However, figures 5.1, 5.2 and 5.3 of the Environment Statement⁸¹² (Need and Alternatives) all show that Veolia based their application on predictions that waste would continue to grow beyond 2015. PAIN understand that those predictions (for 2007-2032) are the same as those used as the basis for the Waste PFI contract. Furthermore, Veolia have not modified their design to take account of the zero waste growth (by 2015) scenario or in the light of changed circumstances. The ES assumes that municipal waste arisings will continue

⁸⁰⁶ PA52, Chart 18: Nottingham City Council's Household Waste Management for the Period 2010 – 2030, page 13.

Also see PA59 and PA60 for the underlying data

⁸⁰⁷ CD115 page 48 and PA52 Para 5.5

⁸⁰⁸ PA52 Para 5.6

⁸⁰⁹ PA52 para 5.7

⁸¹⁰ CD4

⁸¹¹ CC24

⁸¹² CD1

- growing and reach 513,806 tpa either by 2019/20⁸¹³ or by 2018 and thereafter remain constant until 2032⁸¹⁴.
959. Veolia and NCC have failed to demonstrate how there is a need for the incinerator based on current arisings, even if those arisings were subject to a sudden and inexplicable annual increase of 1.7% during each of years from 2011-2015.
960. The Inspector is not obliged to rely upon the predictions of the Regional Waste Strategy (RWS)⁸¹⁵. Those predictions derive from projections that used data from the mid to late 1990s; these data pre-date drivers such as the landfill tax escalator and take no account of the success of government policies in reducing waste arisings. Indeed, EMRP Policy 38 indicates that the (Appendix 4) apportionment data should be "subject to further research and analysis as part of the annual monitoring process.." and, as has already been stated, the EMRA has made it clear (in the 2007 monitoring report⁸¹⁶) that the RWS predictions should be re-evaluated. But, even if waste arisings for the county and Nottingham city were somehow to reach levels predicted by the RWS, this would not justify a need for the proposed ERF at Rufford. It would merely point to a general need for greater waste treatment capacity which could, for example, be achieved by building more recycling and composting facilities.
961. The discrepancy between Veolia's projected figure for 2009/10 and the actual figure is 90,000 tonnes, which equates to around half the capacity of the proposed incinerator.⁸¹⁷
962. PAIN anticipates that as waste continues not to rise as predicted this discrepancy will become larger. The actual quantity of residual waste available for incineration at Rufford will be less than Veolia had anticipated when higher recycling rates are achieved and/or should more than 60,000 tonnes of residual waste be sent to Eastcroft.
963. If it assumed that there is no future growth in MSW arisings, but that 4% of MSW must go to landfill and that the minimum recycling rates, specified in the PFI contract are never exceeded, there would be a residual of nearly 120,000 tpa available for Rufford if Eastcroft continues to burn just 60,000 tpa⁸¹⁸, or a residual of 90,000 tpa if Eastcroft were to take an additional 30,000 tpa from 2020⁸¹⁹. This would fall to nearly 36,500 tpa if arisings were to reduce by 0.5% pa and if slightly more use (10,000 tpa) were to be made of Eastcroft in the lead up to 2020 and if recycling were to increase from the contractual minimum of 52% to 60%⁸²⁰. Using a 1.7% growth rate up until 2017, as suggested by Veolia⁸²¹, which is actually higher than the growth rate assumed in Veolia's application and the Officer's report, and a 52% cap on recycling, with 4% non-combustible material sent to landfill, Mr. Kondakor's model shows that there would still be a residual of just over

⁸¹³ CD1 chapter 5 5..2.78⁸¹⁴ CD1 chapter 5 5.2.73⁸¹⁵ Cross examination of Mr Standen by Mr Watson⁸¹⁶ CD96 para 6.2⁸¹⁷ PA52 p3 Chart 4C⁸¹⁸ PA52 chart 17⁸¹⁹ PA52 chart 18⁸²⁰ PA52 chart 20⁸²¹ VE10.12

- 142,000 tpa – thus Veolia have failed to justify the need to build a new incinerator with a capacity of 180,000 tpa⁸²².
964. DEFRA data show that, as of 2009, household waste per head had dropped 10% relative to the peak in 2002/03 (from 520Kg to 468Kg) and has dropped dramatically since 2004/05⁸²³.
965. Nottinghamshire's MSW peaked in 2004/05 at 466,665 tonnes⁸²⁴ and in 2009/10 the County's MSW was around 408,000 tonnes⁸²⁵.
966. East Midlands' MSW also peaked in 2004/05, and in 2008/09 waste arisings in the Region were lower than those in 2001/02 despite the huge increase in garden waste collection⁸²⁶. This is reflected in the increasing amount of landfill capacity that is becoming available across the region as mineral extraction creates void space more quickly than it is being filled⁸²⁷. For example, the deadline for filling the Erin landfill, which is north west of Mansfield and just outside the county boundary but one of Veolia's (contract A) delivery points⁸²⁸, has recently been extended from 2011 to 2021. This is because 9 years after it opened, only 1.5 million m³ of the 7.5 million m³ void space had been used.⁸²⁹ Indeed, if the situation with respect to landfill capacity is critical, as NCC maintain, they might have decided that this outweighed nature conservation concerns at the (Nottinghamshire) allocated Bentinck void site where the EA have now granted a permit for some 2.5-3.7 million m³ additional capacity⁸³⁰, but planning permission to exploit this has recently been refused.
967. Veolia and PAIN agree that the annual average change for Nottinghamshire's MSW arisings over the period 2001/02 – 2008/09 was minus 0.9%⁸³¹. Landfill tax data show that UK landfilling of standard rate waste fell by 14% in 2008, and is continuing to fall⁸³², and the NCC annual monitoring report for 2008/9 showed that it had taken two and half years for the county's landfill capacity to reduce by one million m³.⁸³³ When combined with the EA's audited tonnage data⁸³⁴, this suggests that the density of landfilled waste may have been up to 1.5 tonnes per m³ during this period.⁸³⁵ In any event, if it is assumed that future landfilling within Nottinghamshire will fall by 5% each year, the currently available void space for non-inert waste would not run out before 2024, even if no additional capacity were to become available and even if the permitted third line at Eastcroft were not to be built.⁸³⁶

⁸²² PA52 para 2.8

⁸²³ PA40 Para 3.1.2 and PA52 Table 1C, page 3

⁸²⁴ SOCG8 Para 4.1.28.3 (a)

⁸²⁵ PA52 Para 2.2

⁸²⁶ SOCG8 Para 4.1.28.8 and PA22 page 6, Paras 5.2.6 and 5.2.7

⁸²⁷ PA22 5.6.6-5.6.8

⁸²⁸ PA40 8.14

⁸²⁹ PA22 S5.8

⁸³⁰ CC15 p69 Table 1

⁸³¹ SOCG8 Para 4.1.28.3 (a)

⁸³² PA22 5.10.3

⁸³³ CD81, PA40 8.1

⁸³⁴ PA73

⁸³⁵ Cross examination of Mr Kondakor

⁸³⁶ PA40 8.12

968. Nottinghamshire's MSW arisings continued to fall in 2009/10⁸³⁷ and partly audited data for the city and county together suggest that arisings across the combined area had reached 566,358 tpa by this time⁸³⁸. This is more than 140,000 tpa lower than the EMRP projection of 710,000 tpa⁸³⁹.
969. Whilst NCC point to the paragraph 13 advice in PPS10 that there "should" be no need to reopen consideration of waste figures contained in RSS, they fail to mention the following paragraph which acknowledges that it may be necessary to revise waste predictions where, as here, there is important new information available.
970. When Nottinghamshire has optimised recycling and composting there will be insufficient residual waste available to operate the proposed incinerator as detailed in the application. There is currently no need to build a new 180,000+ tpa municipal waste incinerator for Nottinghamshire, nor is there expected to be, even if the current disappointing waste trends for Nottinghamshire continue, because even Nottinghamshire's recent poor recycling performance in relation to its peers is far better than that predicted in the Waste PFI contract⁸⁴⁰.
971. There are plenty of opportunities for Nottinghamshire to further reduce, reuse and recycle especially biodegradable waste. These improvements would result in there being little or no municipal waste suitable for incineration available to feed the proposed incinerator, especially considering the prospect of sending more waste to Eastcroft if necessary.
972. The City's waste strategy consultation document points to how a more modern waste strategy for the County could look, with anaerobic digestion of organic waste, the majority of trade waste being recycled and an overall downward trend in total waste arising⁸⁴¹.
973. Turning to the prospect of a Rufford incinerator that would be reliant upon burning C&I waste to make up a significant shortfall in MSW, PAIN note that Veolia anticipated that a change to increased reliance of C&I "*would be subject to the suitability / availability of these waste streams at the unspecified gate fee, and to the undisclosed contractual obligations with NCC. It is agreed that the application - and the accompanying Environmental Statement - did not contain any detailed data about the arisings of commercial and industrial wastes nor detail about their availability or specific suitability for incineration*"⁸⁴².
974. Long ago Veolia accepted that: "*Only residual waste suitable for management within an Energy Recovery Facility is relevant to the selection of plant size. For it to be suitable it must be compatible with the likely requirement of a Pollution Prevention and Control (PPC) permit, must be combustible and of a physical nature to allow handling and feeding into the*

⁸³⁷ PA52 para 2.2

⁸³⁸ Accepted by Mr Hankin in cross examination by Mr Watson

⁸³⁹ CC15 p72 Table 3 and CD7 p172

⁸⁴⁰ PA40 para 2.1.5

⁸⁴¹ PA52 para 5.9

⁸⁴² P4 SOCG3

*ERF plant...*⁸⁴³. Thus, the scope for burning C&I waste at a Rufford facility would be severely limited.

975. PAIN notes that according to the Environment Agency: *"When it is permitted, the name of the installation is likely to be Rufford Municipal Waste Incinerator"*⁸⁴⁴.

976. PAIN also notes the Environment Agency's response to Issue 6, *Veolia's planning application refers to their intention to burn commercial and industrial waste, which does not appear in the PPC application:*

*"Schedule 3 of the Permit specifies the types of wastes that can be burned at the facility...Burning industrial wastes with a waste code other than those listed in Schedule 3 would not be Permitted"*⁸⁴⁵.

977. In response to Issue 18 the EA state: *"Burning industrial wastes with a waste code other than those listed in Schedule 3 would be a breach of the permit conditions and subject to appropriate enforcement action"*⁸⁴⁶.

978. Mr. Kondakor noted in his oral evidence that much of the C&I stream for Nottinghamshire would be unsuitable for incineration. This was confirmed by Mr Hankin when he accepted that less than 25% of the C&I waste arisings were suitable for incineration in the proposed facility (even if they were available to Veolia) and would fall outside of what it is permitted for the Rufford facility. Much of the waste that could potentially be incinerated would be better suited for recycling and composting.

979. The North West Study⁸⁴⁷ showed that up to 97.5% of landfilled C&I waste was potentially recyclable and, as a published article⁸⁴⁸ indicates, there is potential for MRFs that cater for commercial waste.

980. Veolia have not demonstrated that the C&I waste stream can be relied upon to supply sufficient incinerator feedstock to justify their Rufford application.

981. Finally, PAIN draw attention to Veolia's experience in Sheffield to highlight that operational problems occur when feedstock for which an incineration facility was not designed to handle is used. This is detailed further below.

Matter identified by the Inspector - Whether operation of the proposed facility would effectively discourage the reduction, re-use, recycling and composting of waste, or whether measures would be put in place to ensure that only residual waste would be burnt

982. Waste Strategy (WS) 2007⁸⁴⁹ explains that its recycling targets may appear unambitious, in the future, and so they will be reviewed and possibly increased. NCC are therefore relying on what should properly be regarded as minimum targets. This should not be used as justification to disregard the waste hierarchy and government objectives. Indeed, WS2007 points out that energy should be recovered only from residual waste that cannot

⁸⁴³ CD1 planning supporting statement para 5.81

⁸⁴⁴ PA20 para 146.5

⁸⁴⁵ CD44 Decision Document, page 120

⁸⁴⁶ CD44 EA Decision Document, pages 184 – 185

⁸⁴⁷ PA61

⁸⁴⁸ PA63

⁸⁴⁹ CD40 para xiii

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- viably be recycled, as well as certain biomass wastes such as wood and food waste (via anaerobic digestion) where there are clear carbon benefits of doing so.⁸⁵⁰
983. The stated objective of the RSS is exceeding government targets for recycling and composting, with the objective to bring all parts of the region up to the levels of current best practice.⁸⁵¹ That best practice equates to a 70%+ recycling/composting rate, but a figure of 93.3% was used by the Welsh Assembly in their waste strategy consultation.⁸⁵²
984. In order to identify the residual treatment capacity that is needed, one needs to establish what constitutes the highest realistic recycling level achievable within the lifetime of the proposed facility. This approach is reflected in a recent appeal decision where the Inspector expressed concern that a waste strategy appeared to be based on a far lower level of recycling than was seemingly achievable.⁸⁵³
985. Even if contract A of the Nottinghamshire waste PFI were to allow current regional and national recycling targets to be met or slightly exceeded, it does not follow that the ERF, which is based on contract B, would help to meet or exceed those targets. Mr Mitchell has confirmed that the ERF feedstock would include recyclable material, but that source separated material would not be fed into the incinerator. However, that does nothing to encourage greater separation at source, if recycling targets are already being met; there are no plans for separate collections of food waste, for example.⁸⁵⁴ As PAIN has demonstrated, the incinerator would actually depress recycling rates in the county.
986. Veolia seems to have not even attempted to demonstrate that there would be any effective measures in place to ensure that only non-recyclable material would be burnt at Rufford. Certainly there is no evidence to show that the ERF would only process waste that would otherwise go to landfill and, as shown below, the proposed feedstock includes a high proportion of recyclable/compostable/reusable material.
987. Increased incinerator capacity for the County at Rufford is not needed and would only serve to undermine efforts to manage waste at higher tiers of the waste hierarchy.
988. The proposed incinerator would undermine preferred alternative treatments – including anaerobic digestion and recycling – of household and/or commercial biodegradable waste.
989. In considering proposals for the Ridham Dock Incinerator, a facility with a primary combustion chamber designed to cope with higher proportions of commercial and industrial waste, an Inspector concluded that if permission were granted the *“provision of greater incineration capacity than necessary would tend to undermine efforts to increase waste recycling and recovery*

⁸⁵⁰ CD40 Annex K para 52

⁸⁵¹ CD7 para 3.3.57

⁸⁵² PA23 paras 278-280

⁸⁵³ APP/C1055/A/10/2124772

⁸⁵⁴ Cross examination of Mr Mitchell by Mr Watson

locally, and encourage the transportation of waste from a more widespread catchment area”.

990. Waste Strategy 2007 indicates that a key to preventing incineration from undermining the achievement of high levels of recycling is: *“planning and building facilities with an appropriate amount of flexibility built in. This means flexible – e.g. modular – buildings, and also flexible contracts, which do not lock in fixed amounts of waste for treatment which might become obsolete”*⁸⁵⁵.
991. Mr. Mitchell explained how, throughout the lifetime of contract B, NCC would be charged substantial fixed costs regardless of whether or not the County ever uses the full 180,000 tonne incinerator capacity. He went on to explain how, even if third party waste was found to address a shortfall in incinerator feedstock, this would amount to, at best, only a partial rebate for the County Council.
992. Mr Allen explained to the Inspector that he was unable to provide the inquiry with details of the costs, to NCC, associated with use of the ERF as the release of that information was still subject to consideration in the Courts. Mr. Kondakor drew upon his experience of Veolia's Shropshire contract⁸⁵⁶ to illustrate the sort of financial disincentive to recycling and composting that such contracts produce.
993. Mr. Kondakor explained that, were the incinerator to be built, NCC would be obliged to pay the fixed costs associated with contract B regardless of whether or not NCC used the capacity. The effective variable cost, i.e. per tonne, of sending material for incineration would therefore be artificially low setting aside these fixed costs.
994. This means that material, which in a commercial environment (i.e. in the absence of contract B) would be cheaper to recycle or compost, would instead appear attractive as incinerator feedstock.
995. Similarly, sending no material for a Rufford incinerator would still result in substantial costs to NCC, thus disincentivising investment in waste minimisation.
996. In issuing the environmental permit for the Rufford facility, the EA noted that *“It is possible that mixed municipal waste, which is the waste stream that the facility will be designed to burn, may contain some food waste that has not been segregated at source”*⁸⁵⁷.
997. Mr. Kirkman conceded that he had not considered alternative collection methodologies, such as the separate collection of food waste, in his appraisal of alternative technologies.
998. A December 2007 consultation paper by the National Assembly for Wales estimated that up to 93.3% of municipal waste could either be recycled or composted / anaerobically digested. Indeed, Veolia's evidence has confirmed that, whilst only three waste collection authorities in the county

⁸⁵⁵ CD40, Chapter 5, Para 23 and PA77

⁸⁵⁶ PA55 and 56

⁸⁵⁷ CD44 EA (Permit) Decision Document, page 119 ref 3 and page 150 Para 134, and SOCG3 page 11 Para 4.1.24

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- currently collect green waste free of charge⁸⁵⁸, it is reasonable to assume that this number will increase⁸⁵⁹.
999. Waste composition figures, supplied in Veolia's July 2008 Carbon Analysis Final Report⁸⁶⁰, assume that the material they propose to incinerate would be: 30.5% putrescible garden and kitchen waste, 14% paper, 7% cardboard, and 5.8% glass. This would amount to 57.3% (103,140 tonnes) of the proposed input to the incinerator. With the exception of the glass, which is recyclable in any case, this material is all potentially suitable for digestion.
1000. If the 7.3% of plastic were to be included, this gives a figure of nearly 65%, or about 117,000 tonnes out of the 180,000 tonne capacity, that would be better recycled, composted, or even landfilled (if life cycle thinking were applied).
1001. As this constitutes Veolia's assumed waste composition for their proposed incinerator, it is reasonable to assume that operational problems could arise were a different waste composition to be used (see below).
1002. Mr. Mitchell confirmed that Veolia have no plans for food waste collection; the contract does not require it, but nor does it preclude it; the main considerations are economic and technology driven; and NCC believe that they can meet their targets without it⁸⁶¹. He indicates that: *"It is anticipated that this 52% [recycling] target will be reached and exceeded by utilising collection methodology that does not currently include separate food waste collections. NCC is aware that if they wish to consider such a system Veolia Environmental Services are happy to discuss this..."*⁸⁶².
1003. Thus, although Veolia has offered the potential of separate collection of food waste, it is assumed that were the Rufford incinerator to be built, the incinerator would rely upon kitchen waste for its feedstock.
1004. Veolia does not see residual waste as material which cannot be recycled / composted, but only as material that has not been recycled / composted. Veolia's position is that *"Residual Waste"* is *"the term used to describe waste remaining and requiring disposal or treatment after other upstream recovery activities. This is so, regardless of its composition and what potential treatment options exist thereafter"*⁸⁶³.
1005. PAIN notes the minutes of Nottinghamshire's Joint [Waste] Officer Board meeting of Wednesday 28 November 2007 which records how the representative from Gedling Borough Council asked *"if there were any plans to look at food waste collection in the future"*. In reply, NCC's Mick Allen confirmed *"not at the present time as the contract can deliver targets promised to Defra without food waste"*⁸⁶⁴.

⁸⁵⁸ VE10.4 para 3.3

⁸⁵⁹ Mr Standen in answer to the Inspector's question

⁸⁶⁰ CD2, Appendix 3, Page 4, Table 1: Assumed Composition of Waste

⁸⁶¹ Cross examination by Mr Watson

⁸⁶² VE1.1 para 4.40

⁸⁶³ SOCG3, Para 4.1.30.2

⁸⁶⁴ PA23 Para 653 and PA40 Paras 144.3 and 144.4

1006. Further evidence that higher levels of incineration undermine recycling, including specific references to the situation in Nottinghamshire, has been provided⁸⁶⁵.
1007. Finally, Mr. Allen, representing the Waste Disposal Authority, informed the Inspector that if the application is refused, contract B could fall away or Veolia could submit a revised project plan which might, for example, seek to provide an ERF on another site or revised proposals for an ERF at Rufford. If contract B were to be terminated, NCC could also terminate contract A, but this would attract financial penalties. If contract A were to be retained, Nottinghamshire County Council would seek to maximise recycling within the terms of that contract, whilst attempting to secure new arrangements for waste management as a replacement for contract B.

Matter identified by the Inspector - Whether the proposed plant would be considered a recovery operation when judged against the formula set out in Annex II to the revised Waste Framework Directive. In particular, I will want to understand why the Environment Agency believe that the plant could potentially be classified as a recovery facility and what factors this would depend on.

1008. Annex I of the WFD classifies waste incineration as a disposal operation, but a footnote to WFD Annex II explains the circumstances in which waste incineration, that is dedicated to the processing of municipal solid waste, may be regarded as a recovery operation. The qualifying requirement of the WFD Annex II formula⁸⁶⁶ is to demonstrate operation at a minimum relative efficiency factor of 0.65.
1009. The EA found that, using figures supplied by Veolia as part of their permit application for the Rufford facility, the facility would not achieve the 0.65 relative efficiency threshold. They accepted that, on the basis of information provided by Veolia, the Rufford plant could potentially be classified as a recovery operation, but decided that this would ultimately depend on the efficiency of the final plant and how it is operated.⁸⁶⁷ Whilst paragraph 8.27 of the PPS10 companion guide indicates that the waste planning authority should have sufficient information from the applicant to test consistency with PPS10, NCC confirmed⁸⁶⁸ that their evidence for believing that the Rufford plant would qualify as a recovery facility was limited to this inconclusive response from the EA.
1010. Veolia claim that their proposed Rufford incinerator would be similar in performance to their existing Portsmouth incinerator⁸⁶⁹.
1011. However, applying the 2007 Portsmouth data to the (Annex II) R1 formula would also produce a relative efficiency that falls below 0.65⁸⁷⁰.

⁸⁶⁵ PA23 Paras 290 – 303, PA35 Paras 25 and 26, PA76 and PA77

⁸⁶⁶ PA23 Para 525

⁸⁶⁷ CC10

⁸⁶⁸ In answer to the Inspector's question

⁸⁶⁹ CC10

⁸⁷⁰ PA23 Para 533

Matter identified by the Inspector - How throughput rates would affect the efficiency and power output of the proposed facility

1012. The Stoker capacity diagram from the IPPC application⁸⁷¹ shows that the proposed incinerator can only operate if the throughput rate and the calorific value of the feedstock remain within a fairly narrow range. The Nominal Design Point is a municipal waste throughput of 12 tonnes per hour at a LHV of 9,200 kJ/kg which is equal to a thermal input of 30.67 MW. The municipal waste LHV range can vary from 7,000 kJ/kg up to 12,500 kJ/kg. Municipal waste with a LHV below 7,000 kJ/kg can be incinerated only with the support of auxiliary fuel⁸⁷².
1013. There are constraints on the operating ranges in terms of plant inputs / outputs and efficiency. If the calorific value of waste rises above 9,200 kJ/kg then throughput must be progressively reduced from 12 tonnes/hour @ 9,200 kJ/kg to about 8.75 tonnes/hr @ 12,500 kJ/kg. If waste calorific value falls below 9,200 kJ/kg then there is only a small mechanical over-load, of 0.5 tonnes/hour, possible. If waste calorific value falls below 8,832 kJ/kg then the heat input to the incinerator falls as would the electrical output⁸⁷³.
1014. It is important to be confident, therefore, that the quantities and calorific value of the waste would fall within the operating parameters of the Stoker diagram, and ideally be close to the 'nominal point' over the lifetime of the facility, which Mr. Mitchell puts at about 50 years⁸⁷⁴.
1015. As Mr. Smyth explained to the Inspector, burning paper and plastic would increase the efficiency of the proposed incinerator. Conversely, this means that removing paper and plastic from the incinerator feedstock would make it less efficient. This supports the view that incinerators rely particularly on paper and plastic to provide the homogenous waste stream with a stable calorific value that is necessary to achieve stable combustion⁸⁷⁵.
1016. The experiences of Veolia with their application in Sheffield provides a warning to how failure to address the waste stream properly at the application stage can prejudice local management of waste in the future and increase transport distances⁸⁷⁶.
1017. Mr. Standen's letter dated 13 May 2008 includes Sheffield City Council's comment that: *"When the original application was considered the incinerator capacity was tested against higher recycling rates, up to 45%. It was argued that if this waste were to occur that the capacity gap could be filled with up to 80,000 tonnes of commercial waste. It is now being argued that this level of waste is a problem"*⁸⁷⁷.
1018. If by 2008, the composition of commercial waste really had changed to the extent that it was a problem to incinerate waste, that in 2001 had been assessed as suitable for incineration, then it is almost inevitable that

⁸⁷¹ PA23 Para 265

⁸⁷² PA23 Paras 265-266

⁸⁷³ PA23 Para 267

⁸⁷⁴ VE1.3 Para 5.1 and PA23 Para 268

⁸⁷⁵ PA23 Para 290

⁸⁷⁶ PA23 269-272, PA50

⁸⁷⁷ PA50

changes over the lifespan of the proposed Rufford incinerator will have even more serious implications⁸⁷⁸.

