

**IN THE MATTER OF  
THE TOWN AND COUNTRY PLANNING ACT 1990**

**AND IN THE MATTER OF  
NORTHACRE ENERGY FROM WASTE FACILITY,  
WESTBURY, WILTSHIRE.**

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**OPINION**

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1. I am asked to advise Wiltshire Council [‘the Council’] in respect of an application for planning permission for a 243,000 tpa Energy from Waste [‘EfW’] facility [‘the application’] at Stephenson Road, Northacre Industrial Estate, Westbury, BA13 4WD [‘the site’]. The site benefits from permission for a 160,000 tpa Advanced Thermal Treatment [‘ATT’] EfW facility (18/09473/WCM) which was granted in 2019 and, I am instructed, remains extant [‘the extant permission’]. The application seeks a new permission described as ‘Amended energy from waste facility to [the extant permission]’ to use a moving grate combustion technology rather than the approved ATT. The principal differences between the two schemes are summarised in the Planning Statement at paragraph 1.3.1. Pursuant to the locational policies WCS1 and WCS2 of the Wiltshire Core Strategy [‘WCS’], the site is also part of land allocated in the Waste Site Allocations Local Plan 2013 for ‘strategic scale’ waste treatment, a term defined as including EfW. The fuel for the proposed EfW is residual waste. The output is electricity to the grid and steam/hot water. It is accompanied by an ‘R1’ calculation which qualifies it as a ‘recovery facility’ for the purpose of the EU Waste Framework. I have seen emails from Cllr Thorn and Cllr Matthew and have been provided with comments from the planning officer in response. In the light of these, I am asked to advise on ten specific matters, which I set out and then answer below.

2. The following observations, however, set the context for those answers.
3. First, the scheme is for a strategic scale EfW. As such, its location accords with the locational policies in the adopted development plan (the WCS and the Allocations Local Plan). The type of technology (ATT or moving grate) is immaterial to whether it is an EfW. The principle of this type of development at this scale, therefore, accords with the development plan and benefits from the statutory presumption in s.38(6) of the Planning and Compulsory Purchase Act 2004.
4. Secondly, it is proposed to utilise ‘residual waste’. That is, it treats a waste stream which has already undergone sorting and treatment at earlier stages and, being ‘residual’, is now destined to disposal to landfill or export (from the county, or the country) for landfill or recovery elsewhere.
5. Thirdly, it does not appear disputed that Wiltshire generates circa 273,000 tpa of residual (ie after recycling) waste that requires management with a ‘capacity gap’ of 163,000 tpa and an ‘inner market’ capacity gap in the geographic area likely to favour the proposed EfW of 293,000 tpa (including c.52,000 tpa from the adjacent MBT)<sup>1</sup>. Thus, although, a proposal for energy recovery in accordance with the development plan does not need to show need<sup>2</sup>, there is an accepted need for this capacity.
6. Fourthly, the output of the EfW is electricity to grid, with the potential for CHP given the steam and hot water generated. Its projected net power generation is 25.6 Megawatts. While there is a dispute on the carbon calculation between the Applicant’s advisers, Fichtner, and the Council’s, Exeter University’s Centre for Energy and the Environment, I do not understand it to be in dispute that, as a matter of principle, the EfW is a ‘low carbon’ energy source for the purposes of the Glossary of the NPPF and, hence, paragraphs 151 and 154 of the NPPF.
7. Fifthly, a variable part of the residual waste feed stock will be biogenic in origin, so would qualify as ‘renewable’ energy generation.

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<sup>1</sup> See Planning Statement at 3.2.8-3.2.16 and draft Committee Report at 9.1.3; the MBT-derived RDF appears currently to be going to recovery in Germany.

