RENEWABLE ENERGY CENTRE, KEYPOINT, SWINDON

Appellant's Closing Submissions

What's this all about?

1. Government policy on additional Energy from Waste (**"EfW"**) infrastructure is clear.

2. It was stated recently by DEFRA in the December 2018 Waste Strategy[1]:

   (i) "**Given our projections we continue to welcome further market investment**" in EfW infrastructure[2];

   (ii) Why? Because: disposal of waste to landfill is "the **worst option**"[3] which must be "**minimised**".[4]

3. Mr Dewart said that diverting waste from landfill is "*nothing to shout about*". That was an odd thing to say. In c/ex he accepted that providing facilities to assist in moving waste up the hierarchy away from landfill is *consistent with waste policy at every level*.

4. *On any reckoning* and however much one picks and pulls at the figures, the proposed Renewable Energy Centre ("**REC**") would enable the diversion of a great deal of waste away from *unsustainable* landfill and the reduction of *unsustainable* exports of waste. When all is said and done, **these are good outcomes** which should indeed be welcomed.

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[1] CD11.17.

[2] CD 11.17, p.79 with our emphasis added – in this Closing we add emphasis throughout for clarity.

[3] CD11.17, P.20.

[4] CD11.17, P.79.

Why are we here? The reasons for refusal:

> "1. The proposed Renewable Energy Centre would introduce a **visually dominant**, intrusive and unsightly feature in a highly prominent location, which would substantially harm the visual setting of Swindon and its surrounding local area and which could prejudice delivery of Swindon's development strategy, contrary to Policies SD1, SD2, DE1, NC3 and RA3 of the Swindon Borough Local Plan (2015)."

5. We know now that this reason for refusal is about the stack. There is no hiding an EfW stack. That's an inevitable outcome of EfW facilities anywhere. They tend to be tall.[5] The stack would be an industrial feature in views but to say that it would be visually **"dominant"** is an exaggeration.

> "2. The applicant has failed to demonstrate a need for the strategic scale waste management facility. In the absence of a **local** need, and in the absence of a robust assessment of potentially suitable sites closer to the source of the waste, waste would need to be transported to the facility from beyond the **local** area, contrary to the proximity principle and contrary to the principles of sustainable development. The proposal is therefore contrary to Policies WSC1, WSC2, WSC3 and WSC5 of the Wiltshire and Swindon Waste Core Strategy (2009), Policies WDC1, WDC2 and WDC11 of the Wiltshire and Swindon Waste Development Control Policies DPD (2009), Policy TR2 of the Swindon Borough Local Plan (2015), the UK's National Planning Policy for Waste (2014) and the Waste Management Plan for England (December 2013)."

6. We know now that "local" means **Wiltshire**. But this is a *strategic* EfW facility and given the location of Swindon in relation to the rest of Wiltshire (in the top NE corner) and because of this its close proximity to areas outside Wiltshire *it is inevitable* that the catchment for a commercial ("market") strategic EfW facility would extend beyond the county boundary and that there would be cross-boundary movements of waste to it. *In other words,* to criticise a facility like this because its market (the "need" for it) wouldn't

[5] See the schedule of strategic scale EfW facilities put in by the Appellants. (As opposed to the two small scale facilities in Mr Dewart's note.) Our 52 metre stack is by no means exceptional, many are a great deal higher.

simply be "local" (Wiltshire) and that its feedstock wouldn't simply come from "the local area" (Wiltshire) is to criticise the inevitable. It can't be a sensible reason for refusal. It's tilting at windmills.

What about the Development Plan?

Wiltshire and Swindon Waste Core Strategy ("**WCS**")[6]

7. Before we address the policies cited in the RfRs, we make two important points about the WCS:

   (i) First, the plan anticipates that strategic facilities will serve a regional or sub-regional catchment beyond the boundaries of Wiltshire; and

   (ii) Second, to allow for flexibility, the WCS makes provision for unallocated waste treatment facilities to come forward.

8. We emphasise these two points because to a great extent the Council's case rested on the "plan-led system" and the argument that the plan is based on allocating sites to meet Wiltshire & Swindon's needs, whereas the appeal site isn't allocated and its feedstock wouldn't be "local". To which one might well say – "so what"?