Matter identified by the Inspector - Whether this infrastructure provision would secure the highest viable resource and energy efficiency and reduction in emissions

1019. Mr. Hankin explained to the Inspector that the WPA had not re-assessed the application in light of the revocation of the RSS to take account of the duty under PPS1(S) (Paragraphs 9 and 11) to "secure the highest viable resource and energy efficiency and reduction in emissions".
1020. According to the January 2009 report to NCC's Planning and Licensing Committee: *"it may be possible to achieve lower net carbon emissions if other waste treatment options were pursued"* and: *"The current absence of proposals for the beneficial use of hot water by CHP, which could increase the efficiency of the plant and therefore off-set the climate change impact even more, is a disadvantage"*⁸⁷⁹.
1021. Veolia's stated position regarding the Carbon Assessments is as follows: *"The results demonstrate that other forms of residual waste management may outperform an ERF in terms of its estimated carbon footprint, in particular an MBT which achieves a high stabilisation of rejects..."*⁸⁸⁰.
1022. The detailed (August 2004) BPEO (Best Practicable Environmental Option) assessment for NCC found *"Option 5 performing better than all other options"*. Option 5 was based on MBT⁸⁸¹.
1023. In answer to the Inspector's questions, Mr Smyth acknowledged that the Environment Agency's analysis of the available carbon data, and their conclusions based on the data, were different to his own. He also informed the Inspector that, in climate change terms, it is better to landfill plastics than to incinerate plastics.
1024. PAIN has comprehensively addressed the climate change, CHP, and other relevant energy efficiency and emissions issues raised by Veolia's proposed Rufford incinerator⁸⁸². The evidence clearly shows that this incinerator would neither secure the highest viable resource and energy efficiency, nor the highest reduction in emissions.

Matter identified by the Inspector - The availability of sites where a combined heat and power plant might be provided

1025. According to WS2007: *"Although the Government is not generally expressing a preference for one type of technology over another for EfW, it does believe that any given technology is (where applicable) more beneficial if both heat and electricity can be recovered. Particular attention should therefore be given to the siting of plant to maximise opportunities for combined heat and power (CHP)"*⁸⁸³.

⁸⁷⁸ PA23 Para 272

⁸⁷⁹ CD4 Paras 15.15 and 15.17

⁸⁸⁰ SOCG3 Para 4.1.31.2

⁸⁸¹ PA23 Para 219

⁸⁸² PA23 Paras 284 – 289 and 547 – 689, and PA35 Paras 25 – 45 and 52 – 57

⁸⁸³ CD40 Annex E Para 4

1026. Veolia scored both the Portland Industrial and Land off Old Newark Road sites as "B" for energy utilisation, which means "a site with potential to provide heat to existing or prospective heat users"⁸⁸⁴. Mr. Standen has now accepted that both of these shortlisted sites were viable alternatives to the Rufford site.
1027. Veolia's selection of the Rufford site cannot possibly be justified in terms of potential for heat use. The Rufford site offers no significant heat users. There is little certainty that the nearby business park proposal would be granted planning permission, or that if approved the business park would ever be built. To date, there have been no firm agreements to ensure that even if it were built occupants would use some, let alone all, of the heat.
1028. A potentially significant heat user has appeared since the last heat user survey at one of the alternative sites, yet the survey has not been refreshed to reflect this.
1029. Veolia have therefore failed to do a thorough potential heat user study for the viable alternative sites and so have not ruled out the possibility that there are existing developments near those sites with occupants that would sign a heat use agreement which would mean that those sites would have "guaranteed heat users".

Matter identified by the Inspector - What weight the Secretary of State should give to the fact that this energy from waste plant would rely on incineration, rather than anaerobic digestion, gasification or pyrolysis

1030. According to WS 2007 (Annex E): "*Apart from AD, the Government does not generally think it appropriate to express a preference for one technology over another, since local circumstances differ so much*". The Government's preference for AD is explored in PAIN's evidence⁸⁸⁵.
1031. As waste which could be anaerobically digested is anticipated to be used as feedstock for the incinerator (see above), PAIN feels that the past and present Governments' strong preference for anaerobic digestion should be afforded significant weight.
1032. As outlined above, WS2007 states that a key to preventing incineration from undermining the achievement of high levels of recycling is "***planning and building facilities with an appropriate amount of flexibility built in. This means flexible – e.g. modular – buildings, and also flexible contracts, which do not lock in fixed amounts of waste for treatment which might become obsolete***" (**emphasis** in original)⁸⁸⁶.
1033. Unlike mass burn incineration, gasification and pyrolysis do not rely upon a constant feedstock and thus have more flexibility built in.
1034. As Mr. Watson explained in oral evidence, fluidised bed incinerators (of the type proposed for Ince Marshes⁸⁸⁷) rely upon Refuse Derived Fuels. There would necessarily therefore have to be a degree of pre-sorting prior to the waste being burned. The Rufford proposal is for mass burn incineration,

⁸⁸⁴ CD84 Paras 2.38 and 3.3

⁸⁸⁵ PA23 Paras 184 – 186

⁸⁸⁶ CD40 Chapter 5, Para 23 and PA77

⁸⁸⁷ CD110

which means the facility would treat mixed waste which could include recyclable material.

1035. Mass burn incineration, pyrolysis and gasification all produce Persistent Organic Pollutants (POPs), and this gives rise to obligations under the Stockholm Convention and related agreements and legislation. In particular, Article 6(3) of European Regulation 850/2004 requires that, when considering proposals for a facility that would release POPs, priority consideration should be given to alternative processes, techniques or practices that would avoid the formation and release of these substances.
1036. The evidence suggests that modern incinerators are net producers of the POPs known as dioxins⁸⁸⁸. This evidence has not been rebutted, and the issue has at no stage been addressed. The Saltend challenge⁸⁸⁹ showed that it is not the EA's duty to give preference to alternatives to incineration. The EA argued that this obligation fell upon planners. NCC did not discharge this obligation; the inquiry is the only remaining point at which proper consideration can be given to this matter.

Matter raised by the Inspector - Whether there are good reasons for making a decision on the location of a strategic facility, such as this, in advance of consideration being given to it as part of the Waste Development Framework

1037. Both Veolia and NCC, as WPA and WDA, have in the past claimed that there is urgency to this application due to a supposed "landfill crisis". PAIN does not believe that this is the case.
1038. The inquiry has heard evidence from Mr. Kondakor robustly demonstrating that the County has made sufficient provision for landfill capacity to meet relevant Government guidelines.
1039. In cross examination, both Mr. Hankin and Mr. Standen conceded that there were flaws in their respective approaches to calculating remaining landfill capacity. These errors led each of them to underestimate landfill capacity.
1040. PAIN's position regarding landfill is also supported by the comments made by Mr. Allen on behalf of the WDA.
1041. Veolia have said, on behalf of both themselves and Nottinghamshire County Council as the WDA, that they would not even begin work on a 'Plan B' alternative waste solution unless this application was refused. They also said that the 'Plan B' might be an alternative to incineration rather than a new incinerator on another site. PAIN take this to mean that there is no need for an incinerator and that a refusal of this application would not lead to any waste crisis or other calamity.
1042. PAIN believes that there are no good reasons for making a decision on the location of a strategic facility such as this in advance of consideration being given to it as part of the Waste Development Framework.

⁸⁸⁸ PA23 Paras 660 – 689

⁸⁸⁹ VE51

Other Matter: Public Perception of Health Impacts

1043. PAIN also draw attention to the fact that public perception of health impacts is a material planning consideration⁸⁹⁰. Mr Watson concludes⁸⁹¹ that:

Perception of risk, especially if well founded, can be a material planning consideration;

A range of studies has shown that concerns generated by perceptions of risk, even if unfounded, can have real health effects within the WHO definition;

There are significant uncertainties about the emissions from the proposed facility – particularly during start-up (and shut-down) and upset conditions;

The effects of secondary particulates have not been evaluated in the application;

The external costs of the emissions from the proposal, as assessed using UK specific CAFE external costs would be €6.77 - €18.53 per tonne of waste burned; and

The serious health impacts associated with secondary pollutant generation from the proposed incinerator have not been assessed by the Environment Agency as part of the environmental permit determination.

1044. In this instance, the weight that public concern should be afforded by the SoS should take account of:

The views of the community expressed at the community evening⁸⁹², covering both their genuine health concerns and their lack of trust in Veolia;

The acceptance by Prof. Bridges that not only does uncertainty remain regarding the health impacts of waste incineration, but that were the incinerator to be causing health impacts it would be highly unlikely that the community, or indeed the regulators, would be able to determine that the incinerator was the source of these impacts; and

Veolia's acknowledgement in the planning application that: "*The HIA has concluded that, understandably, the provision of a new ERF engenders a number of perceived health impacts (associated with potential emissions from the ERF and the associated traffic and the potential for noise and increased accidents resulting from increased traffic) and associated community concerns...*"⁸⁹³.

Consequences of Refusal

1045. As detailed above, and as confirmed by Mr. Allen for the WDA, if this application were turned down then more waste could potentially be sent to Eastcroft.

⁸⁹⁰ PA23 Paras 357 – 505

⁸⁹¹ PA23 Para 504

⁸⁹² CD111

⁸⁹³ CD1, Planning Supporting Statement, Para 7.7

1046. If this application is refused, as explained above, Nottinghamshire would optimise recycling beyond the recycling rates anticipated in the application, and the County Council could opt to promote separate collection of food waste suitable for anaerobic digestion.
1047. PAIN's case also explains why approval would effectively discourage the reduction, reuse, recycling and composting of discarded material. The majority of waste that Veolia hopes to burn is recyclable, therefore an obvious beneficial outcome of refusal would be the creation of an opportunity for closer adherence to the waste hierarchy.
1048. As outlined above, a Rufford incinerator is not needed, and refusal of this application would not result in a landfill crisis or waste calamity.
1049. Furthermore, refusal would avert the damage that the facility would have inflicted upon Sherwood Forest.
1050. Refusal would mean the site would be restored to heathland and woodland in line with its restoration conditions which require it to be restored, the promises made to the community that it would be restored, and the clearly expressed wishes of local residents that it should be restored.

Written Representations and Oral Submissions by Other Parties

Documents containing those written representations by local residents and other interested persons and parties⁸⁹⁴, which were submitted before the application was called-in, are listed separately to those submitted after the call-in⁸⁹⁵. Speakers at the evening session mostly provided written copies of their individual views⁸⁹⁶. The material points, that are additional to those already outlined above, are as follows.

1051. A petition⁸⁹⁷, signed by some 2329 people, makes reference to the 1995 restoration conditions. It calls for the application site and the proposed BP site, to be restored to heathland and woodland and included in the Greenwood Community Forest and any emerging Sherwood Forest Regional Park.
1052. The following paragraphs provide an amalgam of local residents' views.
1053. Rainworth is a former mining community and, for many families, generations of men worked in the Rufford pit. Then the work stopped and jobs were lost. Now, members of this financially disadvantaged community feel dismay and disillusion at the lack of public engagement over Veolia's proposals and at the prospect of an incinerator being built here, after NCC had led people to believe that the pit area would be returned to unspoilt countryside.
1054. Local residents were not asked for their views on an EfW plant here and do not have the financial resources to secure professional assistance that could be sustained through the lead up to, and duration of, the public inquiry. To make matters worse, people have been denied access to the information needed to challenge the proposals effectively. The scheme arises as a direct

⁸⁹⁴ CD5 CD6

⁸⁹⁵ CD6.1-6.6

⁸⁹⁶ CD111.1-111.34

⁸⁹⁷ CD111.35

result of the PFI contract, but details of that have been withheld; this cannot be right when it is public money that funds that contract. Furthermore, government guidelines on consultation, over the proposed ERF, have not been followed or enforced⁸⁹⁸.

1055. Following intense mechanisation of the coal industry, in the 1970s, for every tonne of coal extracted from the Rufford pit, a tonne of dirt was spread on the landscape. After the mine's closure, and the health problems that miners were left with, the one good thing that the village has is the Forest and the promise that the colliery site will be restored to heathland. Coal stocking here ceased long ago. It would therefore be wrong to betray that promise and unreasonable for the area to become a recipient for other peoples' waste.
1056. Tourism is a growth employment industry in and around the Forest. It has provided a lifeline, since the closure of pits, with sites such as Centre Parcs bringing lots of people into the area. The incinerator would provide very few jobs and would discourage visitors. As a town-edge heathland/woodland site, the former Rufford colliery offers much greater potential for job creation through development that would encourage respect for the local environment.
1057. The increase in HGV traffic, as a result of Veolia's proposed scheme, has been underestimated. This is because it is based on a throughput of 180,000tpa, rather than the maximum capacity of 210,000tpa. Certainly, the traffic would add to existing problems on roads, such as the A614, which already experience congestion. Also, it is feared that Rainworth would once again suffer problems of through traffic, if movement on the new by-pass were to be hampered by further congestion on the approach to Lockwell Hill roundabout and by frequent red lights at the signalled entrance to Colliery Road and the ERF.
1058. Occupants of the semi-detached cottages and of the neighbouring Sherwood House, a small independent hospital close to the site of the ERF, would be most directly affected by increases in HGV traffic, using Colliery Road, and by the noise of constructing the facility itself⁸⁹⁹.
1059. Whilst the ERF application site is within the Newark and Sherwood District, parts of Rainworth are not. This has made the exercise of democracy more difficult to achieve in relation to the proposed scheme. Local residents were not consulted on the proposals in any meaningful way and Veolia simply failed to engage with the community. People have been treated with disrespect and they feel badly let down and misinformed by the (NCC) waste planning authority who argued publicly that the colliery was a brownfield site and that only MSW from within the county would be burned there.
1060. It is notable that Newark and Sherwood District Council voted unanimously against the proposals, whereas NCC voted 10-1 in favour. The county councillor who suggested that alternative means of waste management should be investigated was told that this would be impossible, because PFI contracts had already been signed. Members voting at the (NCC) Planning

⁸⁹⁸ CD111.14

⁸⁹⁹ CD111.15

and Licensing Committee meeting, on 9 January 2009, were clearly influenced by this commercial consideration.

1061. At that meeting, those in favour of the scheme, together with members who didn't appear to understand it, were allowed considerable time to speak. But there was almost no opportunity for objections to be heard. NCC had already decided what they wanted to do and they were not going to be deflected; this is sharply at odds with the current government's thinking that no project should be forced on to communities where there is local opposition.
1062. Against that background, it is notable that some 84% of respondents to a survey questionnaire have come out against the scheme⁹⁰⁰.
1063. Local residents are concerned about their families' health; views of the plume emissions would be a stressful reminder of the dangers. Even the children themselves are worried. There are five schools in Rainworth and people fear the effects of exposure to exhaust gases from the ERF. Efforts to stay healthy, through diet and exercise, seem pointless if an incinerator is to be built here.
1064. Residents have little confidence in the EA's ability to protect people and the environment. Such concerns have grown in the light of publicity given to the Corby case of malformations in unborn children, following the mothers' exposure to airborne toxins⁹⁰¹. The quality of stack emissions will suffer if the furnace temperature is allowed to fall, or if the flue gas filters are not properly maintained. However, experience suggests that Veolia cannot be relied on to ensure optimum performance and the EA's monitoring will be limited to only two days of the year. In any event, particles smaller than 10nm will pass through the filters.
1065. The site of the proposed incinerator is in a bowl shaped depression where mist can become trapped. Under these conditions, pollutants from the ERF stacks may become concentrated and deposited locally. At other times, the pollutants would be dispersed over a 40km radius, affecting urban areas, agriculture, surface waters and (ultimately) groundwater quality across a wide area of sandstone aquifer.
1066. People living near to incinerators have a higher cancer rate than the national average. Indeed, it was suggested⁹⁰² that the Rufford ERF's emissions of harmful pollutants, including nanoparticles, would increase the risk of premature death through cancer or lung disease. This would amount to a violation of Article 2 of the Human Rights Act; the right to life. The effects of exposure would be long term and residents living between the Rufford and Nottingham incinerators would be affected by both facilities.
1067. The type of incinerator now proposed is banned in many advanced countries. This type is built in France, largely because of the strong links between Veolia and the French government. But, unlike the high efficiency incinerators being built in other parts of Europe, where up to 70% of energy

⁹⁰⁰ CD111.5

⁹⁰¹ CD111.23

⁹⁰² CD111.3

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- is recovered from the waste, Veolia's design is poor and only about 21% of the recovered energy reaches the electricity grid⁹⁰³.
1068. At Rufford, it is not clear how the electricity would be fed into the grid.
1069. Following combustion, large quantities of toxic residues would have to be transported away from the site; for every tonne of waste burned, almost a third of a tonne⁹⁰⁴ would be carried away by road⁹⁰⁵. The public can have little confidence in the claim that only waste suitable for incineration is used as feedstock; during a visit to (Veolia) Hampshire installations, a car engine and washing machine were seen being fed to the furnace⁹⁰⁶. Metal slag from the company's incinerators is sent to China, where it is used in the manufacture of goods that are then exported back to Europe⁹⁰⁷. That is not sustainable.
1070. Veolia's reliance on commercial waste, to make up for inadequate MSW being available to feed the Rufford ERF, is also not sustainable. The same claim was made in relation to the Sheffield incinerator, but a sufficient supply of suitable C&I waste has not been found⁹⁰⁸. Anyway, high calorific value fuel items such as paper, cardboard, wood and plastic, are things that should be recycled.
1071. The Sheffield incinerator is known to have caught fire three times in 18 months. However, it is not clear whether the concreted area surrounding the Rufford ERF would be sufficient to contain the contaminated water that might collect here following a sustained period of fire-fighting. A serious incident might involve 12 appliances working over 24 hours. It is not known whether sufficient water would be available to fight such a blaze but, if it was, it could flood a 400m diameter area to a depth of about 1.9m. Alternatively, it could spill over to seep into the surrounding ground.
1072. There are particular concerns over the vulnerability of the sandstone aquifer to pollution, from the Rufford ERF site, given the fissures that are believed to exist here. In one incident, in the 1970s, the entire contents of the colliery's catchment pond emptied through a crack that had appeared in the ground as a result of subsidence; however this event has been overlooked in the ES⁹⁰⁹. Piles to support the ERF are likely to worsen those fissures. The aquifer provides an important source of drinking water and development that would threaten the quality of those supplies would be contrary to NSLP Policy PU4 and to WLP Policy W3.5. Indeed, proposals to build an incinerator at Kirk Sandall were turned down 20 years ago because of the SoS's concerns to protect the aquifer⁹¹⁰. Also, on-site storage of hazardous materials may pose a particular risk at Rufford, given Veolia's questionable safety record; 19 HSE enforcement notices have been listed against Veolia Environmental Services during the period 2005-10⁹¹¹.

⁹⁰³ CD111.11

⁹⁰⁴ CD1 Planning Application Support Statement p45-46

⁹⁰⁵ CD111.29

⁹⁰⁶ CD111.32

⁹⁰⁷ CD111.11

⁹⁰⁸ CD111.13

⁹⁰⁹ CD111.31, CD6.2 and CD1(ES) chapter 11 para 11.4.25

⁹¹⁰ CD111.22

⁹¹¹ CD111.12, CD111.18

1073. A windfarm has recently been constructed near the village. This has resulted in the loss of an open field. Even so, many residents are content to accept it, because it is seen as clean development. Dirty development, such as waste incineration or coal mining, was thought to be a thing of the past. Also, it would seem perverse to allow development that generates huge quantities of carbon dioxide at a time when the need to halt climate change is paramount.
1074. The incinerator would be on the edge of Sherwood Forest and upwind of much of it during the prevailing southerly and south-westerly winds. The Forest appears to be recovering from years of coal mining and it has been designated as a national nature reserve because of the habitat provided by its ancient oaks and heathland⁹¹².
1075. Nationally rare moths use the area; internationally important bird species nest here; toads breed close to the site and migrate across the access road; and, nearby ponds may be suitable for great crested newts. Rainworth Water runs through the colliery site and feeds into Rufford Lake, providing an area of marshland that is attractive to wildlife. Indeed, there are plans for a Sherwood Forest Regional Park. However, it is hard to see how emissions from the ERF would not harm the various conservation interests in the area or the nearby Vicar Water Country Park, an attractive piece of countryside created from a former colliery site.
1076. Crown Farm in Mansfield was Veolia's originally preferred site and, unlike some of the remaining alternative locations, such as the Portland Industrial estate, the Old Newark Road estate and the land at Mile Hill, there are no potential heat users close to the Rufford site who could benefit from CHP. The likelihood of BP users becoming available on the adjoining land appears small, now that the area is being suggested for SPA status on the basis of its use by woodlark and nightjar.
1077. It is impossible to know whether the ERF would represent good value for money because, despite NCC's willingness to publicise the financial details of the PFI contract, Veolia took legal action to secure the protection of commercial confidentiality.
1078. Possible ways of dealing with waste are identified in the (NCC) publications "What would you do with 4 millions tonnes of waste?" and "Nottinghamshire and Nottingham Waste Core Strategy"; these include anaerobic digestion and MBT followed by land-raise. Options such as these should be fully explored before any decision is made about the proposed incinerator⁹¹³.
1079. In any event, much more could and should be done to encourage recycling in Nottinghamshire. There is even inconsistency within the village itself; people who live in the Mansfield DC part of Rainworth have three bins, whereas those who live in the NSDC part have only two, because their garden waste is not collected. The provision of another incinerator will have long term implications, but it will not encourage further reductions in black bag waste. Nor would it be available for at least 4 years, by which time

⁹¹² CD111.10

⁹¹³ CD111.30

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- government initiatives to minimise waste production overall will have achieved significant reductions in the commercial sector.
1080. In financial terms, public ratepayers' money would go to support the ERF whatever the waste flow. But local house prices will fall if the incinerator is built. The only beneficiary would be Veolia.
1081. One local resident spoke in favour of the proposed scheme. As the occupant of Inkersall Manor, in the Forest, he is troubled by disturbance caused by motorcycles and 4X4 vehicles. He believes that the Rufford colliery site needs upgrading and that Veolia are the company to do it. If they move in, other companies and employment will follow⁹¹⁴.
1082. Objections submitted on behalf of a particular patient of the Sherwood House Hospital⁹¹⁵ were withdrawn when arrangements were made for him to be moved⁹¹⁶.
1083. As MP for the area, when the application was made, Paddy Tipping argued that the proposals should be called-in for determination by the SoS, because NCC is a partner with Veolia in delivering the PFI contract. He pointed to conflict with the NSLP; to the site's location in the SLA and Greenwood Community Forest Area; to the proximity of the sandstone aquifer; to shortcomings in selection of the chosen location and to the benefits of an urban fringe site. He also argued that the regeneration benefits of the proposals have been exaggerated and that the scheme should be considered as part of a more comprehensive approach to the wider British Coal site. He highlighted the lack of heat recovery; the modest carbon savings compared with other technologies; the shortage of feedstock waste and the consequential effect of discouraging increased recycling rates.
1084. In January 2008⁹¹⁷, the East Midlands Regional Assembly highlighted the regional (RSS and RWS) targets of working towards zero waste growth by 2016; reducing the amount of landfill; exceeding national targets for recycling and composting; and taking a flexible approach to other forms of waste recovery, bearing in mind the rapid developments in this area of technology. They supported the proposals, given the need to regenerate the northern sub-area of the region, but noted that EfW can discourage waste reduction and recycling, particularly if material other than (LATS rated) biological municipal waste is used as feedstock.
1085. The East Midlands Development Agency supported the proposals⁹¹⁸. They pointed to the RES aims of lessening impacts on climate change and promoting the use of renewable energy technologies.
1086. Mansfield District Council raised no objection to the proposals, subject to suitable conditions being attached to any planning permission⁹¹⁹.
1087. Nottingham City Council raised no objection⁹²⁰.