<sup>2</sup> NPPF 154 and NPPW

8. Sixthly, as a result of the R1 calculation, it is accepted that the proposal qualifies as a ‘recovery facility’ which would move the (residual) waste up the waste management hierarchy from disposal. As such, it accords with WCS policy WCS5 and fulfils the two roles identified in the NPPW for EfWs – namely to generate low carbon power and to treat waste so as to divert it from landfill.
9. I now turn to the specific questions posed.
  - i) *What weight should be given to evolving climate change policy (which is less supportive of carbon-generating EfW developments) relative to both national and local planning policies (which are more supportive of carbon generating EfW developments, at least at this time)?*
10. I must start by observing the trite position that weight is for the decision-maker. That said, it will be expected that adopted policy is likely to be worthy of greater weight than emerging policy. This is particularly so where different strands of public policy are concerned. It is apparent, I hope, that how the aims and aspirations of one policy arena are transposed into effect in another arena of policy is, itself, a matter of policy. Thus, it cannot be seen, precisely, how developing climate change policy will manifest in planning policy until such time as (a) it has itself been adopted and (b) it has been incorporated into planning policy, first at a national level and then at a development plan level.
11. In these circumstances, it is quite unimpeachable for the officer to ascribe greater weight to what the adopted national and local planning policies actually say on EfWs, waste treatment and low carbon energy than what might be deduced or gleaned from emerging advice to/thoughts of Government on climate change.
  - ii) *How existing policy fits with the stated aim to deal with the climate change emergency when these issues have not as yet been included in a Development Plan document as the current Development Plan was adopted in 2015?*
12. Existing policy (as relevant for present purposes) fits with climate change issues by virtue of the fact that energy recovery from residual waste is part of the suite of initiatives encouraged in order to ‘de-carbonise’ energy compared to the burning of

fossil fuels and to treat residual waste that would (by definition) be going for disposal to landfill.

13. While a proportion of the feedstock will itself be fossil-carbon derived, it is 'waste' fossil carbon, that needs to be managed, rather than 'virgin' fossil carbon, mined or extracted for the purpose of energy-generation. As such, it already exists in the 'above ground' carbon equation and, rather than being disposed of, it can beneficially be used to displace energy derived from conventional fossil fuels.
14. From my experience in the energy and waste sectors, I am aware of certain objectors to EfWs arguing, on a carbon basis, that it would be better to 'sequester' the fossil-derived carbon in residual waste by burying it – ie disposing of it to landfill – rather than releasing it to the atmosphere as CO<sub>2</sub>. Whatever the merits of that argument (with which I do not here engage), that is not current Government policy. Rather, for climate change reasons and waste management reasons, Government policy is to move to zero landfill, and EfW treatment of residual waste to recover energy from that waste is part of the armoury of measures which are to be deployed. EfW is, for planning policy purposes, a 'low carbon' energy source, even if it is not a 'no carbon' energy source and, so, is encouraged as part of the moves to tackle the 'climate change emergency'.
15. The current development plan reflects that position by providing opportunities for EfWs, as at the application site.

*iii) Assuming the Council can have regard to the NPS for Renewable Energy Recovery as a material consideration in local decision making, does it, read in the context of the Energy White Paper (Dec 2020), assist in confirming that policy for waste (in the NPPF and relevant Wiltshire DPDs) is not 'trumped' by evolving climate change policy?*

16. The December 2020 Energy White Paper confirms in terms that while the review of NPS policies is being undertaken, 'the current suite of NPS remain relevant government policy and have effect for the purpose of the Planning Act 2008.' While NPS for Renewable Energy Recovery (EN-3) applies directly to development consents for installations generating more than 50MW, it is widely used to indicate Government

policy in respect of smaller schemes for renewable energy, along side the NPPF and the NPPW.

17. Until the NPS has been replaced, therefore, and the NPPF or NPPW replaced or amended to reflect an altered national stance, planning policies remain applicable as currently drafted. Within these EfW has a positive role to play in promoting the low carbon economy and in sustainable waste management.

iv) *(a) In the event of planning permission being given for the Northacre planning application, should Wiltshire Council impose a planning condition requiring a scheme for [Carbon Capture and Storage] or [be Carbon Capture Ready] to be submitted and implemented (for CCS immediately, or for CCR when economically feasible, or is this a matter which can reasonably be left to other regulatory regimes (such as Environmental Permitting)? And could the Council reasonably refuse the application on the grounds that it does not make any provision for CCS and would therefore result in an unacceptable rise in CO2 emissions? – this is going back to the first question, what weight to give to climate change policy?*

18. I do not consider that such a condition could be imposed. It does not appear to be in dispute that CCS is not yet economically or technically feasible in respect of this scheme<sup>3</sup>, and I have not seen evidence to indicate whether or how that might change in a way that could be captured by a planning condition that meets the relevant tests.