9. On the first point (catchments beyond Wiltshire's boundaries):

   (i) **The WCS** anticipates the movement of waste across Wiltshire's boundaries.[7]

[6] CD7.1

[7] CD7.1, §5.3.

(ii) That point is particularly important for "strategic" – rather than "local" – facilities. The plan expects such facilitates to "operate in a wider strategic manner" serving a "wider catchment" [8] and "surrounding local authorities" "in a more sub-regional context".[9]

(iii) Local facilities – in contrast – are said to complement the "County, Borough **and Regional** level solutions provided by strategic waste management facilities".[10]

(iv) So as far as the WCS is concerned, strategic facilities are expected to serve and have larger catchment areas which extend beyond the plan area. Miss Darrie accepted that in c/ex.

10. On the second point (flexibility and unallocated sites):

(i) Miss Darrie's central criticism of the REC is that it is not on an allocated site for waste treatment.[11] But that is a bad point. Because she accepts that the WCS anticipates and makes provision for unallocated sites. That much is obvious from the plan. The point was noted by the WCS Inspector, who said that:

> "Core strategy policies operate not only upon the allocation of sites for waste management development, but upon planning applications for waste management sites including 'windfall' proposals."[12]

[8] CD7.1, §5.6.

[9] CD7.1, §5.7.

[10] CD7.1, §5.8.

[11] See e.g. her PoE at §3.2.15.

[12] CD7.15, §3.50.

(ii) The plan consistently emphasises the need for flexibility,[13] and makes clear that its "network" of sites must adapt and respond to changing needs.[14]

(iii) Any suggestion that "flexibility" in the plan refers only to an "over-allocation" of sites is not right. See e.g. the WCS Inspector's report at §3.50, and how **WCS3** refers to "sites not contained in the Site Allocations DPD will also be considered in order to provide **flexibility**."

(iv) The appeal site is not allocated for waste treatment. But that does not contravene the development plan nor is it inconsistent with the plan. The plan's allocations were never intended to be frozen in time nor to be an exclusive closed list of sites. The plan refers to adapting to changing circumstances,[15] including through the "flexibility" to deliver waste treatment on unallocated sites under WCS3.

(v) That point is particularly important in Swindon because circumstances have changed a good deal since the 2013 Site Allocations Local Plan ("**SALP**").[16] The Council recently granted planning permission for a primary school on *the only site in Swindon* (Chapel Farm, Blunsdon) specifically earmarked in the SALP for strategic EfW.

(vi) So, the Council's notion that, even in those circumstances, an EfW proposal on an allocated employment site within (well under) 16km of Swindon would somehow contravene the plan-led system is, with respect, incomprehensible.

[13] See e.g. the 2nd strategic objective on p.16, §5.4, §5.5, §5.16, §5.17 and WCS3.

[14] See e.g. §5.5.

[15] See e.g. Chapter 6 of CD7.1 from p.28.

[16] CD7.3.

11. We now address the policies in the reasons for refusal.

- WCS1

WCS1: The Need for Additional Waste Management Capacity and Self Sufficiency

Over the period to 2026, Wiltshire and Swindon will address the issue of delivering sufficient sites to meet the needs of the municipal waste management strategies and sub-regional apportionments by providing and safeguarding a network of Site Allocations. The framework of sites will manage the forecast increase in waste arisings associated with the planned growth in the Strategically Significant Cities and Towns (SSCTs) of Swindon, Chippenham, Trowbridge and Salisbury. Rural locations within Wiltshire and Swindon will also be provided with a network of local scale sites to serve local needs where capacity gaps arise. Need will be met locally whilst balancing the importation and exportation of waste within the principles of sustainable development and in accordance with the principles of sustainable transport.