⁹¹⁴ CD111.33

⁹¹⁵ CD6.3

⁹¹⁶ CD91

⁹¹⁷ CD5b

⁹¹⁸ CD5c

⁹¹⁹ CD5e and f

⁹²⁰ CD5g

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1088. Rainworth Parish Council objected to the proposals on grounds⁹²¹ which are reflected in the views of residents outlined above.
1089. Farnsfield Parish Council and Blidworth Parish Council raised no objection, subject to measures designed to minimise the impact of HGV traffic⁹²².
1090. Clipstone Parish Council and Rufford Parish Council objected because of concerns over air pollution⁹²³.
1091. The Environment Agency raised no objections in principle⁹²⁴, subject to various conditions being attached to any planning permission. They did however note that the energy efficiency of the plant would be limited, because surplus heat would not be used. In April 2008, they observed that the issue of energy use had not featured strongly in the site selection process; this was then addressed in Veolia's Regulation 19 response. The EA also provided detailed comments on the revised carbon analysis, of various waste management technologies, that had been included in the Regulation 19 response. They were unable to say whether Veolia's figures were correct, but concluded that they were credible.
1092. The Health Protection Agency (HPA) made various recommendations to the effect that best practice should be followed during construction and operation of the ERF⁹²⁵. The HPA's published statement on the impacts of MSW incineration concludes that *"Incinerators emit pollutants into the environment but, provided they comply with modern regulatory requirements, such as the Waste Incineration Directive, they should contribute little to the concentrations of monitored pollutants in ambient air. Epidemiological studies, and risk estimates based on estimated exposures, indicate that the emissions from such incinerators have little effect on health."*
1093. OPUN, which is the Architecture and Built Environment Centre for the East Midlands, made some comments on how the scheme could be improved, but observed that the proposed ERF, as a building with simple massing, was particularly successful in a rural setting⁹²⁶.
1094. Severn Trent Water, e.on Central Networks, Rolls-Royce and Network Rail raised no objection in principle, subject to suitable conditions being attached to any planning permission⁹²⁷.

⁹²¹ CD5h

⁹²² CD5i and j

⁹²³ CD5k and l

⁹²⁴ CD5m

⁹²⁵ CD5n

⁹²⁶ CD5y

⁹²⁷ CD5bb, cc, dd and ff

INSPECTOR'S CONCLUSIONS

1095. In reaching my conclusions, I have taken into account the applicant's Environmental Statement and other environmental information that was produced in accordance with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. [45-46]

1096. I address nature conservation matters first because, in the event, these occupied a lot of inquiry time and led to substantial adjournments. [5-13]

Nature Conservation

1097. As matters of fact, and by way of background, the application site is within an area (Sherwood Forest) known to support more than 1% of the total UK breeding populations of (woodlark and nightjar) Annex 1 species for the purposes of the Birds Directive. The (2009) East Midlands Regional Plan records that the area is being considered for designation as a Special Protection Area (SPA). The application site itself is known to support breeding woodlark and foraging nightjar, but no part of it is a SSSI or designated, in any way, for its nature conservation interests. [23, 35, 57, 811]

Legal Matters

1098. Legal submissions by the applicant (Veolia) and by the (Nottinghamshire) Wildlife Trust, in relation to nature conservation matters, are set out in the cases for these parties. [311-323, 632-806] Common ground between these parties and Natural England, on the legal principles involved, is also set out in the main body of the report. [54-90]

1099. The Wildlife Trust raise three legal questions that have a bearing on the consideration of Veolia's proposals. The first is whether the UK government is in breach of the Birds Directive for having failed already to classify an area of Sherwood Forest as an SPA. The second is whether this area should now be considered as a pSPA. If the answer to that is no, the Trust question what the implications are of the second sentence in Article 4.4 of the Birds Directive which encourages member states to avoid pollution or deterioration of habitats that are not protected under the Habitats Directive regime.

1100. Whilst matters of law are for others to decide, I make the following observations.

1101. In relation to the first question, the Courts have accepted that good up-to-date ornithological data can be used to demonstrate that an area should have been classified as an SPA. Indeed, classification should be based on ornithological criteria alone. If the SoS were to decide that an area should have been classified already, then that area becomes subject to the requirements of the first sentence of Article 4.4 of the Birds Directive. This would afford the same level of protection to the area, as if it were an SPA, but there would be no opportunity for derogation on the grounds of imperative reasons of overriding public interest. In the current case, Veolia do not rely on such reasons and, on that basis, the distinction is arguably immaterial. [66, 68, 323, 656-661, 672-673, 676]

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1102. If the area should have been classified already, UK domestic practice and procedure cannot be used to justify failure to comply with a directive's requirements. [636]
1103. In relation to the second question, it is seemingly open to the SoS to declare a pSPA at any time. [73-75, 803]
1104. The initial consequences of such a declaration are not contentious here. As a matter of policy, the SoS approaches a pSPA as though it were an SPA.
1105. The third question is addressed by the parties' agreement that a "risk based approach" should be taken, which would follow the same procedure as that laid down in Regulation 61 of the Conservation of Habitats and Species Regulations 2010. This would guard against the risk of the waste planning authority having to review, and potentially revoke, planning permission for the ERF if an SPA were to be declared before the development is substantially complete. [314, 418]
1106. Whilst the Wildlife Trust seek clarity on whether the Sherwood area should be an SPA already, or whether it should be regarded as a pSPA, these are matters for the Secretary of State for the Environment, Food and Rural Affairs. It is outside my remit to make recommendations on such matters and unnecessary for the purposes of determining Veolia's planning application for an energy recovery facility (ERF). The need here is to act in accordance with the Birds Directive's requirement of seeking to avoid pollution or deterioration of habitats used by these Annex 1 species. To my mind, the "risk based approach" to consideration of the application would meet that need. [90, 719-720, 802-806]

Nightjar and Woodlark in Sherwood Forest

1107. The natural ecology of Sherwood Forest is a reflection of the underlying sandstone geology which has resulted in free draining soils that are low in nutrients. Historically, the area was made up of heathland, acid grassland and oak-birch woodland. Coal mining, agriculture and plantation forestry have all impacted on it, but concerted efforts are now underway to reverse those trends and return parts the Forest to their former condition. This is apparent in that part immediately to the east of Mansfield where, despite the number of different landowners involved, large tracts of land are due to be restored in amongst the patchwork of heathland areas that already exist. [486-492]
1108. The 5.4ha application site forms part of UK Coal's 68ha landholding, at the former Rufford colliery, all of which is due to be restored to heathland and woodland by no later than 24 October 2012. That restoration has already been successful in parts of the former colliery, but has yet to take place on the site itself or on land immediately to the north where a business park is now proposed. Nevertheless, it is reasonable to assume that, once restored and subject to limited disturbance by dogs being taken for walks, the site would provide a suitable nesting habitat for woodlark and nightjar. [27-31, 818]
1109. In 2004, Sherwood Forest supported 1.88% of the UK's breeding nightjar population. In 2006, it supported 2.51% of the UK's breeding woodlark. The Forest also appears to function as a single ecological site. It therefore satisfies the first stage of the SPA selection regime and there is evidence to suggest that it meets some of the Stage 2 selection criteria. The RSPB have identified

it as a possible Important Bird Area (IBA) and addition to the list of SPAs. [508, 509, 811, 817]

SPA Boundary Matters

1110. Whilst the boundary of any Sherwood Forest SPA is a matter for determination elsewhere, and might take the presence of other Annex 1 species into account, it has a potential bearing on consideration of the ERF proposals. This is because, whatever view the SoS takes on whether the Forest should be protected as a European site, parties to the inquiry are keen that a Regulation 61 approach should be taken to consideration of the ERF application. Indeed, as a result of evidence presented to the inquiry, Natural England have advised all local planning authorities in the area to adopt such an approach in their decision making, pending greater certainty on the likelihood of an SPA or pSPA being declared. [799, 806]
1111. Two possible SPA boundaries were suggested for the purposes of the inquiry. Neither represents a precise or definitive recommendation for the purposes of any future classification. [804]
1112. One is an indicative core area (ICA) based upon Natural England's understanding of the optimal breeding habitat for nightjar and woodlark territories that were recorded here in the 2004 and 2006 national surveys. The other is the IBA identified by the RSPB; this larger area is an amalgamation of areas of potential interest, for woodlark and nightjar, that were identified before the results of those national surveys became available. [805-806]
1113. In the event that an SPA/pSPA were to be declared here, it is unlikely that any part of the ICA would be excluded, but other areas may be added. The ICA does not include areas of the application site, or of the business park site to the north, where breeding woodlark are known to have been in 1998, 2000, 2009 and 2010; whereas the IBA does. On that basis, I believe that an area which combines the IBA with the ICA would provide the most appropriate boundary for the purposes of a Regulation 61 assessment of the implications, of the ERF proposals, for any SPA/pSPA that might be declared. [728, 808, 826]
1114. Nevertheless, in carrying out a shadow assessment to inform the SoS, I shall also consider implications of a boundary based on either the ICA or the IBA.

Shadow Regulation 61 Assessment

1115. Natural England gave evidence to the inquiry and were consulted over the information needed to support a Regulation 61 assessment. Where appropriate, I draw attention to their views.
1116. In the interests of simplicity, and for the purposes of this assessment, I shall refer to the area which might be declared as an SPA/pSPA as the protected Area.
1117. The ERF is not directly connected with, or necessary to, the management of the protected Area. [79]
1118. Therefore, it is necessary to consider whether the ERF scheme alone, or in combination with other plans or projects, is likely to have a significant effect

on the protected Area. Such an effect will occur if the conservation objectives, for that Area, are likely to be undermined. Provisional objectives, set by Natural England, are to maintain the breeding populations of nightjar and woodlark at or above baseline level and to maintain the area of habitat that is suitable for these breeding birds. [83, 809]

1119. A conclusion that a significant effect is likely can only be avoided if the risk of such an effect can be excluded on the basis of objective information. Nevertheless, in applying this significance test, it is reasonable to take account of mitigation measures which form part of the scheme. [81-84, 811]

Mitigation

1120. The principle of providing new habitat within a pSPA, to mitigate harm caused elsewhere within the pSPA, has been accepted in relation to proposals to widen the A11. However, in that case, the loss involved was of potential habitat for woodlark and nightjar and the new habitat was to be created from land that did not contribute to the pSPA's conservation objectives. That is not the situation here. [246, 526-531, 786, 822]
1121. Indeed, Natural England have made a general observation in relation to the practice of Regulation 61 assessments; namely, that it is difficult to replace lost habitat by creating "functional habitat" from "non-functional habitat", within a protected site. In doing so they point to the need for the functional habitat to be created in sufficient quantity, and of sufficient quality, and with the degree of certainty of success required to conclude that any likely adverse effect on the site will be avoided. [814]
1122. In this case the applicant and others, with an interest in the land concerned, have entered into a planning obligation to provide and maintain an area of habitat that is designed to be suitable for breeding woodlark and foraging nightjar. This undertaking seeks to offset both the loss of habitat within the IBA and the disturbance to birds within the ICA/IBA. The overall area of this Golf Course Plantation (GCP) offset land is some 21.24ha and the intention is that it would provide three woodlark territories on heathland and 2.4km of nightjar foraging along deciduous forestry edge. [94, 247]
1123. The offset land is already within the protected Area, as it lies within both the IBA and the ICA. There is no evidence of woodlark or nightjar being seen here since 1998. This would be consistent with the replanting that took place in 1995 and the birds' preference to breed on clear fell sites and in young plantations. However, the data are inadequate to demonstrate that the GCP does not currently provide functional habitat. Nor is it clear whether the birds could be expected to return as a result of rotational felling in the GCP, in any event, during the lifetime of the ERF; in particular, this might happen if the Forest Design Plan were to change as a result of an SPA/pSPA being declared. [51, 53, 247, 535, 822]
1124. The undertaking makes provision to control public access into the offset land, so as to minimise the risk of disturbance to the birds. Past experience in the area suggests that the effectiveness of barriers to entry will be dependent, in part, on the arrangements for maintaining them. However, details of these arrangements are to be agreed, and subject to review, by the waste planning authority and Natural England. Also, there is provision within the Countryside

and Rights of Way Act to restrict access to heathland, if necessary, for the sake of nature conservation interests. [94, 250, 532]

1125. There is, in addition, an obligation to contribute towards the financing of the police's Operation Nebraska, or other similar initiative between them and local stakeholders. In the past, this Operation has proved successful in reducing illegal activities by off road vehicles in and around the application site and the GCP, although I recognise that the contribution would only be of value if relevant bodies are prepared to continue with the work. [250, 532, 819]
1126. Natural England regard the GCP proposals as ecologically sound and capable of restoring this area to heathland. Nevertheless, in the absence of soil and seedbank tests, there is some uncertainty over the success of the habitat creation. Also, it is not clear whether the area would provide as much as three woodlark territories, given the evidence which suggests that these birds may prefer small clearings to large open areas. [251, 532, 534, 818]

The effect of the ERF alone and in combination with other plans or projects

1127. The application site, which is known to support breeding woodlark and foraging nightjar, is within the IBA. On that basis, the ERF would result in loss of habitat and thereby have a significant effect on the protected Area. This would be the case irrespective of whether the protected Area were to encompass both the IBA and ICA, or just the IBA is isolation. Furthermore, I share Natural England's view that, whilst the GCP proposals would mitigate the effects of the ERF to some extent, it cannot be ruled out that there would be an overall permanent reduction in the area of suitable habitat within the IBA. [532, 534, 821]
1128. However, the application site is outside the ICA and so the ERF would not occupy habitat within the protected Area, if such an Area were to be confined to the ICA. On that basis, and subject to mitigation measures set out in the planning obligation, Natural England believe that the ERF alone would be unlikely to have a significant effect on the qualifying interest features (woodlark and nightjar) of the ICA. It would nevertheless result in the loss of habitat that is known to be used by breeding woodlark, and foraging nightjar, and which is due to be restored to heathland where it is reasonable to assume that both species would nest. Indeed, as was noted at the inquiry, the position of the protected Area's boundary makes no difference to the birds. [245, 247, 538, 819, 821]
1129. Operation of the ERF would generate noise. However research into the effects of noise, on woodlark and nightjar, is inconclusive. Bird calls may be masked, when bird song would not. Also, there is no direct evidence to show whether birds would be discouraged from nesting by noise levels at, above or below the suggested (ERF) boundary limit of 55dBA. Modelling indicates that this level would decay to less than 40dBA, at sites used for nesting in the past, and it does appear that nightjar have returned to nest at a site where noise from traffic is predicted to be in the range 60-65dBA. Even so, a boundary limit of 55dB LA(eq) 1 hour, which is the control that Veolia are willing to accept, would allow for louder intermittent noises from the site. [232, 234, 542-544]
1130. In general, birds may begin to demonstrate adverse effects when affected by noise in the range 40-50dBA although, as Natural England observe, it would also be reasonable to assume that they might habituate to fairly predictable

constant noise at these levels. Woodlark do not nest in the same place every year, but modelling suggests that a noise level of 78dB at the boundary of the site would result in levels no higher than 54dB at any of the nest sites recorded to date. [219, 233, 542]

1131. Woodlark and nightjar are not unduly sensitive to sudden loud noises. Nevertheless, common sense suggests that there is a level beyond which an adverse effect would be likely. To my mind, there is a real risk of such a level being breached by a boundary limit of 78dB which is set as an LA(eq) across the working day during construction of the facility. Ideally, the boundary limit should be set as an LA max/LA 10 or even an LA (eq) 5mins; but the contractors have indicated that this could be unachievable. The applicant is prepared to accept a limit of 78dB LA(eq) 1hour, but notes that this might extend the construction period beyond the anticipated three years. However, even this would allow for much louder impulsive events. [233, 542]
1132. In the circumstances, and bearing in mind all of the above, it would hard to conclude that the construction and operation of the ERF alone would run no risk of undermining the objective of maintaining both the habitats and populations of these birds within the protected Area. Indeed, if the Area were to be designated as an SPA, disturbance caused by the ERF would run contrary to the Policy 38 requirements of the East Midlands Regional Plan. Nevertheless, it is also necessary to consider the effect of the ERF in combination with other plans or projects in the area. [475]
1133. Whilst there are many plans and projects in and around Sherwood Forest, some schemes are particularly close to the application site for the ERF. These include proposals for a business park on about 26 hectares of former colliery land that is immediately to the north of the ERF site and proposals for an extension to the sand quarry that lies just beyond the northern edge of the business park site. Both of these schemes are on IBA land that is already known to provide breeding habitat for woodlark, as well as foraging for nightjar, and is due for restoration to woodland and heathland. [27, 31, 598-599]
1134. There are also various proposals for additional housing and holiday accommodation that would increase recreational pressure on, and therefore the risk of disturbance to, areas of the Forest that are used by these birds. [626, 839-840]
1135. I am led to conclude that the effect on the protected Area, of the mitigated ERF scheme in combination with other plans and projects, is likely to be significant in the terms set out in paragraphs 1118-1119 above. This is irrespective of whether the boundary for that Area is defined by the ICA, the IBA, or a combination of the two. On that basis, I share Natural England's view that an appropriate assessment needs to be made of the implications for the Area, in the light of the provisional conservation objectives that have been set. [844]

Appropriate Assessment

1136. This assessment must take account of the ERF alone and of the cumulative effects which might result from the combination of this scheme with other plans and projects. The applicant agreed to provide information that would be adequate for this purpose. [12, 745]

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1137. The in-combination assessment (I-CA) report, produced by Veolia in consultation with Natural England and the Wildlife Trust, sets out to identify those plans and projects which, when considered together with the ERF, are likely to have a significant effect on the populations or habitats of woodlark and nightjar. The area of search extended to 5km outside the combined boundary of the IBA and ICA, but there is considerable disagreement over the methods used to screen the many hundreds of plans and projects which the report identifies. As Natural England point out, several important schemes are not given the detailed attention that they deserve and the boundary of effects considered by the report is mostly limited to the ICA. [224-225, 556, 560-571, 582-592, 835, 838-839, 843]
1138. Outside the ICA yet within the IBA, as I have already indicated, the ERF, business park and quarry extension would all result in loss of habitat that is known to be used by breeding woodlark and foraging nightjar. The GCP arrangements, secured by a planning obligation, would mitigate for the ERF scheme, but the application site would be lost as an area available for use by the birds. Offset land might also be provided to mitigate the effects of the proposed business park, and of the quarry extension, but details of such arrangements and the likely residual effects are unclear. [837]
1139. The very presence of the ERF could also affect the behaviour of birds nearby; not least because predator species might occupy the building. However, the likely impact of this is unknown. [546]
1140. I have already explained the potential for noise from the ERF to have adverse effects on the birds, particularly during the construction phase which might last for more than 3 years. Natural England believe that the GCP habitat, once established, would compensate for disturbance caused by construction of the ERF. However, the effects of operational and construction noise from the ERF site would be compounded by residual effects from the proposed business park. This is because the area affected by increased noise would be larger and the construction period for the combined schemes, when loud impulsive noises might be heard, could be longer than for the ERF alone. [616-617, 827]
1141. Whilst I accept that workers at the ERF would be unlikely to spend much, if any, time walking in the Forest nearby, the position is less clear in relation to people on the business park. There is no doubt that the recreational activity of people can adversely affect the distribution, productivity and populations of woodlark and nightjar, particularly as a result of disturbance. [238, 620, 623]
1142. Sherwood Pines Forest Park is a large area of managed woodland, situated mostly to the north of the conjoined site for the proposed ERF and business park. It is increasingly popular for mountain bike rides and other outdoor activities. A southerly shift, which has been observed in the nightjar population of the Park, may be the result of rotational felling which has attracted the birds to areas of new habitat. It may also have been encouraged by the focus of recreational activity being towards the north of the Park. To my mind, it is likely to have been a combination of both factors. [239, 621]
1143. Natural England are not persuaded that the birds have been given suitable protection by the way that visitor activity in the Park has been managed to date. Holiday and visitor facilities in the area are now set to expand and, as a

result, it is reasonable to expect that the birds will continue to be pushed south towards the sphere of influence of the ERF and business park. [621, 840]

1144. Woodlark and nightjar will suffer further disturbance as a result of walkers visiting the wider Forest from new housing and holiday accommodation in the area; dog walkers are a particular concern in this respect. However, the applicant's I-CA report limits its detailed consideration of these effects to schemes that are within 5km of the ERF and GCP offset land. This distance is based on the flawed assumption that people would always walk to the Forest, rather than drive. The approach also ignores the combined residual effects of development that is outside the 5km limit, but which would put additional pressure on birds across the protected Area as a whole. [603-604, 841]
1145. Noise, in the protected Area, can be expected to increase as a result of traffic generated by new development. In those parts of the Area that are adjacent to major roads, the effect would be insignificant given existing background levels. However, the combined effect of ERF and business park traffic would lead to a substantial increase in noise levels alongside the Rufford Colliery Access Road. This would create a risk of disturbance along a strip of land that avoids known nesting sites, but penetrates the IBA and therefore reduces the area where the birds might otherwise opt to nest in future. [610, 628]
1146. Operation of the ERF and business park would introduce lit buildings, and vehicle headlights, into an area that would otherwise be dark at night. This might affect the behaviour of nightjar in particular. Conditions to limit the amount of night-time HGV traffic, and to avoid direct illumination of the buildings, would help to minimise the effects. Nevertheless, the likely residual impact on birds is uncertain. [545, 611]
1147. Nitrogen and acid deposition, as a result of the ERF development, could enrich and damage the heathland habitat which supports the nightjar and woodlark. However the level of exposure below which significant harmful effects do not occur, according to present knowledge, is already exceeded in the nearby area. Further deposition would only make this worse, but the increase as a result of emissions from the ERF would be less than 1% of existing deposition rates. On that basis, it would be judged insignificant in terms set out by Environment Agency guidance which was agreed with Natural England. That guidance is both relevant to a Regulation 61 assessment and more recent than workshops which challenged the principle of allowing any further deterioration in conditions at protected sites which already fail to meet relevant standards. [235-236, 479-482]
1148. In deciding to issue an environmental permit for the ERF, the Environment Agency have already carried out an appropriate assessment of the impact of emissions on nature conservation sites. Whilst it did not address Sherwood Forest as an SPA, that assessment did consider the impact on protected heathland in the area and concluded that the emissions would be unlikely to have a significant effect on its condition. That view is shared by Natural England and is one that I see no reason to depart from, given the provisions of Regulation 65 of the Conservation of Habitats and Species Regulations, which suggest that the Agency's assessment, in relation to stack emissions, should suffice. [236]

1149. However, there is evidence to suggest that, when traffic emissions are also taken into account, the combined effects of the ERF and business park might result in significant harm to Rainworth Heath SSSI as a result of increased nitrogen deposition. The applicant's I-CA report does not address this directly. In general terms, air quality across the country is improving, but there is nothing to show that nitrogen emissions from the ERF could be reduced if monitoring of the SSSI were to reveal damage to the heathland habitat and to the sensitive vegetation that it supports. [235-237, 612-614, 629]

Conclusions

1150. This shadow assessment does not take account of all projects and plans that, in combination with the ERF, might affect the protected Area. Nevertheless, from the information above, I draw the following conclusions about the combined effects of development that is planned or underway.

1151. The ERF, business park and quarry extension schemes together would result in the loss of a large and closely linked area of land that is used by breeding woodlark and nightjar. This would run contrary to the aims of the East Midlands Regional Plan (EMRP) and to the requirements of its Policy 29. Habitat would be lost at a time when, otherwise, it would become more attractive to the birds as a result of its restoration to heathland and in response to disturbance caused by increased recreational activity to the north of the area. The residual effects of these three developments might also deter the birds from using land surrounding the sites and the access road. [475]

1152. The loss of habitat could have an adverse effect on the population of woodlark and nightjar. Certainly, it seems likely that the buildings and activity associated with the ERF and business park would discourage the birds from using a wide strip of land at the centre of an area where, consistent with EMRP Policy 29, arrangements are already in place to consolidate the existing patchwork of heathland. Indeed if this land is not developed, and subject to suitable management of these areas, there will soon be a continuous strip of heathland running north from Rainworth Heath SSSI and close alongside the restored tip to the west, thereby adding significant coherence to the ecological structure and function of this part of Sherwood Forest. This would be the case irrespective of where the boundary of any protected Area is drawn. [477, 487, 489]

1153. It is not clear whether offset land would provide habitat of equivalent value to the birds, either in terms of quality, or the number of territories that it would provide. Nor is it known where the offset land would be, other than that which is secured by the applicant's planning obligation. However, it is difficult to imagine any arrangement that would provide the coherence that can be expected to flow from the planned restoration of these parts of the former colliery land.