19. It follows that the scheme could not, in my view, be refused on the grounds that it does not include CCS or CCR, as, in this case, it appears not to be feasible.

v) *The role of planning when dealing with other regulatory regimes when thresholds within those other regulatory regimes may not capture all known areas of concern in an evolving area (air quality)?*

20. It is best to deal with this theoretical question in the practical context before me. If, here, the ‘evolving area (air quality)’ is an allusion to public concern about health impacts of air pollution (and in particular the effects of particulate matters), it is for the planning system to defer to the Government’s approach that such matters are safeguarded by Public Health England advising the conduct of the permitting regime.

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<sup>3</sup> As stated in the application’s accompanying Carbon Assessment.

Actual health impacts are, therefore, something which the local planning authority may legitimately consider are adequately safeguarded, as is advised in para. 183 of the NPPF.

21. Adverse effect in planning terms of genuine health concerns among the local population (albeit not justified on current evidence) *may* be taken into account, if evidenced. The invariable practice of Inspectors and the Secretary of State, however, is to accord it very little or negligible weight in the planning balance, for the very reason that the validity of those concerns are currently unproven; better dissemination of the safeguards built into the public health regime should allay all but irrationally held belief; and planning permission should not be withheld on the basis of irrational belief, even where genuine.

vi) *What is the fallback position when there is an extant scheme which may not be viable?*

22. For there to be a ‘fallback’ in terms of law, there needs to be an extant permission which is capable lawfully of being implemented and completed. I understand that it is not disputed that the extant permission constitutes a fallback in those terms.

23. However, when it comes to giving *weight* to that fallback it is necessary to look at the likelihood of that legal position being put into effect in practice. The greater the likelihood, the greater is the weight that can be given; the lesser the likelihood, the lesser the weight.

24. I consider the matter further under the next question.

vii) *The Appellant has styled their application as an ‘amended energy from waste facility’ clearly putting some reliance on the fact that the Council has previously approved an ATT plant in the same location. However, the view of planning officers is that little weight can be given to this fall-back position in the planning balance as the applicant have themselves indicated that they consider the consented scheme to be unviable, and in addition, the carbon impacts are materially different due to the change in technology being used. Officers are therefore minded to advise members that in these circumstances, the fallback position carries little weight as (1) it is unlikely to be built due to viability issues and (2) utilises materially different technology. Does Counsel agree with this approach?*

25. I understand that the planning officer's thinking at the moment is to give 'significant weight' to the fallback position. The question above seems to alter that approach. While weight is a matter for the decision-maker (the professional officer authoring the report in this case), I am not aware of a change of circumstances between the two conclusions. I am aware, of course, that the officer may not have reached a concluded view yet.
26. Certainly, passages in the ES (eg paragraphs 3.2.6-3.2.8 in Vol. 1) talk quite negatively in terms of viability and likelihood of a deliverable ATT scheme. The Planning Statement para. 1.2.4, is more equivocal, expressing a commercial and operational preference for the tried and tested moving grate system. The question of viability and, hence, likelihood of delivery and, hence, weight to the fallback is, therefore, an open one for the officer to reach a conclusion. Confirmation could be sought from the Applicant as to whether it would develop the extant ATT if the current application were refused permission (locally and/or at appeal).
27. As to the difference in technologies, policy is 'technology blind' when it comes to types of EfW. I can see that relative differences in carbon emissions could be a potential consideration in distinguishing between the two schemes, but so would the different tonnage capacities and flexibility in treating waste streams and hence diverting residual waste from landfill and moving its management up the waste hierarchy. The current application remains a 'low carbon' energy proposal for the purposes of the NPPF and accords with the development plan locational policies. It is not a legitimate planning objection to a policy-compliant scheme that another policy-compliant scheme is 'lower' carbon.

*viii) Comment on the Planning Officer's draft responses to Councillor Matthew's three questions outlined in the Instructions.*

28. Through email correspondence dated 13<sup>th</sup> July 2020-23<sup>rd</sup> November 2020, Cllr Brian Matthew has raised three questions (numbered by him questions 1, 2 and 3, but lettered in my Instructions A, B, and C) and set out the contextual background to his concerns. I have been helpfully provided with the case officer's comments in respect of those questions. For the reasons below, I consider that the officer's response is appropriate.