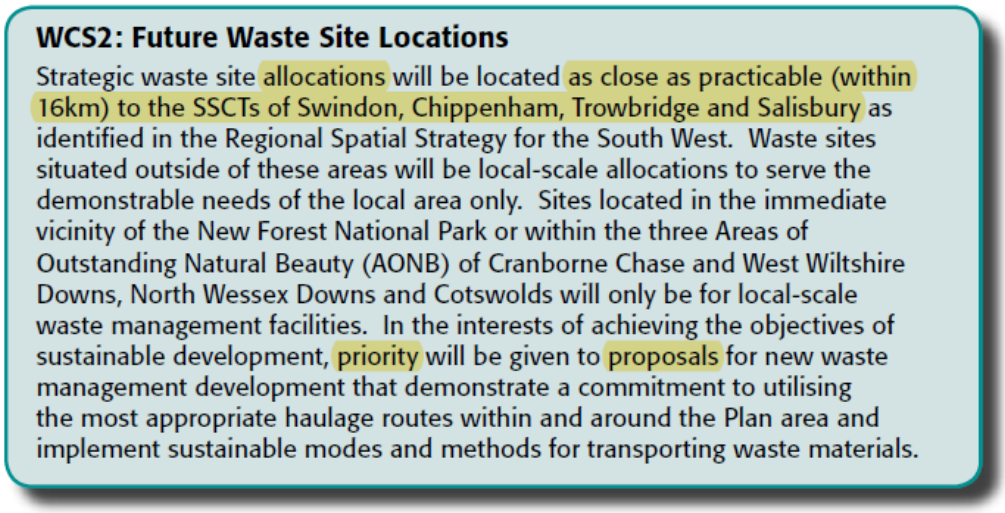
12. The 2nd reason for refusal contends that the proposed REC is "contrary to" WCS1.

13. That cannot be right – WCS1 is simply *a scene-setting policy for the WCS and what's to come in the Allocations DPD*. It is a policy about what *the plan* will do. It is not *a development management policy* at all and also it is irrelevant to the consideration of a proposal on an unallocated site – for which the WCS makes specific provision in WCS3.

14. Accordingly, the proposed REC cannot be contrary to WCS1.

15. Nor is it coherent or sensible to say of a proposal like ours on an unallocated site that it is "not consistent with" WCS1 – as WCS1 doesn't address the subject of unallocated sites at all (*WCS3 does*; WCS1 doesn't) it is ***a false test*** to seek to apply WCS1 to an unallocated site (as Miss Darrie sought to). It is crying for the moon.

- WCS2



WCS2: Future Waste Site Locations

Strategic waste site allocations will be located as close as practicable (within 16km) to the SSCTs of Swindon, Chippenham, Trowbridge and Salisbury as identified in the Regional Spatial Strategy for the South West. Waste sites situated outside of these areas will be local-scale allocations to serve the demonstrable needs of the local area only. Sites located in the immediate vicinity of the New Forest National Park or within the three Areas of Outstanding Natural Beauty (AONB) of Cranborne Chase and West Wiltshire Downs, North Wessex Downs and Cotswolds will only be for local-scale waste management facilities. In the interests of achieving the objectives of sustainable development, priority will be given to proposals for new waste management development that demonstrate a commitment to utilising the most appropriate haulage routes within and around the Plan area and implement sustainable modes and methods for transporting waste materials.

16. The 2nd reason for refusal contends that the proposed REC is "contrary to" WCS2.

17. That cannot be right. The policy concerns where allocations were to be located[17]. The appeal site is not on an allocated site and so the appeal scheme cannot be "contrary to" WSC2.

18. However, the appeal site is located "as close as practicable (within 16km) to" Swindon and so is consistent (not inconsistent) with WCS2's underlying locational strategy.

19. Miss Darrie accepted both points (no breach and consistency with the underlying locational strategy) in c/ex. She was right to do so.

20. The last sentence of WSC2 applies to "proposals"; given that (i) the Council agrees that the REC would utilise the most appropriate haulage routes[18] and (ii) the site is close to

[17] Apart from the last sentence which applies to proposals more widely.
[18] SoCG p.25 issue2(g).

a rail terminal, if anything rather than being "contrary to" WSC2, the appeal proposals should be given the (favourable) "priority" referred to.