1154. That restoration would be outside the ICA. Nevertheless, as Natural England acknowledge, protection of an SPA involves avoiding actions which would threaten death or disturbance to the woodlark and nightjar that justify the SPA designation. In the circumstances, I cannot be certain that the applicant's proposals would not harm the integrity of the protected Area, even if that Area were to be confined to the ICA. [86, 89, 701, 708-710]

1155. On that basis, and if Sherwood Forest were to be identified as a pSPA/SPA, permission for the ERF should not be granted unless no alternative solutions are available and imperative reasons of overriding public interest indicate that the scheme should go ahead. However, it is not suggested that such reasons apply here. [78, 323]

Other Nature Conservation Matters

1156. The Spring Hill SINC has been restored, but poorly managed thereafter. As part of the ERF proposals, arrangements have been made for the habitat of the SINC to be improved and for bee orchids and common lizards to be translocated there from the application site. Previous attempts to translocate the lizards were not entirely successful, but I see no reason to believe that the measures, which the applicant has now undertaken to carry out, would fail. These measures are the subject of a planning obligation. The obligation also makes provision for monitoring the ecological condition of the Rainworth Heath SSSI, over a period of 21 years. [16, 236]

Landscape and Visual Impact

1157. The application site is in the open countryside, about a kilometre to the north of Rainworth, a town with strong links to the coal mining industry. [22, 1053]

1158. In reflection of its past use, as part of the former Rufford colliery, the site retains visible signs of mining activities including access roads, a surfaced car park and areas of compacted colliery waste. In distant views, this is softened by intervening patches of established heath and woodland and by the invading scrub vegetation and trees which now occupy parts of the area where the ERF would be located. A lighting gantry, almost 50m high, provides a landmark some 200m to the north of the site. [19]

1159. Restoration of former colliery land has yet to take place either on the application site, or on land to the north where the business park is now proposed. Nevertheless, much of the surrounding area has been restored and, when seen from Rainworth and viewpoints further to the south, the site is seen as part of the wooded green landscape. [487]

1160. The central part of the aluminium clad ERF building would have two 75m high chimneys and a curved profile roof which would rise to a height of 39.5m. Surrounding this would be a lower skirt roof. The overall footprint would be up to 133m long and 98m wide. Alongside this, and linked to it, would be a three-storey flat roofed administration block. Whilst the upper roof and chimneys of the large non-reflective ERF building would be widely visible, distant views of the skirted area, from anywhere other than the south, would be mostly restricted by the local topography and the plume would not normally be seen to extend beyond the site boundary. [43, 44, 186, 190, 192]

1161. The original Environmental Statement takes conditions in 2007 as the baseline against which to compare the impact of the proposed development. The (2008) response to a Regulation 19 request for further information takes the restored colliery site as its baseline; this latter scenario assumes that heathland would be established on the site and that the woodland, here, would be semi-mature. [188, 465]

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1162. Assessments carried out as part of the EIA process have concluded that the development would have a slight adverse effect on the existing landscape character, and a moderate to substantial adverse effect when restoration is taken into account. Visual effects from areas of Rainworth and the Rainworth by-pass would be slight to moderate adverse, irrespective of restoration. [186, 188]
1163. Whilst there is sporadic development within 550-800m of the site, this is sparse. There is nothing to show that the business park will be permitted and built. Permission has been granted to extend the Sherwood House Hospital but the impact of this, in views from the south, is likely to be minimal. [22, 189]
1164. OPUN, the Architecture and Built Environment Centre for the East Midlands, are generally supportive of the design for the ERF scheme. Also, landscaping of the developed site, to create a small scale heathland mosaic, is likely to be sympathetic to the site's surroundings. Nevertheless, the ERF building would appear as an isolated, but prominent alien feature in the wider rural landscape, particularly when seen from Rainworth and from the southern approaches to the town. To my mind, it would clearly intrude into the openness of the countryside. [194-195, 198, 202]
1165. Unlike the turbines, at the recently constructed Lindhurst wind farm, the ERF would be sited within the Sherwood Forest Special Landscape Area (SLA), an area which has become increasingly popular as a tourist destination and recreational resource. The special qualities of this part of the landscape were recognised when the Rufford Colliery was still operational and, since then, much of it has been improved by restoration works. Indeed, restoration of the remaining Colliery land would be consistent with the aim of the Newark and Sherwood Local Plan (NSLP) to conserve and enhance the SLA's special landscape and ecological value; whereas, the ERF development would not. [19, 193, 198, 400, 440, 487]
1166. The SLA landscape is highly valued locally and protected under the terms of NSLP Policy NE9; this is a policy which allows for those types of development that are permissible under the terms of Policy NE1, but not in the most sensitive locations. The emerging core strategy suggests that the SLA designation may be replaced by a system of protection, based on landscape character assessments. This new approach has yet to be adopted and, as such, it carries limited weight at present. Nevertheless, one of its aims is to create and conserve heathland habitats in and around the application site. The applicant's GCP proposals would be consistent with this, but so too would restoration of the application site. Indeed, this emerging approach seeks sensitivity in the siting of new industrial buildings and aims to conserve the remote rural character of the landscape; the ERF scheme would achieve neither of these. [39, 198-199, 439, 441, 1055]

Development Plan

1167. In the light of the above, and bearing in mind that the Rufford site is not allocated for development, various conclusions can be drawn in relation to the development plan's requirements. [34]
1168. In terms of the Newark and Sherwood Local Plan (NSLP), I find no obvious conflict with the Greenwood Community Forest Policy NE23, given the lack of

objection to the planting arrangements that would form part of the scheme. However, the applicant's proposals are subject to Policy NE1, which seeks to protect the countryside for its own sake and lists those types of development which might be acceptable here and in the SLA. The ERF is not one of the exceptional types of development that is listed; nor would it conserve or enhance the landscape. Therefore, the proposals fail to satisfy both NE1 and NE9. [200-201, 392, 433, 439, 856, 1051, 1083]

1169. NSLP Policy E17 nevertheless allows for employment development to take place at the pit head of former collieries, if this would not intrude into the openness of the countryside. This is in recognition of the job losses suffered by mining communities and the scars left by derelict land on the landscape which serve as reminders of the loss. Arguably, given the circumstances at other collieries in the area, this (1999) Policy was only applicable to Rufford when it was saved in 2007. Its purpose is to provide jobs and restore the land. However, the land at Rufford is already subject to restoration conditions and, whilst the ERF development would provide 36 jobs, the building would represent a massive intrusion into what would otherwise be open countryside. Policy E17 does not provide obvious support for such a scheme. [34, 168-169, 171, 174, 399, 434-438]
1170. The (2002) Nottinghamshire and Nottingham Waste Local Plan pre-dates publication of the government's (PPS10) policy statement regarding planning for sustainable waste management and, to some extent, is superseded by it. In other respects, the Plan's policies have little bearing on consideration of these particular proposals for an ERF, given the overlap of Policy W3.23 with the requirements of the (2010) Conservation of Habitats and Species Regulations. [33, 164, 388-390, 415]
1171. Structure plan policies no longer form a part of the development plan. The most recent expression of development plan policy is now provided by the (2009) East Midlands Regional Plan (EMRP). This provides a strategy for development up to 2026, which is about half way through the ERF contract period. Whilst the government's intention to revoke the EMRP is a material consideration, legislation to achieve this is at an early stage of development in the parliamentary process; therefore the weight attached to that intention is likely to be limited accordingly. [112, 153, 383]
1172. The EMRP regards regeneration of the Northern sub-area, where the application site lies, as a priority. Under the terms of Policy 7, this is to be achieved by a combination of new development and environmental enhancement. [158, 428]
1173. In particular, the EMRP recognises the importance of a new economic base to replace that lost through the decline in the coal industry. The Plan directs most growth, in the north of the region, towards the built up areas. It also allows for employment development along the Mansfield Ashfield Regeneration Route (MARR), within the Sherwood Growth Zone Partnership area. [157, 387]
1174. Rufford colliery is the only site, within the Northern sub-area, that is identified by the (2008) employment land review and is within a priority area for regeneration. This carries only limited weight, however, as its suitability for employment has yet to be tested at examination. [39, 159]

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1175. The site has good access from the MARR, but is physically separated from its former “pit village”. Policy Northern SRS3 therefore suggests that a green use, to enhance the landscape and biodiversity, may be more suitable. This would be consistent with the (Policy Northern SRS5) creation of a Sherwood Forest Regional Park which is expected to generate significant economic and social benefits by protecting and enhancing the area’s natural assets and developing its recreational potential. [144, 159, 431]
1176. As I have already indicated, a particular disadvantage of the ERF scheme is that it would involve the loss of habitat, used by woodlark and nightjar, at a time when the site would otherwise become more attractive to these birds as a result of its restoration. It would also detract from concerted efforts being made to consolidate the patchwork of lowland heath found in this part of Sherwood Forest. This would be at odds with the recognised need for a step change improvement to biodiversity, across the region, and would run contrary to EMRP Policies 1 and 29. [475, 487-490]
1177. Indeed, the countryside location and environmental impact of the ERF would limit the support that EMRP Policy 40 provides, in general terms, for low carbon CHP schemes on former colliery sites. Also, as I explain above, the scheme would conflict with EMRP Policy 38 if an SPA were to be designated here, because of the disturbance that would be caused to the birds. [163]
1178. Policy 38 sets priorities for waste management and it makes specific allowance for large facilities, in the north of the region, to be sited on “previously used land”, including former collieries. It is not clear what is meant by the phrase “previously used land”, but the East Midlands Regional Assembly appear to suggest that Rufford colliery would be unsuitable for employment development, because of the restoration requirements imposed by the 1996 permission. Indeed, it seems that Rufford is unlike other collieries in the area because of the requirement that it be restored to heath and woodland, rather than to something that is suitable for industrial or commercial use. Certainly, it is not “previously developed land” as defined in the government’s (PPS3) planning policy statement on housing. [27, 384, 493, 858-866]
1179. Preparation of the EMRP was informed by the (2006) East Midlands Regional Waste Strategy. This identifies the waste treatment capacity that each sub-region will require, on the basis that recycling and composting will account for 30% of the municipal and solid waste in 2010, and 50% from 2015 until 2020. Evidence suggests that, under the terms of the (2006) Nottinghamshire Private Finance Initiative (PFI) contracts, the county will achieve those levels of recycling and composting, except in the years 2015-2017. To that extent the contracts, which include provision for the Rufford ERF as part of an integrated waste management service, are consistent with Policy 38. [35, 98, 161-162, 384]
1180. Under the terms of Policy 38, waste development frameworks are to provide for waste management capacity that is equal to the amount requiring management. Here, that framework has yet to be produced. However, the capacity for energy from waste incineration, in Nottingham and Nottinghamshire, would be some 430,000 tpa if the recently permitted extension to the (Nottingham) Eastcroft combined heat and power (CHP) facility were to be built, as well as the Rufford ERF. This is far in excess of the 214,000 tpa that the EMRP expects to be in place by 2020, even before

account is taken of the observed reduction in waste arisings. In these limited terms, the proposals are clearly inconsistent with Policy 38. [37, 38, 933, 964-968]

1181. That analysis takes no account of actual waste arisings, of landfill capacity or of the fact that the Regional Waste Strategy does not anticipate any diversion of commercial and industrial waste from landfill to incineration or to any other treatment designed to recover energy. I address the broader issues of need, and of consistency with government (PPS10) policy, in my consideration of other matters about which the SoS particularly wishes to be informed. Before that, and on the basis that there is a need for a facility such as this, I turn to a particular matter identified by the SoS, which is whether the appraisal of alternative sites is robust.

Alternative Sites

1182. In the (2005) lead up to signing the PFI contract, a site at Crown Farm Way, in Mansfield, had been chosen for an ERF to serve the county as a supplement to Eastcroft. However, this soon became unavailable and, in February 2006, the Rufford site was identified as the best alternative in Veolia's updated revised best and final offer. [99, 892]
1183. The Environmental Statement, submitted in support of the Rufford scheme, indicates that 118 potential sites were originally considered. A desk top study reduced this to 36 by selecting only those sites that were, amongst other things, either allocated for development or previously developed land. Such an approach would be consistent with PPS10 and, on that basis, Rufford should have been screened out at this first stage, but it was not. [141, 408, 886-888]
1184. In the event, Rufford was carried through to the final four which were subject to more detailed assessment. The appraisal was then (March 2010) updated to take account of new information; the result of which was to reduce the shortlisted sites to three and to revise their scoring.
1185. However the Rufford score remained "neutral", in relation to nature conservation interests, despite the introduction of evidence to show the site's use by Annex 1 bird species. Indeed, by the time of the update, Natural England had advised the inquiry that a risk based approach should be taken towards development of this site, pending any announcement by the SoS on the future classification of Sherwood Forest as an SPA. [809]
1186. The potential for access by rail or water was also used in this final stage of the assessment. In this respect, the shortlisted site at the (Kirkby-In-Ashfield) Portland industrial estate would appear to be preferable to the Rufford site, as it is next to a working railway and, until recently, had a siding link to it; whereas, the Rufford site is remote from the main railway network now that the former colliery line has been ripped up. However, both sites were given the same "good" score, which was then reduced to "neutral" because Veolia claims to have no intention of transporting waste, to the ERF, by rail. If that is the position, this aspect of the assessment is meaningless. [148,890]
1187. Similarly, the two shortlisted sites, other than Rufford, were precluded from a score of "good" in relation to energy utilisation. Although both are next to planned or existing development, which might make use of waste heat from

the ERF, no approach was made to establish the interest of potential users. [890]

1188. Whilst I am not necessarily suggesting that the Portland site is suitable for an ERF, the photomontages which set out to show that it is unsuitable, given the close proximity of housing, are not persuasive. The architect who designed the building, illustrated on these visual representations, confirmed to me that the design shown is inappropriate for the Portland site. The process of design can take years. Indeed, the architect was commissioned to design the Rufford scheme before Rufford had been selected as the preferred site. [136, 147, 445, 461 900]
1189. These considerations lead me to conclude that the appraisal of alternative sites, which has been undertaken, is not robust.

PPS10: Planning for Sustainable Waste Management

1190. I turn now to the matter of the extent to which the proposed development is consistent with government policies in PPS10, including the need for the proposal given that preparation of new waste development plan documents is at an early stage.
1191. PPS10 gives broad support to the provision of waste management facilities on unallocated sites, such as Rufford, so long as the proposals are consistent with policies in the PPS and in the waste core strategy. Where such consistency exists, it is not necessary to demonstrate need for the facility. Nevertheless, applications for waste disposal installations should be supported by evidence that the scheme would not prejudice movement up the waste hierarchy.
1192. Here, the waste core strategy is at an early stage of preparation and, with this in mind, the SoS has asked to be informed about the need for the proposed ERF. Notwithstanding this, the waste planning authority and the applicant both argue that there is no need to demonstrate “need” for the facility. In doing so, they claim support from the (DCLG) SoS’s decision to permit the Eastcroft extension and from the (DECC) SoS’s consent to construct a refuse derived fuel generating station at Ince. However, the circumstances surrounding those proposals were quite different to those which exist here, as I explain below.[38, 124, 340-343]
1193. Unlike the Rufford scheme, the Eastcroft proposals were to extend an existing facility without conflicting with the development plan’s requirements. Indeed, expansion of the incinerator had been supported by the waste local plan and found to be consistent with national policy. Similarly, the development plan supported the provision of a merchant facility to handle pre-sorted commercial and industrial waste on a regional scale at Ince Marshes. Whereas here I have found little, if any, support from the development plan for siting an ERF on the former Rufford colliery. [343, 855, 1034]
1194. Veolia’s proposals also fall to be considered against the guidance on site selection that is provided in paragraph 21 of PPS10. This highlights the priority that is to be given to using previously developed land and it reflects the sustainability benefits of moving waste by means other than road transport; neither of which lend support to the Rufford scheme.

1195. The guidance requires the (PPS10 Annex E) physical and environmental constraints on development to be addressed. These would include the impact on an SPA, if one were to be designated here. There are also concerns over subsidence and the vulnerability of the sandstone aquifer in the vicinity of the proposed scheme. However, the Environment Agency raise no objection to the proposals, subject to suitable conditions being attached, and the findings of geotechnical investigations appear to be consistent with the Coal Board's view that subsidence, on the site, is unlikely. [303, 305, 1072]
1196. In terms of visual intrusion, the ERF is well designed, but it would be highly intrusive in a landscape which already shows little sign of its industrial past, in anything other than close views, and which is due to be fully restored to heath and woodland. Nevertheless, the landscape is not of national importance and, as the emerging National Policy Statement for Energy (EN-1) suggests in relation to major infrastructure projects, the question is whether the adverse impact on that landscape would be outweighed by the benefits of the scheme. However, unlike the major energy from waste plants that are the subject of EN-1, and which would generate more than 50MW of electricity, the Rufford EFW would only export about 13MW to the national grid. [41, 207]
1197. In sustainability terms, it is clearly preferable to generate energy from waste, rather than simply dispose of it to landfill. This is consistent with the waste hierarchy described in PPS10 and in the (2007) Waste Strategy for England. It is also reflected in the decisions to allow the Eastcroft expansion and the construction of a new merchant facility at Ince Marshes. [118]
1198. Nevertheless, waste incineration is listed as a disposal operation in Annex I of the (2008) Waste Framework Directive. This is below energy recovery in the Directive's (Article 4) hierarchy. [1008]
1199. Transposing Regulations were not in force at the time of the Rufford inquiry, but this (2008) Directive sets out to clarify key concepts such as the definitions of recovery and disposal. Indeed, Annex II sets out a non-exhaustive list of recovery operations which include incineration facilities dedicated to the processing of municipal solid waste (MSW), where the energy efficiency is calculated to be at least 0.65. From the available evidence, it is not certain that this level of efficiency would be achieved at Rufford and, for reasons outlined below, it seems highly unlikely that this facility would process only MSW. On that basis, I cannot be confident that operations here would qualify as recovery, but guidance on this aspect of the new legislation has yet to be confirmed. [117-118, 1008-1111]
1200. In any event, as PPS10 points out, development control decisions should be consistent with driving waste up the hierarchy and waste disposal should be seen as a last resort, albeit one that must be catered for adequately.
1201. Whilst some details of the Nottinghamshire PFI contract remain opaque, I understand that it seeks to ensure that only residual waste is sent for incineration, by defining this as waste "which is not recycled or composted or reused". In itself, this does nothing to encourage movement of waste up the hierarchy, beyond energy recovery; it simply discourages movement down. [112, 847, 983]
1202. Consistent with the terms of the PFI contract, the (2007) Rufford ERF proposals were submitted on the basis that they would provide a facility

capable of incinerating 180,000 tpa of residual MSW which cannot be recycled or composted economically. The application pre-dated the (2009) decision to allow 100,000 tpa extra capacity at Nottingham's Eastcroft incinerator. It was also based on the assumption that the county's MSW arisings in 2009/10 would be 90,000 tpa higher than they apparently were, and that they would continue to rise until at least 2018, whereas they have shown a marked decline since 2004/5. [48, 957, 958, 961, 964, 965, 968]

1203. The fall in MSW may be due, at least in part, to the effects of the recession. To some extent, it may also reflect the success of policies designed to reduce waste arisings. Whatever the cause, annual monitoring suggests that the amount of MSW requiring management across Nottinghamshire is likely to be considerably less than had been suggested when the ERF application was made. [37, 266, 957]
1204. Arguably, it is more appropriate to consider waste arisings across the city and county combined, as the two waste planning authorities work together to prepare a waste development framework for the area and the EMRP projections reflect this. The (2003) data, appended to the Regional Plan, provide a basis for deciding the waste management capacity that is needed. Nevertheless, in accordance with EMRP Policy 38 and with the continuous planning process advocated by PPS10 (paragraphs 10 and 14), these projections are subject to review in the light of significant change that is demonstrated by annual monitoring. [36]
1205. Actual MSW arisings, across the city and county in 2009/10, appear to be more than 140,000 tpa below the (EMRP) expected figure of 710,000 tpa. To my mind this is a significant change and one that is unlikely to have been caused by recessionary effects alone, bearing in mind that household waste per head peaked in 2002/3 and has dropped every year since 2004/5. An upturn in the economy might be expected to slow the observed trend, but not necessarily reverse it. [964, 968]
1206. Indeed, whilst the EMRP projections take planned new housing numbers into account, I see no reason to believe that they will have underestimated the amount of waste produced per household. If anything, given the changes observed since 2003 when the source data were produced, they are more likely to have overestimated it. [384, 964]
1207. Various scenarios have been considered in relation to the management of future MSW arisings. These suggest that there would be inadequate MSW available to fuel the Rufford ERF, even if waste were now to grow at the rate predicted by the EMRP which, as I have already indicated, appears unlikely. If arisings were to stabilise at their current level and the Eastcroft ERF were to take 30,000 tpa more of the county's MSW from 2020, there would be about 120,000 tpa available to feed the Rufford facility even if only 4% of total (MSW) arisings were to be landfilled. [355, 963]
1208. As things stand, the two line Eastcroft incinerator can burn up to about 150,000 tpa of MSW. Under the terms of the PFI contract, Veolia is able to use 60,000 tpa of this for the county's waste, although this might be renegotiable. When that contract was being prepared, it was anticipated that half of the additional 100,000 tpa additional capacity would be made available for the county's MSW. However, it seems that this third line has now been

“earmarked” for commercial and industrial (C&I) waste, although this is not reflected in the terms of the planning permission. Nor is there any restriction on the area from which waste can be sourced. [112, 355, 933-935, 941]

1209. Facilities at Rufford and Eastcroft would provide a potential 330,000 tpa capacity for incinerating MSW. This is considerably more than half of the total (MSW) arisings for the county and city combined which, in 2009/10, amounted to some 566,357 tpa. Indeed, if those arisings were to increase to 600,000 tpa, Eastcroft alone would provide the 25% which Waste Strategy for England 2007 expects energy from waste to account for by 2020. [115]
1210. These considerations lead me to conclude that the need for the Rufford ERF cannot sensibly be justified on the basis of MSW arisings alone. Indeed, given the considerable uncertainty over future arisings, it would be unreasonable to constrain the feedstock mix as a condition of planning permission. C&I waste would almost certainly form part of the supply and neither the contract, nor the environmental permit, place any restriction on either the amount of it, relative to MSW, or its source. To that extent, there are similarities between Veolia’s proposals and the recently permitted merchant facilities at Ince Marshes and in the Eastcroft expansion. However, as I have already indicated, those schemes were supported by the development plan’s requirements, whereas the Rufford proposals are not. [112, 261, 270]
1211. Whilst the Rufford environmental permit allows for the incineration of C&I waste that is similar in content to household waste, there is considerable uncertainty over the amount that would be available to the facility. Much C&I waste is potentially recyclable and not all is suitable for incineration. Nevertheless, given the high levels of C&I arisings, I consider it likely that sufficient material could be sourced, for the ERF, to make up for any shortfall in MSW. Also, it would seem that Rufford is well placed to accept waste that might otherwise have to be transported a considerable distance to a landfill site. Certainly, the increased diversion of C&I waste from landfill and the better integration of treatment for municipal and non-municipal waste are supported by PPS10 as they are key objectives in the Waste Strategy for England 2007. [268-270, 353-357, 973, 978-980, 1017-1018]
1212. That Strategy points out that energy from waste facilities need not discourage high rates of recycling, so long as the arrangements, for the plants, allow for flexibility in relation to supply of feedstock. At Rufford, some flexibility would be achieved through the mixed sourcing referred to above and, if supplies were to fall significantly, the plant could operate on just one of the two boilers. [122, 990]
1213. This may not be as great as the flexibility provided by gasification or pyrolysis where, unlike mass burn incineration, a constant feedstock is not required. Nevertheless, as the government’s Waste Strategy points out, incineration should not be ruled out, in advance, as an energy from waste technology; this is to avoid raising costs and restricting options unnecessarily. I also accept that for operators such as Veolia, who have considerable experience of incineration, this form of energy from waste inspires greater confidence than technologies which are subject to more uncertainty and limitations on feedstock. [281, 368, 369, 1033]

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1214. Anaerobic digestion (AD) is the only form of energy from waste technology that is given express encouragement by the government; the (2007) Waste Strategy notes that AD may be particularly cost effective for separately collected food waste. However, in Nottinghamshire, there are no plans to collect food waste separately. The contract does not preclude it and Veolia do not rule it out. Even so, the evidence suggests that the waste disposal authority are unlikely to pursue it, at least for the time being, because achievement of government targets does not depend on it. [985, 1002, 1005]
1215. Whilst more green waste is likely to be collected for composting across the county, in future, almost a third of the ERF feedstock is expected to be putrescible. In the circumstances, and despite concerns expressed by the Environment Agency, there would appear to be little prospect of food waste being segregated at source for subsequent composting or anaerobic digestion and, in that respect, use of the ERF would not help implement the national Waste Strategy. This would run contrary to one of PPS10's key objectives. [996, 999]
1216. As I have already indicated in relation to the (2008) Waste Framework Directive's requirements, operation of the ERF might be regarded as waste disposal, rather than recovery. If that is the case, as PPS10 (paragraph 25) points out, Veolia should be able to show that use of the Rufford ERF would not undermine the waste planning strategy by prejudicing movement up the waste hierarchy. [120]
1217. Consistent with this, the regional waste strategy sets out to exceed government targets for recycling and composting and to bring all parts of the region up to the levels of current best practice. At Rufford, the available evidence indicates that more than half of the feedstock waste would be recyclable or compostable; that burning paper and plastic would increase the plant's efficiency; and, that the waste disposal authority might increase efforts to improve recycling levels if planning permission for the ERF were to be refused. I have no doubt that more could be done to recycle or compost the material. I am less clear about whether it would be viable to do so. [272, 979, 983, 1007, 1015, 1084]
1218. It has been suggested that, if the ERF were to be built, there would be a financial disincentive to moving waste further up the hierarchy because of those elements of the costs, associated with the ERF, that would have to be borne by the waste disposal authority in any event. However, it is impossible to establish the true position because contractual details of those costs have been withheld. On that basis, and notwithstanding the clear hierarchical benefits of landfill diversion to the ERF, it could reasonably be argued that Veolia have failed to show that use of the Rufford facility would not prejudice further movement up the waste hierarchy. [103, 122, 847, 991-995, 1077]
1219. Refusal of planning permission for the proposed ERF might result in the termination of Veolia's contract to provide such a facility, or it might lead to revised proposals for an ERF at Rufford or elsewhere. In the interim, efforts would be made to maximise levels of recycling, but significant amounts would still be going to landfill. [115, 1007]
1220. Landfill capacity within Nottinghamshire has been falling, but evidence to show that void space available to the waste disposal authority is dangerously close

to running out, is not persuasive. Annual monitoring data, for the county, paint a confusing picture and estimates of the remaining permitted capacity range from some 13 years down to significantly less than 10 years. Also, the rate at which new space will become available within Nottinghamshire is not clear. Nevertheless, Veolia's contract allows them to use a landfill site just outside the county boundary where, notwithstanding the needs of the neighbouring authority, there is very substantial capacity remaining. Therefore, if it is found that there is a need for the ERF, a shortage of landfill capacity does not add urgency to meeting that need. [274, 347-350, 966-967, 1037-1041]

Sustainable Development under the terms of PPS1 and PPS1(S)

1221. A further matter on which the Secretary of State wants to be informed is whether the application would deliver a sustainable form of development, in terms of PPS1 and its *Planning and Climate Change* supplement PPS1(S), particularly in respect of policy on renewable and low-carbon energy generation.
1222. PPS1(S) encourages the provision of energy generating facilities that would contribute towards reducing carbon emissions; this would include the Rufford ERF. Also, the (2010) revised draft National Policy Statement for Renewable Energy Infrastructure (EN-3) points out that a proportion of the biodegradable waste feedstock may be classified as "renewable" for the purposes of Renewable Obligation Certificates. However, for the purposes of PPS1(S), this direct incineration plant would be classified as low-carbon technology and, as such, it would not benefit from the concessions made to renewable energy schemes in terms of landscape impact or the need to justify them. Nor would it fall to be considered against the emerging (EN-3) policy for nationally significant renewable energy infrastructure. [117, 124, 126, 374, 919]
1223. Tackling climate change is a key priority for the planning system and the approach set out in the (2007) publication of PPS1(S) will have informed preparation of the EMRP, but not the earlier development plan documents. Pending the updating of local plan policies, to reflect the supplement, consideration should be given to the consistency of development proposals with the supplement's key planning objectives; this approach is outlined in paragraphs 39-40 of PPS1(S).
1224. One of these objectives is to deliver growth that makes the fullest possible use of sustainable transport for moving freight. Here however, as I have already indicated, the site selection process paid scant regard to the potential for transporting waste by rail.
1225. Another is to deliver infrastructure that secures the highest viable resource and energy efficiency and reduction in emissions of greenhouse gases. The proposed ERF forms part of an integrated waste management service that is to be provided within the terms of a PFI contract. As outlined above, the viability of recycling at rates higher than those specified by the contract is hard to establish. Nor is it possible to predict the energy efficiency with confidence, given the inconclusive view of the Environment Agency and the potential variability in feedstock. Annex E to the (2007) national Waste Strategy points out that the conversion efficiency, expected from anaerobic digestion (AD) of the food waste, is likely to be higher than that from direct combustion.