29. Question 1 (A) concerns health impact (in particular, ‘ultrafine’ particles) and the operation of para. 183 of the NPPF. It is the role of the Environment Agency operating the permitting regime to regulate the stack emissions in respect of their impacts on public health, and it is the role of Public Health England to oversee that regime’s effectiveness in those terms. Thus, it is within PHE’s jurisdiction in protecting public health both *what* emissions are to be regulated and what *limits* if any are to be imposed. These being are matters on which PHE advises the permitting regime, as necessary (or not) in the interests of public health, based on the best epidemiological evidence available to it, it is not the role of the planning regime to seek to replicate or depart from that position.
30. Both the permitting regime by the EA and the overview of public health matters by PHE are settled regulatory regimes upon which the Council can rely in the discharge of *its* functions as local planning authority. There may be public concerns about the health effects of ultrafine particles, but the Council is entitled to rely on PHE’s consultation response and, in doing so no separate ‘duty of care’ on the part of the LPA, (as questioned by the Councillor in Qu. 3(C) below), is engaged.
31. Question 2 (B) concerns the assessment of alternatives under the EIA Regulations. The officer is correct that the obligation is to report the alternatives assessed, rather than to assess any specific alternatives. As the application is for energy recovery from and treatment of residual waste, it is perfectly reasonable to have considered alternatives that would achieve that purpose.
32. Question 3 (C) concerns a duty of care on behalf of the Council to protect the public in its decision-making. This appears to be a return to Question 1/A. The officer’s response is correct. The local planning authority is entitled, for the purposes of public health, to rely on the permitting regime, and as a matter of policy is directed by Government to assume that that regime operates effectively<sup>4</sup>.

*xi) Provide a considered view on the issues raised by Councillor Thorn (Leader of the Opposition) in his email of 5 January 2021 to help inform the Council’s response to the queries he has raised and for the report to the Strategic Planning Committee.*

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<sup>4</sup> NPPF para. 183



33. Cllr Ian Thorn set out five questions in his email of 5<sup>th</sup> January 2021. The email, and questions, specifically reference the correspondence of Cllr Matthew under cover of his email of 23<sup>rd</sup> November 2020 (see my Instructions: Question (x), above).
34. Question 1 concerns ultrafine particles and is closely related to Cllr Matthew's Question 1. The answer is the same: what constituent of the stack emissions is monitored and what is regulated and to what standards, if regulated, it is limited are all matters for the permitting regime, operated by the EA, governed by PHE to protect public health. The Council is entitled as a matter of law, and expected as a matter of policy to assume that that regime operates effectively.
35. Question 2 concerns air quality monitoring stations. I have no information on these. If they are future monitoring stations, required under the environmental permit, they will be regulated by the EA. If they are existing monitoring stations, for example if the Council has such operated by the EHO for monitoring AQMAs, their operation would remain as now.
36. Question 3 concerns 'ground plume modelling'. This is a matter relevant to the environmental permit. Its consideration may have affected the proposed stack height, which may then have visual or landscape implications for the planning authority, but its public health impact is for the permitting regime.
37. Question 4 elides the issue of waste composition and treatment under the Waste Hierarchy Regulations and the issue of 'alternatives' under the Planning EIA Regulations. The former is relevant to the creation of the 'RDF' used by the proposed EfW; that is not for the local planning authority to regulate, it needs only impose a suitable condition that the feedstock conforms to the definition of RDF. The latter is essentially the same as Cllr Matthew's Question 2; as is the answer.
38. Question 5 concerns the Council's duty of care and is essentially the same as Cllr Matthew's Question 3; as is the answer.

ix) *Advise generally.*

39. I have no specific further advice to give beyond the above, and to observe that I consider the current approach of the planning officer to be unimpeachable in its approach, given that this is an allocated site for the purpose of the use proposed, in the context of a continuing need and a lawful fallback.
40. I have not entered into the detail of the rival carbon calculations (and their various input factors) but I do offer a word of caution about adopting the (Exeter) position that dismisses the comparator to landfill in its entirety. Other than export (to landfill out of the county or to recovery out of the country), landfill does appear to be the destination of this residual waste. While landfill CO2 generation assumptions can be argued about, the residual waste arisings do not simply ‘evaporate’ if they are not managed here: there is a continuing tonnage per annum that will need to be managed beyond current capacity.
41. That said, I note that the officer has concluded that there is no need to choose between the two rival carbon calculations: EfW is a ‘low carbon’ energy source and a waste management process encouraged by policy and for which there is a continuing need. I agree with that conclusion.
42. I am not asked to and make no comment on any other planning merits of the application.

CHRISTOPHER BOYLE QC

5<sup>th</sup> February 2021

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