- WCS3

WCS3: Preferred Locations of Waste Management Facilities by Type and the Provision of Flexibility

[…]

Waste Management Facility	Preferred Location
Non-Hazardous / Hazardous Landfill	Adjacent to Existing Landfill Facilities As Part of the Restoration of Mineral Workings (where appropriate)
Inert landfill	Adjacent to Existing Landfill Facilities
Materials Recovery Facilities	Industrial Land / Employment Allocations
Waste Transfer Stations	
Household Recycling Centres	Site Allocations and Current Waste Management Facilities
Recycling Facilities	
Mechanical Biological Treatment Facilities	
In-Vessel Composting Facilities	
Anaerobic Digestion Facilities	
Energy from Waste Facilities	

21. The 2nd reason for refusal contends that the proposed REC is "contrary to" WCS3.

22. The policy has been treated as if it is in two parts. The **first part** is set out above. Our case in a few words is simply that the proposed REC cannot be "contrary to" this part of the policy as the appeal site is an Employment Allocation and thus a "preferred location" for EfW. Miss Darrie accepted this in c/ex as did Mr Dewart.

23. Subsequently, Mr Maurici QC has suggested that this part of the policy is concerned only with steering what was then the forthcoming Allocations DPD. We disagree **but** even if Mr Maurici's interpretation is accepted, the appeal site is consistent with (and

not inconsistent with) the underlying objective of the policy i.e. that EfW facilities should be sited on employment allocations.

24. And so, however one interprets this part of the policy, the proposed REC cannot be contrary to it.

25. Turning to the **second part** of WCS3:

> Sites not contained in the Site Allocations DPD will also be considered in order to provide flexibility if they can be demonstrated by the applicant to be in accordance with all relevant provisions of the Strategy, objectives and policies of Waste Development Plan Documents. Strategic sites must be supported by an independent Sustainability Appraisal / Strategic Environmental Assessment (SA/SEA) report and all other relevant assessments. As part of the SA/SEA report the Councils will expect to see a full consideration of suitable alternative sites, especially of those contained in the Site Allocations DPD.

26. This is the part of the policy which allows for flexibility so that unallocated sites can come forward and so, the proposed REC cannot be contrary to it simply by virtue of the appeal site not being allocated.

27. It is our case that the proposed REC is in accordance with all **"relevant"** provisions, objectives and policies – see what is said above about **WCS2** and the first part of **WCS3** and what is said below about **WSC5** – and so, the proposed REC is consistent with this aspect of WCS3 which (perfectly sensibly) allows for unallocated sites to come forward if they align with the underlying objectives of the waste plans, as the appeal site does.

28. That leaves the issue of whether the Appellant was required under this part of the policy to submit "a full consideration of suitable alternative sites". For reasons which we will come to, we don't agree that we were **but** if we are wrong about this it really doesn't matter as an Alternative Sites Assessment (**"ASA"**) was submitted with our Statement

of Case thus satisfying this requirement. Accordingly, the application is not "contrary to" this part of WCS3 either.

29. Miss Darrie criticised aspects of the ASA. However, a "right" way of carrying out an ASA isn't set down anywhere – we did it our way, she would have done it her way. We'll come to the detail later on but one must be careful not to get distracted by all this. There is a much simpler point to be made. Although much of what we have done isn't criticised, Miss Darrie does disagree with some of the *planning judgments* made in the ASA **but** let's face it, it is highly unlikely that an ASA will be agreed with across the board.

30. Whether an alternative site is "suitable" or not is quintessentially a matter of planning judgment which reasonable people might well hold different views about.

31. The 2nd reason for refusal refers to "the absence of a robust assessment of potentially suitable sites closer to the source of the waste". It would be best to stick with the words of the policy (if they apply in the first place) which simply requires "a full consideration of suitable alternative sites." The ASA is just that. One might disagree with some of its planning judgements but that doesn't make it something other than "a full consideration of suitable alternative sites".

32. It is also important to remember the Council does not contend that there is a (more) suitable alternative site for the proposed REC than the appeal site, which puts this part of the Council's case in its proper context.

33. We will now discuss whether we were required to submit an ASA in the first place.

34. As submitted above (in relation to the first part of WCS3) the appeal site as an employment allocation is a "preferred location" for EfW. If this is accepted then it follows that the plan does not require an alternative sites assessment – see the explanatory text at WCS §5.17 (with emphasis added):

> 5.17 In order to allow for flexibility in terms of precisely which form of facility can be located in a particular location, the policy also outlines an approach for dealing with proposals put forward outside of the preferred locations. In such circumstances, sites that do not fall within preferred locations will be considered on their merits as long as they can be demonstrated by the applicant to be in accordance with all relevant provisions of the Strategy as well as the objectives and policies of other Waste DPDs, the RSS and national policy. It is important to note that such sites must be supported by an independent Sustainability Appraisal / Strategic Environmental Assessment report (SA/SEA) and other relevant assessments in order to justify consideration as exceptions to the Strategy and site selection methodology.