However, use of AD would attract the cost of source separation. I also accept that the proposed ERF represents technology that is proven, reliable and deliverable. [98, 281, 1015-1018,]

1226. A combined heat and power (CHP) facility would be considerably more energy efficient than one which generates electricity alone. The potential to supply heat to a business park development at Rufford colliery could be safeguarded by a condition, but there is nothing to suggest that such a development is likely to go ahead. This is unlike the situation at the other two shortlisted sites where heat might be supplied to development that already exists or is clearly envisaged. Retrofitting heat supplies to existing development is generally more difficult than supplying new build schemes, but the possibility has not been explored with the operators of industrial development close to the Portland site. Nor has any attempt been made to contact those with an interest in the nursing home, hotel and other development that is expected to take place close to the Newark Road site. [409-410, 890, 1026-1029]
1227. In terms of reducing greenhouse gas emissions, in particular carbon dioxide and methane, the ERF would perform better than landfill. It seems likely that a mechanical biological treatment process, which achieves a high stabilisation of rejects, would perform better still. However, analysis of the available data does not reach clear conclusions on the relative performance of all the various waste management techniques which were studied. [283, 1021, 1023, 1091]
1228. These considerations suggest that the Rufford ERF would not secure the highest resource and energy efficiency, nor the greatest reduction in carbon emissions. However, the viability of alternatives has not been established.
1229. In summary, the application would not provide a renewable energy scheme and, as such, it is not immune to considerations of need or of impact on a locally valued landscape. The proposals are for a low-carbon energy from waste scheme which is a more sustainable form of development than disposing of waste to landfill and one that is supported by the Planning and Climate Change supplement to PPS1. The technology and location of the proposed ERF, do not necessarily represent the best available waste management solution, in terms of climate change impact, but the viability of alternatives is unclear.

Sustainable Development under the terms of PPS7

1230. When the Secretary of State called in the application for her determination, she drew attention to three of the key principles that are set out in national (PPS7) policy for *Sustainable Development in Rural Areas*. The first of those, which requires strict control over new development in the open countryside, has now been subsumed by Policy EC6 in (PPS4) *Planning for Sustainable Economic Growth*. Nevertheless the thrust of that (EC6.2a) Policy for economic development, such as the ERF, remains the same; as does its (EC6.1) purpose.
1231. As outlined above, the former Rufford colliery is not allocated for development. It is in the open countryside and away from Rainworth. However, the ERF would be prominent in residents' views and it would detract from their enjoyment of the area. It would also undermine efforts being made to develop Sherwood Forest as a tourist destination, because of the harm that would be caused to the rural landscape. This is clearly at odds with the need to protect

the countryside for the sake of its intrinsic character and beauty, so that it may be enjoyed by all. [1053, 1055, 1056]

1232. In terms of the second principle, the site selection process failed to prioritise previously developed land, over the Rufford site. Furthermore, it has not been demonstrated that the sustainability credentials of developing brownfield sites, which were identified in the process, are worse than those of developing Rufford.
1233. Given the size of building and height of stacks needed to accommodate a 180,000 tpa energy from waste incineration facility, the proposed design succeeds in minimising the development's scale and visual impact so far as is possible at this location. Nevertheless, despite the architect's skill, the ERF would not be in keeping with its rural surroundings or sensitive to the unspoilt character that is rapidly returning to this part of the Forest as former colliery land is being restored. On that basis, the third principle also offers little support to the proposals. [202, 204]
1234. PPS7 recognises the importance of considering employment alongside matters such as protection of the environment. However, the ERF would provide only 36 jobs, whereas the development's impact on the countryside, and people's enjoyment of it, would be substantial. [174]

Other Matters

Public Health

1235. Notwithstanding the applicant's Health Impact Assessment, which found that the proposed ERF would not present any meaningful risk to health, members of the community are clearly worried that this waste incinerator could be harmful. Their principal concerns focus on the quality of plume emissions; on the related need to avoid incinerating waste at sub-optimal temperatures; and, on the importance of proper monitoring and maintenance of the process. These are all matters that are regulated under the terms of the environmental permit. [1043, 1063, 1064, 1066]
1236. Some local residents doubt the Environment Agency's ability to protect people. Nevertheless, that organisation is responsible for pollution control and, in accordance with relevant government policy (PPS23 paragraph 10), I rely on the Agency to ensure that air quality meets standards that are designed to guard against impacts on human health. [288-290, 1063]
1237. In relation to Article 2 of the European Convention on Human Rights, I see no reason to believe that the ERF poses a real and immediate risk to life, or that the permit conditions would not be properly enforced. There are fears that people living near to incinerators suffer an increased risk of cancer, but Waste Strategy 2007 (at paragraph 22 of chapter 5) points to research which has shown no credible evidence of this. Further reassurance is provided by the Nottinghamshire County Teaching Primary Care Trust and by the Health Protection Agency, who confirm that emissions from properly regulated modern MSW incinerators should have little effect on health. [289, 1066, 1092]
1238. In the circumstances, whilst I recognise that residents are genuinely concerned about the possible health effects of the proposed ERF, I do not believe that

those concerns should carry great weight in the Secretary of State's determination of the application. [299, 381, 1044]

Persistent Organic Pollutants (POPs)

1239. Uncontested evidence suggests that the proposed ERF would be a net producer of persistent organic pollutants (POPs) and that it is therefore necessary, under European law, to give priority consideration to alternative processes that would not generate and release these substances. This would appear to a matter for the planning regime, rather than the pollution control authority. [1035-1036]

1240. The implications of the law are not for me to decide. Nevertheless, this argument lends weight to the suggestion that the application should be refused so that more waste, which would otherwise be incinerated, could be recycled, composted or fed to an anaerobic digester. [1046]

Planning Obligations

1241. The applicant has entered into two unilateral undertakings under S106 of the Town and Country Planning Act 1990. The content of these is no different from the final versions that were presented to the inquiry, although signed and dated versions were not provided until after the proceedings had closed. [16]

1242. One undertaking makes provision to screen views of the ERF from the existing Sherwood House Hospital. Also, as outlined above, it sets out to ensure that translocation of species from the application site, to the adjoining SINC, would be successful. In addition, it would secure long term monitoring of the ecological condition of the the Rainworth Heath SSSI. [93,189]

1243. The other makes arrangements for the application site to be restored to heathland, after operation of the ERF has ceased. In addition, as I have described, it is intended to provide suitable habitat for breeding woodlark and nightjar, on some 21.24ha of land known as the Golf Course Plantation, so as to mitigate the effects of the ERF development. The area of this offset land is considerably greater than the 5.4ha covered by the application site, but it already lies within the larger area that is known to be used by these birds. The undertaking is intended to alter the management of this Plantation land and thereby make it more attractive to the birds. However, as I have already explained, it is not clear whether this would be successful in creating the number of territories that the applicant claims. In the circumstances, I do not regard these provisions as as over-generous. [94]

1244. To my mind, these undertakings are both relevant and reasonable. Furthermore, they would be needed to make the ERF development acceptable, if planning permission were to be granted. I am led to conclude that these obligations satisfy the tests set out in ODPM Circular 05/2005.

Conditions

1245. Possible conditions which might be attached to permission for the ERF were agreed between Veolia and the waste planning authority (WPA). These were discussed in open session at the inquiry and I have considered their content, and detailed wording, against the guidance in DoE Circular 11/95. Conditions that I consider appropriate, if planning permission were to be granted for the

scheme, are Annexed to this report. The reasons for them are as follows.
[310]

1246. The WPA clearly need advance warning of when the development is to commence, so that they can enforce the relevant conditions. Also, it is necessary that the development should be carried out in accordance with the approved plans, for the avoidance of doubt and in the interests of proper planning; the developer would then be able to seek minor amendments to the approved scheme, if required, before it is carried out. However, it would be imprecise and unreasonable to tie details of the development to those described in the Environmental Statement, because some of those details have changed during the proposals' evolution.
1247. In order to protect the character and appearance of the area, it is reasonable in this particular case to restrict potentially prominent development that would otherwise be permitted under the terms of the GPDO and to require that approval is gained for the external materials to be used in the scheme.
1248. I see no need for a condition requiring remediation of the application site as the Environmental Statement (technical annex 11.2) reports analytical and survey data which suggest that the soils are not contaminated. However, given the history of use on the site, I do consider it necessary to make provision for dealing with any unexpected contamination, should it be found. I have therefore adapted the wording of model conditions suggested for this purpose.⁹²⁸
1249. There is no evidence to indicate that archaeological/cultural heritage remains exist on the site. Much of the ground has been disturbed in the past, but there is potential for remains to have survived in the south-east part. In the circumstances, I agree with the WPA that an archaeological watching brief is warranted here.
1250. Construction of this substantial facility is expected to take at least three years and it is necessary to ensure that the potential for harm to the environment, and to people's living conditions, would be kept to a reasonable minimum through maximising the reuse of waste materials generated on the site and through the imposition of suitable controls over working practices. Restrictions on times when work might be audible beyond the site boundary are needed in order to protect people against undue disturbance, but I see no need for the last sentence of the agreed condition. Furthermore, any planned change to the specified times should be sought as a minor material amendment to the scheme. There may be a need for pragmatism in situations where work has to continue, for a short period, in order to avoid loss of life, limb or property; this would be better addressed through the enforcement regime, rather than by imposing a condition that is imprecise.
1251. Similar arrangements should be made for the demolition phase. However any refurbishment works, which do not require planning permission, should be subject to the normal operational controls only.
1252. Restrictions that are specific to the construction and demolition phases should also include measures designed to protect woodlark and nightjar. Particular

⁹²⁸ DCLG letter (30.5.08) to Chief Planning Officers

care is needed to protect these birds during their breeding season, which extends from March through to August. Woodlark may be nearby at other times too, but normally in flocks and when they are more willing to move away from sources of noise. [233, 540]

1253. However, in terms that I describe above [1131], the applicant is unwilling to accept a control which would protect the birds against loud impulsive events. The practicalities of monitoring compliance with a short duration standard, such as an LA(eq) 5mins, LA 10 or LA max, would not make the imposition of such a control unreasonable, because a Veolia representative could be present to witness any extraneous influences when noise measurements are made. Nevertheless, there is no point in attaching a condition that could not be complied with. I therefore suggest the use of a 78dB LA(eq) 1 hour limit, during the breeding season, as this appears to be the best that could be achieved; albeit at a potential cost of extending the construction period beyond three years. Outside of the breeding season, I accept that a more relaxed limit of 85dB LA(eq) 1 hour would be reasonable, given the constraints that would otherwise be imposed on site contractors. [233, 542]
1254. Suitable arrangements would need to be made for monitoring compliance with the noise limits.
1255. As I have already indicated, the translocation of common lizards and bee orchids, from the site, is secured under the terms of a S.106 undertaking. Nevertheless, I accept that a walkover survey is needed to ensure that no protected species remain on, or close alongside, the site before the development begins. The site should also be checked for nesting birds no more than a week before clearance works commence; unchallenged evidence, in this respect, suggests that some species start breeding in February. [476]
1256. Other steps also need to be taken, in the interests of minimising the impact of the development on biodiversity. Measures to protect toads in their migration across the access road, would be warranted, but I find no particular justification for a scheme that is designed to enhance their population. Separately, and in order to protect the Rainworth Heath SSSI, there is a need to control the routing arrangements for connecting the proposed facility to the mains infrastructure. [1075]
1257. Operational controls include the need to restrict the overall capacity of the ERF, so as to limit consequential effects to those described in the Environmental Statement. This should properly take account of the plant's availability which, because of the need for planned maintenance and other shutdowns, is expected to be 85%.
1258. Vehicles and plant within the site should be fitted with suitable noise suppression devices, so as to avoid causing disturbance to people living nearby. Veolia expect no tonality in the operational noise from the ERF itself, but it is clear that distinguishable discrete notes, or distinct impulses, can increase the likelihood of complaint. On that basis, and consistent with the approach in the Environmental Statement, it is appropriate that the BS4142 approach to calculating rating levels should be used to protect living conditions in nearby residential properties.
1259. However, I accept that it is far from clear whether such an approach would be warranted in order to protect woodlark and nightjar, given the uncertainties

over these birds' sensitivities and the fact that this (BS4142) approach is designed with people, rather than birds, in mind. A boundary limit that is set as a specific noise level would therefore be appropriate. Again, the proposed limit of 55dB LA(eq) 1 hour is more a description of what could be achieved, rather than a reflection of what the birds could tolerate. [234, 542, 543]

1260. Monitoring compliance with the operational noise controls needs to take place at the outset. Noise monitoring may also be needed in response to complaints or if the waste planning authority has other reason to believe that operations are causing undue disturbance to people or birds. In the event that specified noise limits are being exceeded, it would be for the operator to devise means of securing future compliance. Failure to do so could result in enforcement action being taken against the operator.
1261. In order to protect the amenity value of the local area, suitable arrangements would be needed to contain dust, litter, soil and odours within the site and within vehicles used to transport waste to and from the site. Some of the material that is to be kept in the outside bays, such as glass, may be dense. Nevertheless, Veolia have accepted the need for sheeted skips outside the ERF building in order to prevent the escape of dust and other airborne solids and it is open to them to seek a minor amendment to such a requirement, should this be necessary.
1262. In the interests of protecting the access road and the living conditions of people living nearby, any necessary highway repairs should be identified before the development commences and then completed according to a timetable that has been agreed with the waste planning authority. Restrictions on the amount and timing of HGV movements are also needed; if variations to the agreed limits are sought, these should be pursued as minor amendments.
1263. In order to avoid the storage of waste elsewhere, some HGV deliveries would need to take place when people are generally asleep. At such times, Veolia have indicated that they could comply with noise limits of LAeq 5min 50dB and LAeq 8hour 45dB, as measured in the grounds of Sherwood House or of the dwellings next door. I would certainly expect the occasional night-time sound of passing HGV traffic to be irregular enough to attract the attention of the occupants of these properties but, to my mind, an 8hour LAeq would be inappropriate as a means of protecting people against disturbance caused by the relatively brief periods of elevated noise levels. BS4142 recommends that the appropriate reference time interval at night should be 5 minutes and suggests that complaints are likely if the difference between the rating level and the background level is 10dB or more. However the Environmental Statement (Appendix 12.2) suggests that (LA90 1 hour) background noise levels at Sherwood House are in the range 27.7-45.5dB. On that basis, and bearing in mind that the BS4142 rating level would be 5dB higher than the specific noise level, I am concerned that occupants of these properties would still be likely to complain about the noise of up to eight HGVs passing by at night, even if the suggested limit of 50dB LAeq 5min were to be complied with. Nevertheless, this would seem to be the most appropriate control in the circumstances. [1058]
1264. The proposed limit of 64dB LAeq 1 hour, at a distance of 10m from the access road, would do little to protect woodlark and nightjar against the effects of short duration loud events. Birds might be discouraged from nesting close to

the road, but there is nothing to suggest that a quieter noise climate could be achieved here, if the development were to proceed.

1265. In the interests of highway safety, on-site vehicular circulation and parking arrangements would need to be in place before the ERF commences operation and, subject to any minor amendments subsequently sought, should be kept available for their intended purpose thereafter. Parking on the unadopted access road would also need to be controlled, in order to ensure free passage for HGV traffic, but I see no need for a scheme to regulate traffic movements here.
1266. In order to encourage sustainable means of transport, for employees, bicycle stands should be provided on the site. I also accept that the operator should produce a travel plan that is designed to reduce reliance on the use of private cars and I have reworded the agreed condition to ensure that the ERF could not be brought into operation until a suitable plan is in place.
1267. In addition, controls are necessary to ensure that run-off from the site does not increase the risk of flooding elsewhere and does not pose a threat to the quality of surface water or groundwater. Indeed, local residents have raised particular concerns over the vulnerability of the sandstone aquifer, given the past mining activity and fissures which are believed to exist here. However, the evidence suggests that the ERF would not be sited within an area where subsidence is known to have occurred or is likely to occur in future. Also, the Environment Agency raise no objection in principle to the scheme, subject to the imposition of suitable controls. Their remaining concerns are addressed in suggested conditions, the wording of which I have simplified. [303-305, 1072]
1268. Landscaping measures are needed to mitigate the visual impact of the development and details of any external lighting, on the site, need to be agreed so as to avoid undue light pollution. Also, in order to protect against the risk of adverse odours and vermin in the area, it would be necessary to facilitate arrangements for the site to be cleared of waste material if the ERF were to cease operation for more than a month.
1269. As I have already indicated, the potential to supply neighbouring development with waste heat from the ERF should be safeguarded by a condition. Condition 1.3.2 of the Environmental Permit requires the practicability of using the ERF for CHP to be reviewed, at fairly frequent intervals, but it does not guard against barriers to implementation of such a scheme. For the purposes of securing the potential, I have revised conditions attached to the SoS's decision to allow the construction and operation of a 100MW biomass fuelled generating station at Avonmouth (Inquiry Document VE41) . In doing so, I have simplified the wording, but retained the reference to a Good Quality Combined Heat and Power scheme as described in draft National Policy.
1270. Finally, whilst I recognise that Network Rail property is reasonably close to the western boundary of the application site, there are no apparent plans to reinstate the track and I see no need to afford this former railway land any greater protection than already exists.

Summary of Mitigation Measures

1271. Therefore, if planning permission were to be granted for the proposed ERF, the main measures to avoid, reduce and offset adverse effects of the development would include:

controls, over working practices, that are designed to minimise harm to the living conditions for local residents and wildlife;

a cap on the amount of waste that could be handled in any one year, so as to limit consequential effects to those described in the Environmental Statement;

promoting sustainable travel arrangements for employees and creating infrastructure that would allow waste heat from the facility to be used, in order to reduce carbon emissions;

drainage arrangements designed to protect groundwater quality;

a building design that, together with landscape works and restrictions on lighting, is intended to soften the visual impact of the development;

improved management of the adjoining Site of Interest for Nature Conservation and the translocation to it of lizards and bee orchids from the application site;

restoration of the application site, to heathland, after the ERF has ceased operation;

arrangements to make some 21.24ha of nearby land more attractive to woodlark and nightjar; and

an environmental permit for the facility which contains operational controls and emission limits that are designed to avoid pollution and which the Environment Agency regard as the Best Available Techniques.

Overall Conclusions

1272. My conclusions in relation to the matters identified by the SoS may be summarised as follows.

Development Plan

1273. At the time of writing, the development plan policies that are most relevant to consideration of these proposals are those of the (1999) Newark and Sherwood Local Plan and the (2009) East Midlands Regional Plan. In terms of the Local Plan, the ERF scheme would not be one of the exceptional types of development in the countryside that is allowed for under Policy NE1 and its adverse impact on the landscape would run contrary to Policy NE9. Whilst the facility would provide some employment at the pit head of a former colliery, the site is part of a larger area that is in the process of being restored to heath and woodland; as a result, the proposals lack support from Policy E17 because of the development's intrusion into what would otherwise be open countryside.

1274. The Regional Plan notes that employment and environmental improvements are both needed, to regenerate this part of the region, following the decline of the coal industry here. Most growth is expected to take place in the urban areas, but employment development is also allowed for along the Mansfield

Ashfield Regeneration Route, which follows the recently completed Rainworth by-pass. However, the new road now separates this former pit settlement from the Sherwood Forest countryside to the north, where the colliery used to operate, and the Regional Plan suggests that a green use for the application site might therefore be more appropriate. Certainly, the planned restoration of the site would be consistent with Policies Northern SRS3 and SRS5, whereas provision of the ERF would undermine efforts that are already underway to enhance the area's biodiversity, in accordance with Policies 1 and 29.

1275. The site is not previously developed land and its restoration requirements seemingly deny it the support that EMRP Policy 38 lends to the provision of large waste management facilities on previously used former colliery land. Nor is there any need to permit more waste incineration capacity, in this part of the region, in order to meet this Policy's expectations.

1276. I therefore find that the proposals fail to satisfy the development plan's requirements.

Alternative Site Appraisal

1277. Recognition that the site is not previously developed land would have ruled it out at an early stage in the site selection process. I have also identified significant shortcomings in the subsequent assessment of this and other shortlisted sites. To my mind, the appraisal of alternative sites has not been robust.

PPS10: Planning for Sustainable Waste Management

1278. The preparation of a waste core strategy is still at an early stage and, in terms of PPS10, this choice of site does not benefit from the priority that is given to the re-use of previously developed land. Energy recovery is higher up the waste hierarchy than landfill, but this particular facility might not qualify as a recovery operation for the purposes of the Waste Framework Directive.

1279. It has been argued that there is no requirement to demonstrate the need for this facility. That would certainly be the case if the proposals were consistent with an up-to date development plan; but they are not. Considerations of need are not ruled out by PPS10 in the current case.

1280. Despite the fact that the ERF was designed to handle 180,000tpa of residual municipal solid waste (MSW), the need for it is not justified on the basis of MSW arisings alone. In my view, it would be heavily dependent upon supplies of commercial and industrial (C&I) waste. PPS10 encourages the diversion of both MSW and C&I waste streams, from landfill, but I am not persuaded that there is a shortage of landfill capacity here which adds urgency to this.

1281. More could be done to recycle or compost the waste. The viability of this is unclear, because details of the PFI contract have been withheld, but it becomes relevant if the proposed incineration facility does not qualify as a recovery operation. In that event, Veolia would have failed to demonstrate that the ERF development would not prejudice further movement up the waste hierarchy. This would be contrary to PPS10.

PPS1: Delivering Sustainable Development

1282. The ERF would be classified as low-carbon technology for the purposes of the *Planning and Climate Change Supplement* to PPS1. It would not be a renewable energy scheme and it would not necessarily represent the best available waste management solution, but it would help to reduce carbon emissions. However, the potential for moving waste by rail has been largely ignored and there is no certainty that the scheme would provide combined heat and power (CHP).

1283. The *Supplement* advises that new development should be consistent with the objective of securing the highest viable resource and energy efficiency and reduction in emissions. Here, however, the viability of alternatives is unclear.

PPS7: Sustainable Development in Rural Areas

1284. The ERF would provide 36 jobs, but the Rufford colliery site is not allocated for development. It is in the open countryside, away from Rainworth, and the proposed scheme would be harmful to the landscape. This runs counter to the former key principle 1(iv) of PPS7, which is now reflected in PPS4 Policy EC6.

1285. This is a greenfield site. Evidence to suggest that the site selection process gave appropriate consideration and priority to the use of previously developed land, is not persuasive. This is at odds with PPS7 key principle 1(v).

1286. Contrary to key principle 1(vi), this large incineration facility would not be sensitive to the character of the countryside.

Conditions

1287. The Annex to this report contains a list of those conditions that I consider appropriate, should planning permission be granted for the scheme.

Other Matters

1288. The application site is within an area (Sherwood Forest) that is known to support more than 1% of the UK breeding populations of woodlark and nightjar. Whilst the area is not currently identified as a Special Protection Area, there is evident merit in following a (Conservation of Habitats and Species) Regulation 61 approach towards considering the impact of the ERF scheme on the use of this area by these Annex 1 bird species.

1289. That approach leads me to conclude that the effect of the mitigated scheme, in combination with other plans and projects, is likely to be significant. Furthermore, on the basis of the available information, I cannot be certain that the scheme would not harm the integrity of the area that is being considered for protection. There is no suggestion that imperative reasons of overriding public interest would justify the development.

1290. Local residents have expressed concern over the risks to public health, from the operation of a waste incinerator here. Their fears mostly relate to matters that are regulated by the environmental permit and, whilst I do not doubt that these concerns are genuine, I do not believe that they should carry much weight in reaching a decision on this planning application.

1291. The fact that the incinerator would be a net producer of persistent organic pollutants does appear to be a material planning consideration. It adds weight

to the argument for greater source separation, recycling and composting of the waste.

1292. It is for the Secretary of State to decide whether granting permission for the ERF would violate people's human rights, by increasing their risk of premature death through exposure to pollutants. However, such a claim would appear to be unrealistic on the basis of the evidence that is available.

1293. Veolia draw support for the ERF from recent (2010) DEFRA correspondence which outlines the basis for the departmental approval that was given to the Nottinghamshire waste PFI project. Various features are attributed to the project, although it is not clear whose analysis this is based on. The letter concludes that the project "continues to be consistent with Government policy", but there is no indication of which policy is being referred to. In the circumstances, it has had no bearing on my consideration of the planning merits of the ERF proposals. [105-9, 308]

1294. On balance I am led to conclude that, whilst it is better to use waste as a resource for energy, rather than landfill, the sustainability benefits of this particular proposal are insufficient to outweigh the evident conflict with the development plan's requirements and the potential for harm to the integrity of habitat used by breeding woodlark and nightjar.

Recommendation

1295. I recommend that planning permission for the proposed development be refused.

1296. If the Secretary of State is minded to disagree with my recommendation, and grant permission for the scheme, the Annex to this report lists the conditions which I consider should be attached.

Rupert Grantham

Inspector

ANNEX

Schedule of Conditions

Commencement

1. The development hereby permitted shall be begun before the expiration of three years from the date of this permission.
2. The waste planning authority shall be notified in writing of the date of commencement at least 7 days, but not more than 14 days, prior to the commencement of the development hereby permitted.

Approved Plans

3. The development hereby permitted shall be carried out in accordance with the following approved plans:
 - a) Drawing No. 2GB.9B 001 Revision 0: Site Plan & Layout for Rufford Energy Recovery Facility (ERF) received by the WPA on 30 November 2007.
 - b) Drawing 2GB.9B 010 Revision 0: Horizontal Section 1-1, Levels +88.00 to +100.00 for Rufford ERF received by the WPA on 30 November 2007.
 - c) Drawing 2GB.9B 011 Revision 0: Horizontal Section 2-2, Levels +105.50 & +106.00 for Rufford ERF received by the WPA on 30 November 2007.
 - d) Drawing 2GB.9B 012 Revision 0: Horizontal Section 3-3, Level +108.50 for Rufford ERF received by the WPA on 30 November 2007.
 - e) Drawing 2GB.9B 013 Revision 0: Horizontal Section 4-4, Levels +108.50 & +117.00 for Rufford ERF received by the WPA on 30 November 2007.
 - f) Drawing 2GB.9B 020 Revision 0: General view on Facades for Rufford ERF received by the WPA on 30 November 2007.
 - g) Drawing 2GB.9B 021 Revision 0: General West & East Facades for Rufford ERF received by the WPA on 30 November 2007.
 - h) Drawing 2GB.9B 022 Revision 0: General North & South Facades for Rufford ERF received by the WPA on 30 November 2007.
 - i) Drawing 2GB.9B 023 Revision 0: Internal East Elevation B and Internal East Elevation C for Rufford ERF received by the WPA on 30 November 2007.
 - j) Drawing 2GB.9B 024 Revision 0: Internal West Elevation D and Internal West Elevation E for Rufford ERF received by the WPA on 30 November 2007.
 - k) Drawing 2GB.9B 025 Revision 0: Internal North Elevation and Internal South Elevation for Rufford ERF received by the WPA on 30 November 2007.

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- l) Drawing 2GB.9B 030 Revision 0: Long Section A-A for Rufford ERF received by the WPA on 30 November 2007.
 - m) Drawing 2GB.9B 031 Revision 0: Cross Section 1-1 and Cross Section 2-2 for Rufford ERF received by the WPA on 30 November 2007.
 - n) Drawing 2GB.9B 032 Revision 0: Cross Sections 3-3 and Cross Section 5-5 for Rufford ERF received by the WPA on 30 November 2007.
 - o) Drawing 2GB.9B 040 Revision 0: Administration Building Plans for Rufford ERF received by the WPA on 30 November 2007.
 - p) Drawing 2GB.9B 041 Revision 0: Administration Building Elevations for Rufford ERF received by the WPA on 30 November 2007.
 - q) Drawing 2GB.9B 042 Revision 0: Administration Building Sections for Rufford ERF received by the WPA on 30 November 2007.
 - r) Drawing 2GB.9B 050 Revision 0: Transformer Building for Rufford ERF received by the WPA on 30 November 2007.
 - s) Drawing 2GB.9B 060 Revision 0: Circulation Plan & Visitors Route for Rufford ERF received by the WPA on 30 November 2007.
 - t) Drawing WCL 0002 Revision A02: General Arrangement (Rufford Access Works) for Rufford ERF received by the WPA on 30 November 2007.
 - u) Drawing WCL 0006 Revision A01: Typical Cross Sections (Rufford Access Works) for Rufford ERF received by the WPA on 30 November 2007.
 - 4. A copy of this permission, including all plans and documents hereby approved and any other plans and documents subsequently approved in accordance with this permission, shall be retained at the Rufford ERF site offices for inspection by the waste planning authority at all times during the lifetime of the development hereby permitted.

Removal of Permitted Development Rights

- 5. Notwithstanding the provisions of Parts 4, 8 and 25 of Schedule 2 of the Town and Country Planning (General Permitted Development) Order 1995 (or any order revoking and re-enacting that order with or without modification):-
 - a) Other than development expressly authorised by this permission, no external fixed plant or machinery, buildings or structures shall be erected, extended, installed or replaced at the site without the prior written agreement of the waste planning authority.
 - b) No telecommunications antenna shall be installed or erected without the prior written consent of the waste planning authority.

Construction Materials

6. Notwithstanding the details shown on the approved plans, details and samples of the materials to be used in the construction of the external surfaces of the buildings hereby permitted shall be submitted to and approved in writing by the waste planning authority before those surfaces are created. Development shall be carried out in accordance with the approved details.

Ground Contamination

7. In the event that contamination of land is found on the site, when carrying out the permitted development, that finding must be reported in writing to the waste planning authority. That report must be submitted within 3 days of the finding and, once the authority has identified that part of the site which is affected by the contamination, development must be halted on that part of the site until the authority has given its written approval that all of the following measures have been completed:

(a) the findings of an assessment of the contamination must be submitted to and approved in writing by the waste planning authority. The assessment must be undertaken by a competent person and it must include:

(i) a survey of the extent, scale and nature of contamination; and

(ii) an assessment of the potential risks to:

- human health,
- property (existing or proposed) including buildings, crops, livestock, pets, woodland and service lines and pipes,
- adjoining land,
- groundwaters and surface waters,
- ecological systems,
- archaeological sites and ancient monuments;

(b) details of a remediation scheme must be submitted to and approved in writing by the waste planning authority. That scheme must be designed to bring the site to a condition suitable for the intended use by removing unacceptable risks to human health, buildings and other property and the natural and historical environment. The scheme must include all works to be undertaken, proposed remediation objectives and remediation criteria, an appraisal of remedial options and proposal of the preferred option(s), and a timetable of works and site management procedures. The scheme must ensure that the site will not qualify as contaminated land under Part 2A of the Environmental Protection Act 1990 in relation to the intended use of the land after remediation; and

(c) the measures in the approved remediation scheme must be implemented in accordance with the approved timetable. Following completion of those measures, a validation report must be submitted to and approved in writing by the waste planning authority.

Archaeology

8. The developer shall afford access to the areas that are shown hatched pink on Figure 15.1 of the (Veolia 2007) Environment Statement, at all reasonable times, to any archaeologist nominated by the waste planning authority and shall allow him/her to observe the excavations and record items of interest and finds.

Controls relating to Construction and Demolition

9. Prior to the commencement of the development hereby permitted, and to the commencement of demolition of the buildings hereby permitted, details of the following matters shall have been submitted to and approved in writing by the waste planning authority:
 - a) Contractors' access arrangements for vehicles, plant and personnel;
 - b) Contractors' site storage area/compound;
 - c) The number, size (including height) and location of all contractors' temporary buildings;
 - d) Temporary means of enclosure and demarcation of the site operational boundaries, to be erected prior to the commencement of construction or demolition operations in any part of the site and maintained for the duration of those operations;
 - e) The means of moving, storing and stacking all building materials, plant and equipment around the site;
 - f) The arrangements for parking vehicles;
 - g) Measures to ensure that dust emissions are minimised;
 - h) Details of external floodlighting to be installed during the period of construction or demolition, including hours of operation;
 - i) A noise mitigation scheme which shall provide details of how the impacts of noise emissions on adjoining receptors will be minimised during construction or demolition operations. Particular reference shall be made to any potential noise impacts upon off-site Woodlark and Nightjar bird species during the breeding season. The scheme shall identify those activities that are considered noisiest; where and when those activities are likely to occur; and, the best practicable measures that will be taken to reduce the noise from those activities;
 - j) The method of controlling the release of water from the site, during construction or demolition, to avoid pollution of surface water and of the underlying groundwater; and
 - k) Details of any wheel wash facility, use of water bowsers and any other measures necessary to ensure that vehicles do not leave the site in a condition

whereby mud, clay or other deleterious materials are carried onto the public highway.

Those matters shall be dealt with in accordance with the approved details during the construction and commissioning of the development and during the demolition of the buildings hereby permitted.

10. No development shall take place until a qualified ecologist has carried out a walkover survey of the site, and of land extending up to 50m beyond the site, to check for the presence of statutorily protected species; and, until the findings of that survey have been submitted to and approved in writing by the waste planning authority. If any protected species is found to be present during that survey, no development shall take place until details of measures to mitigate adverse effects on that species, including the timing of such measures, have been submitted to and approved in writing by the waste planning authority. The mitigation measures shall be implemented in accordance with the approved details.
11. With the exception of exploratory survey works, no excavations shall commence on site until a detailed strategy and method statement for minimising the amount of construction waste resulting from the development has been submitted to and approved in writing by the waste planning authority. The statement shall include details of the extent to which waste materials arising from the demolition and construction activities will be reused on site and it shall demonstrate how that reuse will be maximised, so far as is reasonably practicable. For waste materials that will not be reused on site, the statement shall provide details of measures that shall be taken to maximise the reuse, re-cycling or composting of those materials elsewhere. All waste materials, arising from the construction of the development, shall be dealt with in accordance with the approved strategy and method statement.
12. Site clearance/preparation operations that involve the felling, clearing or removal of vegetation, or disturbance of bare ground, shall not be undertaken during the months of February through to August inclusive, unless otherwise agreed in writing by the waste planning authority on the basis of the findings of a survey of nesting birds, carried out by a suitably qualified ecologist, that has been carried out less than eight days before the operations commence.
13. Construction or demolition works which are audible at the site boundary shall not take place outside the hours of 07.00 – 19.00 on Monday to Friday or 07.00 – 13.00 on Saturdays, and shall not take place at any time on Sundays, Public or Bank Holidays.
14. When the development is under construction or demolition, the equivalent continuous noise level LAeq(1 hour) at the boundary of the application site shall not exceed 78dB during March through to August inclusive or 85dB during September through to February.
15. No development shall take place until a scheme for monitoring the noise of construction and demolition activities has been submitted to and approved in writing by the waste planning authority. The scheme shall make provision for the monitoring and recording of noise and for the presentation of the results of monitoring. The scheme shall be implemented as approved.

Protection of Toads

16. No development shall take place until a scheme to protect migrating toads, as they cross the Rufford Colliery Access Road, has been submitted to and approved in writing by the waste planning authority. The scheme shall provide protection during both the construction and operation of the permitted facility and it shall be carried out in accordance with the approved details.

Provision of Electricity / Water / Sewerage Connection

17. Connections from the permitted facility to the local electricity transmission system, to the mains water system and to the sewerage system, shall be underground and shall be made in accordance with details that have previously been submitted to and agreed in writing with the waste planning authority.

Operational Controls

18. The processing capacity of the energy recovery facility, based on 85% availability, shall be no more than 180,000 tonnes per annum; and, no more than 194,823.5 tonnes of material shall be delivered to the facility, for combustion, in any 12 month period.
19. The rating level from any plant operating on the application site shall be at least 10 dB(A) below the measured L_{A90} level at a distance of one metre from the façade of all noise sensitive residential dwellings that are referred to in Table 12.11 of the (Veolia 2007) Environmental Statement. The method of assessment shall be carried out in accordance with BS 4142:1997 'Rating industrial noise affecting mixed residential and industrial areas'. The measured L_{A90} levels are those established and reported in Table 12.11 of the Environmental Statement. The rating level shall exclude noise associated with vehicle movements on the colliery access road.
20. The specific noise level from any plant operating on the application site shall not exceed a level of L_{Aeq} 1 hour 55 dB at the boundary of the site. The specific noise level shall exclude noise associated with vehicle movements on the colliery access road.
21. All plant, machinery and operational vehicles used on the site, other than vehicles which are not under the direct control of the operator, shall incorporate white noise reversing or similar specification warning devices and shall be fitted with silencers maintained in accordance with the manufacturers' recommendations and specifications to minimise noise disturbance.
22. The operator of the energy recovery facility shall submit a noise monitoring report to the waste planning authority within one month of the facility's commissioning. The report shall assess compliance with the requirements of Conditions 19 and 20 and it shall include:
 - (a) A schedule of all plant and equipment installed on the application site;

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- (b) Details and locations of the plant and equipment and of arrangements for the attenuation of noise from the plant and equipment;
 - (c) Manufacturers' specifications of sound emissions, from the plant and equipment, in octave or third octave detail; and
 - (d) Noise monitoring data obtained during commissioning of the facility and evidence of the measurements made.
23. The operator shall undertake a noise survey within two weeks of any written request, by the waste planning authority, for such a survey to be undertaken. The survey shall include measurements of noise taken at the boundary of the site, and at any other locations specified by the authority, and it shall be undertaken in accordance with BS 4142:1997 'Rating industrial noise affecting mixed residential and industrial areas'. The survey shall be carried out under the supervision of the authority and the results of the survey shall be provided to the authority within one month of the survey being undertaken.
24. The energy recovery facility shall not be brought into operational use until details of measures to prevent dust and litter leaving the site have been submitted to and approved in writing by the waste planning authority. Those details shall include use of dust suppression systems and arrangements to ensure that the fast acting screen shutters, of the energy recovery facility's tipping bay, are maintained in good operational order at all times. Development shall be carried out in accordance with the approved details.
25. The waste that is being transported by vehicles, entering or leaving the application site, shall be fully enclosed or sheeted.
26. The energy recovery facility shall not be brought into operational use until details of measures to prevent malodours leaving the site have been submitted to and approved in writing by the waste planning authority. Such measures shall include:
- a) Movement of waste within the refuse bunker to discourage its decomposition;
 - b) Maintaining negative air pressure within the tipping hall so that air is drawn from the tipping area into the boilers as part of the combustion process; and
 - c) The application of masking agents where necessary to neutralise any malodours.
- Development shall be carried out in accordance with the approved details.
27. The energy recovery facility shall not be brought into operational use until details of a scheme, to prevent soil or dirt from within the application site being deposited on the public highway, have been submitted to and approved in writing by the waste planning authority. The scheme shall include arrangements for the regular sweeping and cleaning of vehicle circulation and manoeuvring areas within the site. The scheme shall also provide a mechanism for its details to be reviewed and for the revised arrangements to be put in place within one month of the waste planning authority requesting

such a review. Development shall be carried out in accordance with the approved details.

28. All waste that is on the application site, but outside the energy recovery building, shall be covered or sheeted.

Site Access and Traffic

29. No development shall take place until a survey has been made of the structure and condition of the Rufford Colliery Access Road between the A617 and the access to the energy recovery facility. The results of this survey shall be provided within a report that both identifies any areas of carriageway deterioration and incorporates details of a timetabled schedule for any maintenance, replacement and resurfacing works that are needed to re-instate the carriageway. No development shall take place until that report has been submitted to and approved in writing by the waste planning authority. The energy recovery facility shall not be brought into operational use before the waste planning authority has confirmed in writing that the works have been carried out in accordance with the approved details.
30. HGV movements into or out of the site shall be no more than:
1090 two way movements (545 each way) in any one week;
24 two way movements (12 each way) during the 1900-2300 hours period; or
8 two way movements (4 each way) between 2300 hours and 0700 hours.

There shall be no HGV movements into or out of the site:
after 1900 hours, or before 0700 hours, on a Saturday or Sunday; or
at any time on Christmas Day, Boxing Day or New Years Day.

The site operator shall make and keep written records of all HGV movements into and out of the site; these records shall include the times when such movements take place. That operator shall make copies of the records available to the waste planning authority within seven days of the authority requesting access to the records.

31. During the night-time period of 2300 hours to 0700 hours, the free-field level of noise generated by traffic using the colliery access road to arrive at or depart from the energy recovery facility, shall not exceed:
- (a) LAeq 5mins 50dB when measured at a height of between 1.2-1.5m above ground level in the gardens of Sherwood House and the adjacent residential properties at locations that have been agreed in writing by the waste planning authority and which are at least 3.5m away from any reflective surface; and
 - (b) LAeq 1hour 64 dB when measured at a height of between 1.2-1.5m at locations that are 10m away from the edge of the access road carriageway and have been agreed in writing by the waste planning authority.
32. The energy recovery facility shall not be brought into operational use until arrangements for vehicular access, circulation and parking have been marked out and made available for use in accordance with the approved plans and

details. These arrangements shall thereafter remain available for their designated purposes at all times.

33. The energy recovery facility shall not be brought into operational use until eight covered bicycle stands have been erected and made available for use in accordance with details that have previously been agreed in writing by the waste planning authority.
34. The energy recovery facility shall not be brought into operational use until the waste planning authority has given its written approval to a travel plan that has been submitted by the operator. The travel plan shall aim to discourage reliance on the use of private cars as a principal means of transport to and from the site by staff and visitors. Thereafter, the plan shall be reviewed by the operator and submitted for the authority's written approval at intervals of no longer than five years. At all times, the plan shall be implemented in accordance with the authority's most recent written approval.
35. The energy recovery facility shall not be brought into operational use until a scheme to control the unauthorised parking of vehicles on the unadopted part of the access road, which forms part of the application site, has been submitted to and approved by the waste planning authority. Thereafter the operator may submit revisions to the scheme for the authority's written approval. At all times, the scheme shall be implemented in accordance with the authority's most recent written approval.

External Lighting

36. The energy recovery facility shall not be brought into operational use until details of a scheme, to provide external lighting on the site, have been submitted to and approved in writing by the waste planning authority. The scheme shall be designed to ensure that the external faces of the completed facility buildings and chimneys are not directly illuminated and the details shall include a lighting contour map which identifies levels of lighting within the application site and any light spillage onto adjacent land. Development shall be carried out in accordance with the approved details.

Site Drainage and protection of groundwater

37. The energy recovery facility shall not be brought into operational use until works to drain the site have been carried out in accordance with details that have previously been submitted to and approved in writing by the waste planning authority.
38. All surface water drainage from hardstanding areas on the site shall pass through oil interceptors that have been designed and constructed in accordance with details that have previously been submitted to and approved in writing by the waste planning authority.
39. The use of piled foundations on the site shall only take place in accordance with details that have previously been submitted to and approved in writing by the waste planning authority.

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40. Any facility for the storage of oils, fuels or chemicals on the site shall be located on an impervious base and surrounded by an impervious bund wall and there shall be no drain through the base or wall of the bund. The containment capacity of any bunded compound shall be no less than 110% of the capacity of the storage facility or, if there is more than one facility within the compound, it shall be no less than either 110% of the largest facility's capacity or 25% of the aggregate capacity of all the facilities within the compound, whichever is the greater. Any filling point, vent or sight glass, serving such a facility, must be located within the bunded area.

Landscaping

41. The energy recovery facility shall not be brought into operational use unless hard and soft landscape works have been carried out in accordance with details that have been submitted to and approved in writing by the waste planning authority.

Details of hard landscape works shall include:

- Proposed finished levels or contours;
- Means of enclosure;
- Car parking layouts;
- Other vehicle and pedestrian access and circulation areas; and
- Hard surfacing materials.

Details of soft landscape works shall include:

- Planting proposals which shall include proposals for the creation of 2.37 hectares of heathland in accordance with the Revised Indicative On-Site Landscape Plan shown on the (January 2010) Figure LVSS1 contained in the (March 2010) RPS document labelled VE4.11;
 - A balancing pond suitable for the cultivation of wet heath species in accordance with the details shown on the Revised Indicative On-Site Landscape Plan referred to above;
 - Written specifications (including cultivation and other operations associated with plant and grass establishment);
 - Schedules of plants, noting species to be used (which shall not include conifers), plant sizes and proposed numbers/densities where appropriate, which shall be in accordance with the details shown on the Revised Indicative On-Site Landscape Plan referred to above; and
 - An implementation programme.
42. The energy recovery facility shall not be brought into operational use until details of a scheme to maintain the landscaped areas have been submitted to and approved in writing by the waste planning authority. The landscaped areas shall be maintained in accordance with the approved details. Any trees or shrubs that, within a period of five years after planting die, are removed or become seriously damaged or diseased, shall be replaced in the next planting season with others of similar size and species, unless the waste planning authority gives written consent to any variation.

Closure of Site

43. In the event that the use of the site for the importation of waste should cease for a period in excess of one month, the operator shall clear the site of all stored waste and processed material within one month of receiving a written request, to do so, from the waste planning authority.

Use of Waste Heat

44. The commissioning of the energy recovery facility shall not take place until sufficient plant and pipework has been installed to ensure that there are no barriers to the future supply of heat, to the boundary of the site, if opportunities to use the heat are identified pursuant to condition 45.
45. The commissioning of the energy recovery facility shall not take place until a review of potential commercial opportunities for the use of heat from the facility has been submitted to and approved in writing by the waste planning authority. The review shall provide for the ongoing monitoring and exploration of potential commercial opportunities to use heat from the facility as part of a Good Quality Combined Heat and Power scheme (as described in the October 2010 revised draft National Policy Statement for Energy EN-1).

APPEARANCES

FOR THE APPLICANT (VEOLIA):

Rhodri Price-Lewis QC and Stephen Morgan of counsel	Instructed by Bond Pearce LLP
They called	
Steve Mitchell BA(Hons)	Veolia Environmental Services UK
Richard Kirkman BEng MSc MBA	Veolia Environmental Services UK
Professor James Bridges BSc PhD DSc	University of Surrey
Jonathan Standen BSc DIP CEnv FRICS MRTPI MCIWM	RPS Planning and Development
Jean Robert Mazaud DPLG	S'PACE Architecture et Environnement
Corrina Demmar BA(Hons) DipLA(Hons) MLI	RPS Planning and Development
Darran Humpheson BSc(Hons) MSc MIOA	RPS Planning and Development
Daniel Smyth BSc(Jt Hons) MSc DIC	RPS Planning and Development
Roger Buisson BSc(Hons) PhD MCIWEM CEnv	RPS Planning and Development
Professor Max Wade BSc(Hons) PhD FIEEM CEnv	RPS Planning and Development
Paul Hardwick BSc(Hons) PhD FRGS IAHS	RPS Planning and Development (Evidence submitted in writing only)

FOR THE (NCC) WASTE PLANNING AUTHORITY:

Paul Brown QC	Instructed by Jayne Francis, NCC Services Director of Legal and Democratic Services
He called	
Michael Hankin BA(Hons) MSc MRTPI	Planning Applications Manager NCC

FOR THE (NCC) WASTE DISPOSAL AUTHORITY:

Mr Mick Allen	Appeared to answer questions from the Inspector
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FOR (NSDC) NEWARK AND SHERWOOD DISTRICT COUNCIL:

Karen White	NSDC Solicitor
She called	
Sylvia Bland BTP MRTPI	NSDC Planning Manager

FOR THE (NWT) NOTTINGHAMSHIRE WILDLIFE TRUST:

Graham Machin of counsel	Instructed by NWT
He called	
Janice Bradley MSc CEnv MIEEM	NWT Head of Conservation Policy and Planning
John Underhill-Day PhD BSc CBiol CEnv MIEEM	Director of Footprint Ecology

FOR (PAIN) PEOPLE AGAINST INCINERATION:

Alan Watson BSc(Hons) CEng	Public Interest Consultants
Shlomo Dowen BSc(Hons) AdvDipEDM UKSS	Only Solutions LLP
Keith Kondakor BEng(Hons)	Consultant

FOR (NE) NATURAL ENGLAND:

David Harrison	Principal Solicitor (NE) Legal
He called	
Neil Pike BA(Hons)	NE Delivery Leader of Statutory Casework East Midlands
Steven Clifton BSc(Hons) DipCM MIEEM	NE Regional Regulation Enforcement and Designation Advisor East Midlands

INTERESTED PERSONS AT THE EVENING SESSION:

Georgia Jones	Local Resident
Terry Jones	Local Resident
Adrian Wilson	Friends of Sherwood Forest
Paddy Tipping	Former MP
Councillor Martin Wright	NCC Councillor for Mansfield East
Steve Arnold	Local resident speaking on behalf of himself and his brother Gary Arnold
Jane Norwood	Local resident speaking on behalf of herself and Kath Benton
John Bradbury	Local Resident
Charles Cannon	Local Resident
Paul Cullen	Local Resident

Josh Dowen	Local Resident
Lorraine Dowen	Local Resident
Linda Tift	Local resident, parish and district councillor, speaking on behalf of herself, Alex Tift and Nita Roper (Manager Sherwood House Independent Hospital)
Sharon Draycott	Local resident speaking on behalf of Emma Draycott
Delma Jackson	Local Resident
Helen Johnson	Local Resident
Joyce Kitts	Local Resident
Richard Kirkland	Local Resident
Jean Morris	Local Resident
Paul Frost	Local Resident
Trevor Stevens	Local Resident
Megan Tansley	Local Resident
Bernard Thompson	Local Resident
Jacqueline Toplis	Local Resident (written submission only)
John Toplis MCIOB	Local Resident
Terry Coleman	Local Resident
Alan Evans	Local Resident
Shlomo Dowen	Speaking on behalf of Allen Tift (former parish and district councillor)
Derek Blow	Local Resident
John Middleton	Local Resident
Nigel Draycott	Local Resident

DOCUMENTS

Core Documents

A. Application Documents, Consultation Responses and Committee Report

- CD1 Planning Application Submission, Non-Technical Summary and Environmental Statement
- CD2 Regulation 19 1st response dated 23rd September 2008
- CD3 Regulation 19 2nd response dated 19th November 2008
- CD4 Report to Planning and Licensing Committee 9 January 2009
- CD4a Minutes of Planning & Licensing Committee Report of 9th January 2009 and amendment to these minutes dated 3rd February 2009
- CD5 Consultation responses to the planning application
- cd5.a.) Representations From Government Office East Midlands GOEM
 - cd5.b.) Representations from East Midlands Regional Assembly
 - cd5.c.) Representations from East Midlands Development Agency
 - cd5.d.) Representations from Newark and Sherwood District Council
 - cd5.e.) Representations from Mansfield District Council
 - cd5.f.) Representations from Environmental Health Officers at Newark and Sherwood District Council
 - cd5.g.) Letter from Nottingham City Council
 - cd5.h.) Representations from Rainworth Parish Council
 - cd5.i.) Representations from Farnsfield Parish Council
 - cd5.j.) Letter from Blidworth Parish Council
 - cd5.k.) Letter from Clipstone Parish Council
 - cd5.l.) Letter from Rufford Parish Council
 - cd5.m.) Representations from Environment Agency
 - cd5.n.) Letter from Health Protection Agency
 - cd5.o.) Letter from Nottinghamshire County NHS Teaching Primary Care Trust
 - cd5.p.) Representations from Natural England
 - cd5.q.) Representations from Nottinghamshire Wildlife Trust
 - cd5.r.) Representations from Nottinghamshire County Council Conservation Group (Nature Conservation)
 - cd5.s.) Memo from Nottinghamshire County Council Country side Access Team
 - cd5.t.) Memo from Nottinghamshire County Council Conservation Archaeology Team
 - cd5.u.) Memo from Nottinghamshire County Council Acoustic Engineer
 - cd5.v.) Memo from Nottinghamshire County Council Landscape and Reclamation Team
 - cd5.w.) Memo from Nottinghamshire County Council Spatial Planning Team
 - cd5.x.) Memo from Nottinghamshire County Council Urban Design Officer
 - cd5.y.) Letter from OPUN
 - cd5.z.) Memo from Nottinghamshire County Council Highways
 - cd5.bb.) Letter from Severn Trent Water
 - cd5.cc.) Letter from eon Central Network
 - cd5.dd.) Letter from Rolls Royce
 - cd5.ff.) Letter from Network Rail
- CD6 Letters received from local community prior to call-in
- CD6.1 Further representation received from Mrs L Tift 14.10.10

CD6.2	Letter from Mr Alan Evans regarding subsidence at Rufford Colliery 20.10.10
CD6.3	Correspondence from Irwin Mitchell LLP, acting on behalf of a resident of Sherwood House 22.7.09
CD6.4	Correspondence from Ms D Jackson received 11.9.09
CD6.5	Correspondence from RSPB 23.9.09
CD6.6	Correspondence from Mr B Robinson 1.10.09
 B	 <u>Development Plan Policy Documents</u>
CD7	East Midlands Regional Spatial Strategy (RSS) published 12 March 2009
CD7a	East Midlands Regional Spatial Strategy (RSS) published 12 March 2009 Supporting Sustainability Appraisal
CD8	Nottinghamshire and Nottingham Joint Structure Plan (2006) (Now replaced by East Midlands Regional Plan)
CD9	Secretary of State's direction concerning the saved policies of the Nottinghamshire and Nottingham Joint Structure Plan
CD10	Nottinghamshire and Nottingham Joint Waste Local Plan (January 2002) (includes Nottinghamshire and Nottingham Waste Development Framework)
CD10a	Extract from NCC Waste Local plan paras 10.34 to 10.60
CD11	Nottinghamshire and Nottingham Waste Local Plan - Adopted January 2002 - Nottinghamshire County Council request to save policies beyond 27 September 2007 - List 1
CD12	The Emerging Nottinghamshire and Nottingham Waste Development Scheme 2009
CD12a	The Adopted Minerals and Waste Development Scheme 2007
CD13	Newark and Sherwood Local Plan (1999)
CD13a	Newark and Sherwood Local Plan Proposals Map
CD14	Newark and Sherwood Local Development Scheme
CD14a	Newark and Sherwood Submission Core Strategy DPD formed by the Publication Core Strategy and the Schedule of Minor Changes and Clarification.
CD15	Secretary of State's direction on the saved Policies of the Newark and Sherwood Local Plan
CD16	East Midlands Northern Sub-Region Employment Land Review: Final report, March 2008 produced by Nottinghamshire County Council and Partners
CD16a	Employment Land Review 2010 Update
CD17	Nottinghamshire and Nottingham Waste Core Strategy and Development Control Policies - Issues and Options - October 2006
CD17a	Nottinghamshire and Nottingham Waste Core Strategy and Development Control Policies – Issues and Options September 2010
CD18	Nottinghamshire and Nottingham Minerals and Waste Framework - Draft Minerals and Waste Development Scheme 2009
 C.	 <u>National Planning Policy: Planning Policy Statements (PPS) Planning Policy Guides (PPG) and Companion Guides</u>
CD19	Planning Policy Statement 1 - Delivering Sustainable Development
CD20	Planning Policy Statement 1 Supplement - Planning and Climate Change
CD21	Planning Policy Statement 3 - Housing
CD22a	Planning Policy Statement 4 – Planning for Sustainable Economic Growth

CD23a	Planning Policy Statement 5 – Planning for the Historic Environment
CD24	Planning Policy Statement 7 - Sustainable Development in Rural Areas
CD25	Planning Policy Statement 9 - Biodiversity and Geological Conservation
CD26	Planning Policy Statement 10 - Planning for Sustainable Waste Management
CD27	Planning Policy Statement 10 - Companion guide
CD28	Planning Policy Statement 11 - Regional Spatial Strategies
CD29	Planning Policy Statement 12 - Local Spatial Planning
CD30	Planning Policy Guidance 13 - Transport
CD33	Planning Policy Statement 22 - Renewable Energy
CD34	Planning Policy Statement 22 - Companion guide
CD35	Planning Policy Statement 23 - Planning and Pollution Control
CD36	Planning Policy Guidance 24 - Planning and Noise
CD37	Planning Policy Statement 25 - Development and Flood Risk
CD38	Planning Policy Statement 25 - Practice Guide

D. Waste Strategy Documents

CD39	The National Waste Strategy, Waste Strategy 2000
CD40	Waste Strategy for England 2007 May 2007 and Supporting Annexes
CD41	The East Midlands Regional Waste Strategy (January 2006)
CD41a	Study to determine the current and future treatment capacity of the East Midlands Region, November 2004, Enviros Consultants with updated waste arising data from DEFRA EA and Local Authorities
CD42	Nottinghamshire County Council Municipal Waste Management Strategy (MWMS) (2001)
CD43	Nottinghamshire PFI Waste Management Contract (Redacted version)

E. Environment Permit

CD44	Environment Permit Number BP3035MG (for Rufford ERF) and Environment Agency Decision Document
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F Waste Legislation

CD45	EC Waste Framework Directive (75/442/EEC amended 91/156, 91/692 and 96/350)
CD46	EC Directive 1999/31/EC of 26 April 1999 on the Landfill of Waste
CD47	EC Directive 91/689/EEC of 12 December 1991 on Hazardous Waste
CD48	EC Directive on Integrated Pollution Prevention and Control (IPPC) (96/61EC)
CD49	EC Waste Incineration Directive (2000/76/EC)
CD50	EC Directive 2006/12/EC on Waste
CD51	EC Directive 2008/98/EC of 19 November 2008 on Waste and repealing certain Directives
CD52	The Landfill (England and Wales) Regulations 2002
CD53	The Hazardous Waste (England and Wales) Regulations 2005.
CD54	Landfill Allowance Trading Scheme (LATS).

G. Biodiversity and Ecology Documents

CD55	Nottinghamshire Biodiversity Action Plan
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CD56	Draft Guide to Planning and Biodiversity for Nottinghamshire and Nottingham (October 2006)
CD57	Nottinghamshire Heathland Strategy, Nottinghamshire Heathland Forum 1992 (revised 2004)
	• Nottinghamshire Heathland Strategy Forward • Nottinghamshire Heathland Strategy Part 1 • Nottinghamshire Heathland Strategy Part 2 • Nottinghamshire Heathland Strategy Part 3a • Nottinghamshire Heathland Strategy Part 3b
CD58	A Vision for the Future of Sherwood Forest, Sherwood Habitats Steering Group (2005)
CD59	Sherwood Forest Regional Park: Feasibility Study Report, May 2008
H.	<u>Landscape and Visual Documents</u>
CD60	Nottinghamshire County Council Countryside Landscape Guidelines (1997)
I.	<u>Relevant Planning Appeal</u>
CD61	Eastcroft Inspector's report dated 10 December 2008 and Secretary of State's Decision Letter dated 12 February 2009. (APP/Q3060/S/2036129/NWF)
J.	<u>Public Inquiry Documents Submitted by Interested Parties</u>
CD62	Secretary of State's Rule 6 Statement dated 18 March 2009
CD63	Planning Inspector's Notes of a Pre-Inquiry Meeting dated 10 June 2009
CD70	ITN January 04 Redacted Part 164
CD71	ITN January 04 Redacted Part 234
CD72	BAFO January 05 Redacted Part 1
CD73	BAFO January 05 Redacted Part 25
CD74	RBAFO May 05 Redacted Part 1
CD75	RBAFO May 05 Redacted Part 2
CD76	URBAFO February 06 Redacted Part 1
CD77	URBAFO February 06 Redacted Part 26
CD78	Stakeholder Update Letter September 2009
CD79	Stakeholder Appendices September 2009
CD80	PAIN Response to Stakeholder Consultation 05-11-09
CD81	Nottinghamshire Minerals and Waste Development Framework Annual Monitoring Report 2009
CD82	Newark and Sherwood District Council Core Strategy Options Report October 2009
CD83	Veolia Submission of Supplementary Environmental Information
CD84	Alternative Site Appraisal Review Updated March 2010
CD84a	Alternative Site Appraisal Review Updated Summary March 2010
CD85	DECC Draft Overarching National Policy Statement for Energy (EN1) 2009
CD85a	Revised Draft Overarching National Policy Statement for Energy (EN-1)
CD86	DECC Draft National Policy Statement for Renewable Energy Infrastructure (EN-3) 2009
CD86a	Revised Draft National Policy Statement for Renewable Energy Infrastructure (EN-3)
CD87	DCLG Letter to Chief Planning Officers (9 November 2009)

CD88	Forestry Commission - Sherwood Pines Forest Park - Forest Design Plan - Period 2009-2019
CD89	Forestry Commission - Rainworth Forest/Golf Course (Nottinghamshire) Forest Design Plan - Period 2008-2017
CD90	RSPB - Background information on work carried out to date by the RSPB on a possible Special Protection Area in Sherwood Forest
CD91	IRM1 - Irwin Mitchell Letter
CD92	Notes of Pre Inquiry Meeting February 2010
CD93	Amended Forestry Commission - Rainworth Forest/Golf Course (Nottinghamshire) Forest Design Plan consultation document
CD94	Opening submissions by all parties
CD94a	Opening submission on behalf of Veolia.
CD94b	Opening submission on behalf of (NCC) Waste Planning Authority
CD94c	Opening submission on behalf of Newark and Sherwood District Council
CD94d	Opening submission on behalf of Nottinghamshire Wildlife Trust
CD94e	Opening submission on behalf of PAIN
CD95	Planning Application submitted to Newark Sherwood District Council (31/03/2010), by Harworth Estates, for former Rufford Colliery Site
CD96	East Midlands Regional Assembly Waste Monitoring Report Dated February 2007
CD97	Staffordshire and Stoke on Trent Waste Local Plan – Inspector's Report on Objections
CD98	All Fiveways to Thetford – Statement to inform the appropriate assessment for the Breckland Special Protection Area (SPA)
CD99	Comments on Veolia's Draft Methodology for the in-combination assessment of the proposed Rufford ERF
CD100	Submission to Public Inquiry – John Bradbury
C101	Illegal Use of Public Rights of Way and Green Spaces with public access by mechanically propelled vehicles
CD102	Extracts from DEFRA: Designing Waste Facilities – A guide to modern design in waste
CD103	Draft conditions
CD103a	Draft list of conditions agreed between Veolia and NCC (27/09/2010)
CD103b	Revised draft list of agreed conditions (19 October 2010) showing tracked changes
CD103c	Revised draft list of agreed conditions (19 October 2010)
CD104	The Landscape Institute – Guidelines for Landscape and Visual Impact Assessment (Second Edition)
CD105	Letter from the Forestry Commission – Golf Course Plantation Forest Design Plan amendment
CD106	Decision Notice Newark & Sherwood DC (09/00896/FULM) Land adjacent Sherwood House, Rufford Colliery Lane, Rainworth
CD107	File Note in connection with Sherwood House Planning Decision
CD108	Natural England Advice Note to Local Planning Authorities regarding the consideration of effects on the breeding population of nightjar and woodlark in the Sherwood Forest region (28.06.10)
CD109	Minutes of Sherwood Forest Regional Park Board Meeting (8.06.10)
CD110	Documents concerning an appeal and application by Peel Environmental Ince Ltd relating to a Resource Recovery Park and Refuse Derived Fuel Plant on land adjacent to the Manchester Ship Canal, Ince, Cheshire
CD110A	DCLG Appeal decision to allow the appeal and grant outline planning permission for the Resource Recovery Park

CD110B	Report to Secretaries of State for CLG and for Business, Enterprise & Regulatory Reform
CD110C	DECC Secretary of State's decision to grant consent to construct and operate a refuse derived fuel generating station at land adjacent to the Manchester Ship Canal, Ince, Cheshire
CD110D	Consent under section 36 of the Electricity Act 1989 to construct and operate a refuse derived fuel generating station at land adjacent to the Manchester Ship Canal, Ince, Cheshire
CD111	List of Speakers at public meeting of Inquiry on 6 October 2010
CD111.1 to CD111.35	Copies of speeches given at public meeting of Inquiry on 6 October 2010 and front sheet of petition presented to Inspector containing 2,329 signatures
CD112	Plan showing access to Strawberry Hill
CD113	Horizontal Guidance Note H1-Annex (f)
CD114	Extracts from ADAS Study into Commercial and Industrial Waste Arisings (April 2009)
CD115	Nottingham City Council – “A Waste-Less Nottingham” (Waste Strategy 2010-2030) dated May 2010
CD116	Closing submissions by all parties
CD116a	Closing submission on behalf of Veolia.
CD116b	Closing submission on behalf of Waste Planning Authority
CD116c	Closing submission on behalf of Newark and Sherwood District Council
CD116d	Closing submission on behalf Nottinghamshire Wildlife Trust
CD116e	Closing submission on behalf of PAIN, together with annexed Judgment on Capel Parish Council and Surrey County Council
CD117	Notes of pre-inquiry meeting 7 June 2010
CD118	Letter from PINS (19 November 2010) inviting comments on the 10 November judgment in the case of Cala Homes
CD119	Email from PINS (5 January 2011)

Veolia Documents

VE1.0	Summary Proof of Evidence of Steve Mitchell
VE1.1	Proof of Evidence of Steve Mitchell
VE1.2	Proof of Evidence of Steve Mitchell Appendices
VE1.3	Rebuttal Proof of Evidence of Steve Mitchell
VE1.4	Appendices for Rebuttal Proof of Evidence of Steve Mitchell
VE1.5	Supplemental Summary Proof of Evidence of Steve Mitchell
VE1.6	Supplemental Proof of Evidence of Steve Mitchell
VE1.7	Supplemental Appendices of Steve Mitchell
VE1.8	Comments on PA74 and PA75
VE1.9	Note on Veolia's safety record
VE2.1	Summary Proof of Evidence of Richard Kirkman
VE2.2	Proof of Evidence of Richard Kirkman
VE2.3	Proof of Evidence of Richard Kirkman Appendices
VE2.4	Rebuttal Proof of Evidence of Richard Kirkman
VE2.5	Appendix for Rebuttal Proof of Evidence of Richard Kirkman
VE2.6	Errata in respect of Richard Kirkman's Proof of Evidence
VE3.1	Summary Proof of Evidence of Jean Robert Mazaud
VE3.2	Proof of Evidence of Jean Robert Mazaud
VE3.3	Proof of Evidence of Jean Robert Mazaud Appendices
VE4.1	Summary Proof of Evidence of Corinna Demmar

VE4.2	Proof of Evidence of Corinna Demmar
VE4.3	Appendices for Corinna Demmar
VE4.4	Figures for Corinna Demmar
VE4.5	Rebuttal Proof of Evidence of Corinna Demmar
VE4.6	Appendices for Rebuttal Proof of Evidence of Corinna Demmar
VE4.7	Figures for Rebuttal Proof of Evidence of Corinna Demmar
VE4.8	Supplemental Summary Proof of Evidence of Corinna Demmar
VE4.9	Supplemental Proof of Evidence of Corinna Demmar
VE4.10	Supplemental Appendices of Corinna Demmar
VE4.11	Supplemental Figures of Corinna Demmar
VE4.12	Addendum to Supplementary Proof of Evidence of Corinna Demmar
VE4.13	Figures for Supplementary Proof of Evidence of Corinna Demmar
VE4.14	S PZ 6 Sherwood Pines Wooded Estatelands
VE4.15	Landscape Character Survey Sheet (report) plus plan 'Sherwood Policy Zones and Landscape Character Parcels'
VE4.16	Extract 'A Green Infrastructure Strategy for Newark & Sherwood' (Feb 2010)
VE5.1	Summary Proof of Evidence Dan Smyth
VE5.2	Proof of Evidence Dan Smyth
VE5.3	Proof of Evidence Dan Smyth Appendices
VE5.4	Rebuttal Proof of Evidence of Daniel Smyth (in response to Alan Watson's Proof of Evidence)
VE5.5	Rebuttal Appendices of Daniel Smyth (in response to Alan Watson's Proof of Evidence)
VE5.6	Rebuttal Proof of Evidence of Daniel Smyth (in response to Janice Bradley's Proof of Evidence)
VE5.7	Rebuttal Appendices of Daniel Smyth (in response to Janice Bradley's Proof of Evidence)
VE5.8	Supplemental Summary Proof of Evidence of Daniel Smyth
VE5.9	Supplemental Proof of Evidence of Daniel Smyth
VE5.10	Supplemental Appendices of Daniel Smyth
VE5.11	Errata in respect of Daniel Smyth's evidence
VE5.12	In combination effects summary note – overview road traffic data
VE5.13	Air Quality and Climate (Daniel Smyth)
VE5.14	Bio-accumulation and persistent pollutants
VE6.1	Summary Proof of Evidence of Professor Jim Bridges
VE6.2	Proof of Evidence of Professor Jim Bridges
VE6.3	Proof of Evidence of Professor Jim Bridges Appendices
VE7.1	Summary Proof of Evidence of Paul Hardwick
VE7.2	Proof of Evidence of Paul Hardwick
VE7.3	Appendices to Proof of Evidence of Paul Hardwick
VE7.4	Ground Conditions and Hydrogeology - RPS Response to Submissions made at the evening session
VE8.1	Summary Proof of Evidence of David Bell
VE8.2	Proof of Evidence of David Bell
VE8.3	Appendices to David Bell's Proof of Evidence
VE8.4	Rebuttal Proof of Evidence of David Bell
VE8.5	Appendices for Rebuttal Proof of Evidence of David Bell
VE9.1	Summary Proof of Evidence of Professor Max Wade
VE9.2	Proof of Evidence of Professor Max Wade
VE9.3	Proof of Evidence of Professor Max Wade Appendices
VE9.4	Rebuttal Proof of Evidence of Professor Max Wade

VE9.5	Appendices and Figures for Professor Max Wade's Rebuttal Proof of Evidence
VE9.6	Supplemental Summary Proof of Evidence of Professor Max Wade
VE9.7	Supplemental Proof of Evidence of Professor Max Wade
VE9.8	Appendices to Professor Max Wade's Supplemental Proof of Evidence
VE9.9	RPS Report "Opportunities to Deliver Offsetting and Enhancement for the Proposed Rufford ERF" (April 2010)
VE9.10	Scoping survey of two land parcels, at Rainworth Water LNR and No-Man's Land, proposed for off-setting and enhancement
VE9.11	Interim report on visits 1 and 2 of 2010 survey for breeding woodlarks at former Rufford Colliery
VE9.12	Rufford Colliery Woodlark Survey and supporting figures
VE9.13	Ecological Appraisal of Golf Course Plantation.
VE9.14	Ecological Appraisal of Land Adjacent to Rainworth Water
VE9.15	Summary to (Ecology) Supplementary Proof of Professor Max Wade
VE9.16	(Ecology) Supplementary Proof of Professor Max Wade
VE9.17	Appendices to (Ecology) Supplementary proof of Professor Max Wade
VE9.18	Points to follow up post cross-examination of Professor Max Wade, together with Appendix
VE10.1	Summary Proof of Evidence of Jonathan Standen
VE10.2	Proof of Evidence of Jonathan Standen
VE10.3	Proof of Evidence of Jonathan Standen Appendices
VE10.4	Rebuttal Proof of Evidence of Jonathan Standen
VE10.5	Rebuttal Appendices for Jonathan Standen
VE10.6	Supplemental Summary Proof of Evidence of Jonathan Standen
VE10.7	Supplemental Proof of Evidence of Jonathan Standen
VE10.8	Supplemental Appendices of Jonathan Standen
VE10.9	Errata in respect of Jonathan Standen's Proof of Evidence
VE10.10	Newark & Sherwood District Council Committee Report (17/03/2010) Sustainable Development and Regeneration
VE10.11	Ashfield Local Plan Review (Adopted November 2002) extract – Employment Land Allocations
VE10.12	Table 6.1 Updated Projected Treatment Capacity (Proof of Jonathan Standen)
VE11.1	Summary Proof of Evidence of Darren Humpherson
VE11.2	Proof of Evidence of Darren Humpherson
VE11.3	Note on Traffic Flow Sources for Air Quality and Noise Assessments
VE11.4	Standard Operation Grid Noise Map – Woodlark & Nightjar Territories
VE11.5	Note on Noise Modelling and Construction and Operational Noise Considerations in Relation to Revised Woodlark and Nightjar Territories
VE11.6	Note on Traffic Flows (14.10.10) Darran Humpheson
VE11.7	Note on Bird Calls, ERF and Traffic Noise Frequency Spectra (14.10.10) Darran Humpheson
VE11.8	Note on Construction and Operational Noise Conditions
VE12.1	Summary Proof of Evidence of Roger Buisson
VE12.2	Proof of Evidence of Roger Buisson
VE12.3	Appendices of Roger Buisson
VE12.4	Documents referred to in Annex 1 of VE12.2
VE12.5	Summary of Supplementary Proof of Evidence by Roger Buisson
VE12.6	Supplementary Proof of Evidence by Roger Buisson
VE12.7	Appendices to Supplementary Proof of Evidence by Roger Buisson.
VE17	Veolia Supplementary Statement of Case
VE18	Chronology on Nature Conservation

VE19	Carl Larson's Draft PhD Thesis (Chapters 2 and 4 only)
VE20	Oliver Thompson MSc Thesis - The Role of GIS in defining the Habitat Preferences of Caprimulgus Europaeus (The European Nightjar) in the Sherwood Forest (1995)
VE21	John Szczur unpublished findings of surveys for Woodlark in UK Coal's land (including the application site)
VE22	Rufford ERF In-Combination Assessment
VE23	Technical Note: In-Combination Traffic Flows
VE24	Letter to PINS dated 3 September 2010 and table of Division of In-Combination Report Witnesses
VE25	Treatment capacity for residual waste arisings:
VE25a	Treatment capacity for residual waste arisings in Nottinghamshire and Nottingham to 2033/2034 –Assumptions from Draft Nottingham Waste Strategy and Nottinghamshire Development Plan
VE25b	Treatment capacity for residual waste arisings in Nottinghamshire and Nottingham to 2033/2034 –Assumptions from Draft Nottingham Waste Strategy and other assumptions
VE25c	Treatment capacity for residual waste arisings in Nottinghamshire and Nottingham to 2033/2034 –Assumptions from Draft Nottingham Waste Strategy and other assumptions
VE26	Planning Obligation by Unilateral Undertaking Relating to Land at the Former Rufford Colliery, Rainworth, Nottinghamshire (Draft 30/09/2010 Spring Hill SINC)
VE27	Planning Obligation by Unilateral Undertaking Relating to Land at the Former Rufford Colliery, Rainworth, Nottinghamshire (Draft 01/10/2010 Golf Course Plantation)
VE28	Rufford ERF: In-Combination assessment Draft v3
VE29	Rufford ERF: Appendix A Methodology for In-combination assessment
VE29	Rufford ERF: In-Combination assessment
VE30	Rufford ERF: In-Combination assessment, record of changes made in the preparation of the report
VE31	Summary of records of Woodlark and Nightjar territories in the Sherwood Pines Forest Park (SPFP)
VE32	The Effects of Traffic on the Density of Breeding Birds in Dutch Agricultural Grasslands
VE33	Battle to Save Dorset's Disappearing Heathland
VE34	Reproductive success of Woodlarks Lullula Arborea in traditional and recently colonized habitats (Bird Trust for Ornithology 2007)
VE35	Plan: Areas of wood and heathland in Sherwood Forest (about 1920) and location of Golf Course Plantation
VE36	Plan: Oak Tree Local Wildlife site to Rufford Country Park
VE37	Woodlark abundance in Thetford Forest
VE38	Summary Note for the Planning Inspector on the (VE27) Draft Offsetting Undertaking (Pinsent Masons 13.10.10)
VE39	Planning Obligation by Unilateral Undertaking Relating to Land at the Former Rufford Colliery, Rainworth, Nottinghamshire Draft by Pinsent Masons 13.10.10 (to show track changes)
VE40	Planning Obligation by Unilateral Undertaking Relating to Land at the Former Rufford Colliery, Rainworth, Nottinghamshire Draft by Pinsent Masons 13.10.10 (no track changes)

VE41	Application from Helius Energy plc for consent to construct and operate a Biomass Fuelled Generating Station at Avonmouth Dock, Bristol Port, Avonmouth
VE42	Committee Plan – 08/01905/OUTM
VE43	UK Without Incineration Network Website Home Page
VE44	Nottinghamshire Case Study, July 2008 – UK Without Incineration Network Website
VE45	Rainworth Incinerator Campaign People Against Incineration PAIN Sherwood Forest Website
VE46	Summary Note explaining the changes made to the Draft S106 Undertakings
VE47	Planning Obligation by Unilateral Undertaking Draft 19/10/2010
VE48	Planning Obligation by Unilateral Undertaking Draft 19/10/2010
VE49	Planning Obligation by Unilateral Undertaking Draft 19/10/2010
VE50	Planning Obligation by Unilateral Undertaking Draft 19/10/2010
VE51	E-mail from Environment Agency (20/10/2010) concerning Saltend Challenge
VE52	Legal submissions on behalf of Veolia
VE53	Approved Judgement – Derbyshire Dales DC/Peak District National Park Authority and The Secretary of State (CLG)/Carsington Wind Energy Limited
VE54	Summary note explaining the changes made to the Draft S106 Undertakings
VE55	Planning Obligation by Unilateral Undertaking Draft 25/10/2010
VE56	Planning Obligation by Unilateral Undertaking Draft 25/10/2010
VE57	Planning Obligation by Unilateral Undertaking Draft 25/10/2010
VE58	Planning Obligation by Unilateral Undertaking Draft 25/10/2010
VE59	Response to PAIN'S application for partial award of costs
VE59a	Copy of letter to Planning Inspectorate (22 April 2010) concerning applicant's request for adjournment of the Inquiry
VE59b	Copy of letter to Planning Inspectorate (17 May 2010) concerning applicant's request for adjournment of the Inquiry
VE60	Applicant's comments on the 10 November 2010 Cala Homes judgment
VE61	Applicant's comments on other parties' responses to the Cala Homes judgment
VE62	Completed planning obligation to Nottinghamshire County Council, dated 6 January 2011
VE63	Completed planning obligation to Newark and Sherwood District Council, dated 6 January 2011

Waste Planning Authority Documents

CC1	Consolidating Proof of Evidence Appendix CC1: Technical advice from Environment Agency and DEFRA regarding the definition of waste incineration in the context of the European Waste Framework Directives.
CC4	Consolidating Proof of Evidence Appendix CC4: Part 20 Class A of the Town and Country Planning (General Permitted Development) Order 1995.
CC5	Consolidating Proof of Evidence Appendix CC5: Email from Sylvia Bland – Planning Manager (West) Newark and Sherwood District Council providing a policy interpretation relating to the former Rufford Colliery site.
CC6	Consolidating Proof of Evidence Appendix CC6: Background papers in connection with the redevelopment of Bilsthorpe Colliery.

CC7	Consolidating Proof of Evidence Appendix CC7: Justification of need for the extension of Eastcroft EFW facility.
CC9	Consolidating Proof of Evidence Appendix CC9: Email from Wastedataflow regarding the use of auditted waste figures.
CC10	Consolidating Proof of Evidence Appendix CC10: EA Briefing note setting out the ERF efficiency calculation.
CC12	Consolidating Proof of Evidence Appendix CC12: Letter from DEFRA dated 15th March 2010 confirming consistency of Nottinghamshire PFI project with Government Policy.
CC13	Consolidating Proof of Evidence Appendix CC13: Planning and Licensing Committee report dated 3rd November 2010.
CC14	Consolidating Proof of Evidence Appendix CC14: Planning and Licensing Committee report dated 9th March 2010.
CC15	Consolidating Proof of Evidence
CC16	Email from Andrew Pritchard dated 13th August 2010 confirming the status of the East Midlands Regional Waste Plan and underpinning research data.
CC17	Consolidating Summary Proof of Evidence
CC18	Errata to CC15.
CC19	Statement on behalf of the Waste Planning Authority in light of Supplementary Evidence (NE5.1) Submitted by Natural England.
CC20	E-mail dated 4th October 2010 providing audited MSW arisings between 200/01 & 2008/09 and comment on C & I waste arisings.
CC20a	Additional data from the Environment Agency 2002/03 survey of industrial and commercial waste arisings (Tables 5, 6, 7) & Environment Agency Landfill Deposits & capacity trends
CC21	Extract from Nottinghamshire Mineral Local Plan (1997) identifying the location of collieries within Nottinghamshire (Newark collieries highlighted)
CC22	Extract - East Midlands landfill capacity trends 1998/99 – 2009 with further calculations
CC23	Note from the EA (01/05/02010) - calculating landfill capacity
CC24	Waste Planning Authority's comments on the Cala Homes judgment of 10 November 2010
CC25	Waste Planning Authority's comments on other parties' responses to the Cala Homes judgment

Newark and Sherwood District Council Documents

DC0	Proof of Evidence
DC0a	Summary Proof of Evidence
DC1	Committee Report (9 December 2008)
DC2	Letter from NSDC to NCC dated 17 December 2008.
DC3	Planning Decision Notice 3/95/1289 – stocking/blending of Coal at Rufford
DC4	Aerial Photos
DC5	UK Coal master plan for Rufford
DC6	EIA Scoping letter for UK Coal redevelopment of Rufford Colliery
DC7	Extract of policies from N&S Local Plan
DC8	Extracts from N&S LDS (May 2009)
DC9	N&S LDF
DC10	Indicative plan of MARR
DC11	Secretary of State direction of saved policies within N&S LP
DC12	Bilsthorpe Colliery restoration proposals.
DC13	Extracts from Northern Sub-Region Employment land review.

DC14	Towards a Sustainable Energy Policy Draft Framework – Executive Summary.
DC15	Copy of email correspondence between NCC and NSDC.
DC16	Supplementary Proof of Evidence.
DC17	Appendix to Supplementary Proof of Evidence: Committee Report (9 February 2010).
DC18	Appendix to Supplementary Proof of Evidence: Committee Report (9 March 2010).
DC19	Appendix to Supplementary Proof of Evidence: N&S LDS October 2009.
DC20	Appendix to Supplementary Proof of Evidence: Letter from RPS on behalf of Haworth Estates.
DC21	Supplementary Proof of Evidence.
DC22	Appendices to Supplementary Proof of Evidence (DC21): Extracts from N&S LDF Publication Core Strategy
DC23	Appendices to Supplementary Proof of Evidence (DC21): Employment Land 2010 ARUP update.
DC24	Appendices to Supplementary Proof of Evidence (DC21): Economic Development Strategy Update 2010.
DC25	Appendices to Supplementary Proof of Evidence (DC21): Landscape Character Assessment.
DC26	Appendices to Supplementary Proof of Evidence (DC21): A Green Infrastructure Strategy for Newark and Sherwood.
DC27	Nottinghamshire County Council 'The Plan for Sherwood Forest'
DC27a	Proposals Map to show areas to be given priority
DC28	Countryside Appraisal – Nottinghamshire Landscape Guidelines (Sherwood Regional Character Area)
DC29	NSDC comments on the Cala Homes judgment of 10 November 2010

People against Incineration (PAIN) Documents

PA1	RPS (March 2007) Exeter Waste to Energy Health Impact Asssessment.
PA2	RJB Mining planning application for Rufford Coal Stocking (Nov 1995)
PA3	NCC Committee report concerning coal stocking at Rufford site.
PA4	A vision for Sherwood Forest Regional Park feasibility study.
PA5	NCC report of joint members board bidders conference.
PA6	NWT/Invitation to the renewal of Sherwood Forest.
PA7	NEP article – Incinerator opposition.
PA8	Onyx/Veolia: Overview of the Onyx Proposal.
PA9	Evidence of Staines, A (2009) re health impacts
PA10	Evidence of Howard, C.V (2009) re particulate emissions and health
PA11	Evidence of Hogg, D, Sherrington et.al (2009).
PA12	Nottingham Evening Post article (8/11/06)
PA13	Trigg, M (2006) PFI Waste Contract presentation.
PA19	Summary Proof of Evidence: Shlomo Downen
PA20	Proof of Evidence: Shlomo Downen
PA21	Summary Proof of Evidence: Keith Kondakor
PA22	Proof of Evidence: Keith Kondakor
PA23	Proof of Evidence: Alan Watson
PA24	Summary 1 of PAIN's Planning Objections to the application
PA25	PAIN Part 1 Planning Objection 29 February 2008
PA26	PAIN IPPC Objections as Submitted 25 April 2008
PA27	PAIN Part 2 Planning Objection October 2008

PA28	PAIN Part 2 Appendix A – Review of RPS carbon analysis report.
PA29	PAIN Part 3 Planning Objection November 2008
PA30	PAIN Part 4 Planning Objection December 2008
PA31	PAIN Rufford Bottom Ash Review Final
PA32	PAIN Rufford Bottom Ash Review Supplement
PA33	PAIN Rufford Final Comment re Climate Model
PA34	Summary Proof of Evidence: Alan Watson
PA35	Supplementary Proof of Evidence of Alan Watson
PA36	Annex 1 to PA35
PA37	Annex 2 to PA35
PA38	Summary Proof Updated March 2010: Shlomo Downen
PA39	Supplementary Proof of Evidence supporting PA20: Shlomo Downen
PA40	Supplementary Proof of Evidence supporting PA22: Keith Kondakor
PA41	Appendix to PA40
PA42	PAIN Supplementary Statement of Case on Ornithology and Nature Conservation (24 February 2010).
PA43	PAIN Submission Re Birds Directive and Delay (01.10.2009)
PA44	PAIN (4 September 2009) email re POPs Regs
PA45	PAIN (2 June 2009) Response re POPs Regs Interpretation
PA46	PAIN (30 April 2009) Submission re POPs Regs
PA47	PAIN (17 April 2009) email re Thornby Farms & FSA Letter
PA48	PAIN (15 April 2009) Submission on Draft Permit Decision
PA49	PAIN letter: Friends of the Earth Judicial Review.
PA50	Letter from RPS (Jonathan Standen) to Sheffield City Council dated 13 May 2008.
PA51	Errata to Supplementary Proof PA23
PA52	Further Supplementary Proof of Evidence to be read alongside PA22 & PA40: Keith Kondakor.
PA53	Appendix A to PA52.
PA54	Appendix B to PA52.
PA55	Veolia Shropshire Payment Mechanism
PA56	Veolia Shropshire Contract Rates and Performance
PA57	Environment Agency's East Midlands Waste Deposit Trends 2009
PA58	Figures 10 and 14 from the draft Municipal Waste Management Strategy entitled "A Waste –Less Nottingham: Waste Strategy 2010-2030"
PA59	Spreadsheet underpinning Nottingham City's assumptions for MSW Management
PA60	Spreadsheet underpinning Nottingham City's assumptions for Trade Waste Management
PA61	Potential to recycle section of the North West of England Commercial and Industrial Waste Survey 2009
PA62	Pages 16 and 17 of Final Technical Report (January 2003) prepared for East Midlands Regional Technical Advisory Body
PA63	Article from "Resource Management and Recovery" (1 October 2010) entitled Commercial confidence
PA64	Recommendation of a preferred bidder for the waste PFI contract (27 July 2005) Appendix A - Contract Proposals
PA65	Mr Kondakor's comments and queries arising from VE25a,b & c
PA66	Modified chart of Veolia scenario B
PA67	East Midlands: Landfill Capacity Trends 1998/99 – 2008 (000s cubic metres)
PA68	Correspondence regarding incorrect figures used by Nottinghamshire County Council at the Planning Committee Meeting of 9th January 2009

PA69	Nottinghamshire Waste Summit (22.09.10)
PA70	Chris Sloley (8.10.10) 'Recycle Bank at heart of Veolia's Scottish strategy'
PA71	Data from Defra wastedataflow on landfilling of MSW from Derbyshire, Nottinghamshire, Leicestershire and Lincolnshire for Calendar year 2009
PA72	Environment Agency – Waste Information 2009
PA73	East Midlands: Waste Deposit Trends
PA74	PAIN's Notes, Queries and Suggestions relating to Conditions and Obligations (14.10.10)
PA75	Iain Robinson 'The Sentinel' - 'Council faces £400,000 claim over incinerated waste shortfall'
PA76	Response by Alan Watson to supplementary questions from the Inspector
PA77	Response by Alan Watson to matters raised during cross examination
PA78	NCC Budget Documents
PA79	Report of the Cabinet Member for Environment and Sustainability (24 March 2010) Nottinghamshire PFI waste contract –Rufford ERF Public Inquiry and changes to contractual details
PA80	Application on behalf of PAIN for costs
PA80a	Letter from PAIN to the Planning Inspectorate dated 26 April 2010
PA81	PAIN's comments on the Cala Homes judgment of 10 November 2010
PA82	PAIN's comments on other parties' responses to the Cala Homes judgment

Nottinghamshire Wildlife Trust Documents

WT1	Proof of Evidence of Janice Bradley
WT1a	Summary Proof of Evidence of Janice Bradley
WT2	Legal Submission by Graham Machin (Counsel)
WT2.1	Covering Letter to support Legal Submission by Graham Machin
WT2.2	Legal Submission references by Graham Machin (Counsel)
WT3	Proof of Evidence of Janice Bradley (WT1) Appendix Figures Coversheet
WT3.1	Proof of Evidence of Janice Bradley (WT1) Appendix Figures 1- 5
WT4	Proof of Evidence of Janice Bradley (WT1) Appendices 1-14
WT4a	Proof of Evidence of Janice Bradley (WT1) References 1-19
WT5	Supplementary Evidence in support of NWT Legal Submissions, covering letter, copy of woodlark and nightjar territories and supporting figures.
WT6	Letter NWT to Bond Pearce dated 19 Jan 2010
WT7	Letter NWT to Natural England dated 19 January 2010.
WT9	Supplementary Statement of Case of Janice Bradley.
WT10	Supplementary Proof of Evidence of Janice Bradley.
WT10.1	Supplementary Proof of Evidence of Janice Bradley (WT10) Figures 1-4
WT10.2	Supplementary Proof of Evidence of Janice Bradley (WT10) Appendices
WT11	Proof of Evidence of John Day
WT11a	Summary Proof of Evidence of John Day
WT11.1	Proof of Evidence of John Day (WT11) Maps and Figures.
WT11.2	Proof of Evidence of John Day (WT11) References to Proof.
WT12	Supplementary Proof of Evidence of John Day
WT12a	Summary of Supplementary Proof of Evidence of John Day
WT12.1	Annex 1 of Proof of Evidence of John Day (WT12).
WT13	Draft unsigned Statement of Common Ground relating to development proposals for consideration in an assessment of cumulative effects on Woodlark and Nightjar.

WT13a	Plans to draft unsigned Statement of Common Ground relating to development proposals for consideration in an assessment of cumulative effects on Woodlark and Nightjar.
WT13.1	Appendices to draft unsigned Statement of Common Ground relating to development proposals for consideration in an assessment of cumulative effects on Woodlark and Nightjar.
WT15	Second Supplementary Proof of Evidence of Janice Bradley.
WT15a	Summary of Second Supplementary Proof of Evidence of Janice Bradley.
WT16	Figure 1 referred to in Second Supplementary Proof of Evidence of Janice Bradley (WT15).
WT17	Appendices 1-3 referred to in Second Supplementary Proof of Evidence of Janice Bradley (WT15).
WT18	References referred to in Second Supplementary Proof of Evidence of Janice Bradley.
WT19	Second Supplementary Proof of Evidence of John Day
WT19a	Summary of Second Summary Proof of Evidence of John Day.
WT20	Appendix 1 & 2 referred to in Second Supplementary Proof of Evidence of John Day (WT19)
WT21	Further legal submissions of Graham Machin (Counsel) and supporting references.
WT22	Graham Machin's Comments on Veolia's draft methodology for the in-combination assessment of the proposed Rufford ERF.
WT23	Vision statement for Sherwood Forest Regional Forest Regional Park Draft Version 2.
WT24	Sherwood Forest Regional Park Board Minutes of Meeting 09.03.2010
WT26	Schedule summarising R Buisson noise references
WT27	Rufford LWS notification papers September 2010
WT28	The effects of car traffic on breeding bird populations in woodland (Journal of Applied Ecology 1994)
WT29	Statement to accompany planning application for continued coal stocking and blending operations at Rufford Colliery, Nottinghamshire
WT30	Environment Committee Report (24.04.96)
WT31	Demography and Productivity of Woodlarks lullula arborea in Breckland (Lucy Joanna Wright Jan 2006)
WT32	Spring Hill SINC (LWS) Reptile Fence Photos Taken August 2010
WT33	Photographs to show Rufford Tip Phase 1 Restoration 1996 and 1997 and photos x 2 to show restored heathland habitats
WT34	Notes on Draft S106 agreement
WT35	Second supplementary legal submissions by Graham Machin (Counsel) on behalf of Nottinghamshire Wildlife Trust
WT36	Note for the Inspector from NWT on Lucy Wright's dissertation of which an abstract was circulated at WT31
WT37	NWT's comments on the 10 November 2010 Cala Homes judgment
WT38	NWT's comments on other parties' responses to the Cala Homes judgment

Natural England Documents

NE1	Response to Planning Inspectors Request for Information from Natural England
NE2	2009 - 10 SPA Review Terms of Reference
NE3	Revised Advice Note Rufford ERF (12 Feb 2010)
NE4	NE Statement of Case

NE5	Proof of Evidence of Steve Clifton
NE5.1	Supplement to the NE5 Proof of Evidence
NE5.2	Second Supplement to NE5 Proof of Evidence
NE6	Appendix 1 to NE5 – Revised Response to Planning Inspector's request for information from Natural England
NE7	Appendix 2 to NE5 – An Indicative core Area of Breeding Nightjar and Woodlark in Sherwood Forest
NE8	Proof of Evidence of Neil Pike
NE9	Appendix 1 to NE8: Natural England's response to the Inspector's questions provided on Wednesday 8th October 2009.
NE10	Appendix 2 to NE8 SPA selection guidelines
NE11	Appendix 3 to NE8: Indicative core area for breeding Nightjar and Woodlark in the Sherwood area.
NE12	Appendix 4 to NE8: 2009-10 SPA review terms of reference.
NE13	Letter dated 28th April 2010: Natural England Clarification of Position
NE14	Provisional conservation objectives for breeding nightjar and woodlark populations of the Sherwood Forest Area.
NE15	Letter from Natural England to Bond Pearce dated 24th September 2010.
NE16	Note to advise Inspector on likely effects of the proposed ERF

Statements of Common Ground between Parties

SOCG1	Statement of Common Ground between Veolia and Nottinghamshire County Council acting as Waste Planning Authority.
SOCG2	Statement of Common Ground between Veolia and Newark and Sherwood District Council
SOCG3	Statement of Common Ground between Veolia and PAIN
SOCG4	Statement of Common Ground between Veolia and Nottinghamshire Wildlife Trust
SOCG5	Statement of Common Ground between Nottinghamshire County Council acting as Waste Planning Authority and PAIN
SOCG6	Supplementary Statement of Common Ground between Nottinghamshire County Council acting as Waste Planning Authority and PAIN
SOCG7	Statement of Common Ground between Veolia and Newark and Sherwood District Council dated 3 March 2010
SOCG8	Statement of Common Ground between Veolia and PAIN
SOCG9	Technical Statement of Common Ground between Nottinghamshire Wildlife Trust and Veolia, signed 31 March 2010
SOCG10	Legal Agreed Statement between Nottinghamshire Wildlife Trust and Veolia and Natural England Signed 13 April 2010
SOCG11	Statement of Common Ground between Veolia, NCC and NSDC regarding the revocation of the Regional Plan
SOCG12	Statement of Common Ground between Veolia, Nottinghamshire Wildlife Trust and Natural England