35. That supporting text is "plainly relevant to the interpretation of a policy to which it relates"[19]. Its role in clarifying the meaning of WCS3 is particularly important when the policy to which it relates is "ambiguous"[20]. And Miss Darrie was right to agree in c/ex that this part of WCS3 is ambiguous:

> Sites not contained in the Site Allocations DPD will also be considered in order to provide flexibility if they can be demonstrated by the applicant to be in accordance with all relevant provisions of the Strategy, objectives and policies of Waste Development Plan Documents. Strategic sites must be supported by an independent Sustainability Appraisal / Strategic Environmental Assessment (SA/SEA) report and all other relevant assessments. As part of the SA/SEA report the Councils will expect to see a full consideration of suitable alternative sites, especially of those contained in the Site Allocations DPD.

[19] *R (Cherkley Campaign Ltd) v Mole Valley District Council* [2014] EWCA Civ 567 at §16.

[20] *Phides Estates (Overseas) Ltd v Secretary of State for Community and Local Government* [2015] EWHC 827 (Admin) at §26.

36. It is ambiguous not least because it refers to SA/SEA (see the submissions below – SA/SEA do not apply to planning applications). But any ambiguity is clarified by §5.17 which, as seen above, makes clear that the need for SA/SEA only arises for strategic sites not allocated in the SALP which fall outside preferred locations.

37. On this interpretation, we are not required to submit an ASA.

38. In any event, even if the final two sentences of WCS3 *do* apply to this scheme, what can the references in them to SA/SEA sensibly mean when it comes to the consideration of a planning application?

39. Read literally, the policy makes no sense: SA / SEA simply cannot be required of individual planning applications. It is impossible as a matter of law. Miss Darrie was right to accept in c/ex that the requirement for a SA/SEA makes no sense because SEA applies only to plans or programmes (like the Waste CS and the Allocations DPD), and not to individual planning applications: see the legal annex to these closing submissions.

40. There has been some "shock horror" expressed about the notion that a policy which has been through examination and been found sound doesn't make sense – indeed, that it is nonsense. It certainly shouldn't have happened. But it has and the result is a policy which asks for something to be done that literally cannot be done. It's not our responsibility or fault that this part of the plan is in such a sorry state.

41. **But** the objective of the policy is, we say, obvious. It aims to ensure that any significant environmental impacts of planning applications for strategic waste treatment applications are properly assessed. The *only* legal vehicle to achieve that objective is not SEA but EIA.

42. The point is a simple one – references in the policy to SA/SEA should be read as references to EIA. By doing so the policy fits the legal framework and doesn't overstretch itself in terms of the scope *in law* of SA/SEA on the one hand and EIA on the other.

43. And so, Mr Burrell was right that the requirement can only sensibly be interpreted so as to impose a requirement to consider e.g. alternatives as part of the EIA process. But on that, as we explain in the legal annexe to these closing submissions:

    (i) The obligation in the EIA Regulations covers only the alternatives which the developer has in fact considered. The Regulations do **not** require alternatives which have not been considered by the developer to be covered, even though the local planning authority might consider that they ought to have been considered.[21]

    (ii) An EIA requires only the "main reasons" (and not a full environmental assessment) for selecting the preferred option to enable people to comment on the alternatives.[22]

44. Even if Mr Maurici's position is correct, and somehow an SA/SEA-style assessment is required to support an individual planning application, even then the legal requirement would be only to include the main reasons[23] for selecting the preferred option over the reasonable alternatives, and those reasons only need to be outline.[24]

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[21] *R (Bedford and Clare) v London Borough of Islington* [2002] EWHC 2044 (Admin) at §224.

[22] *R v Secretary of State for the Environment, Transport and the Regions, ex p Challenger* [2001] Env LR 12 at §60-§61.

[23] *R. (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2016] Env. L.R. 1 at §88(xii).

[24] §8 of Schedule 2 to the Environmental Assessment of Plans and Programmes Regulations 2004.

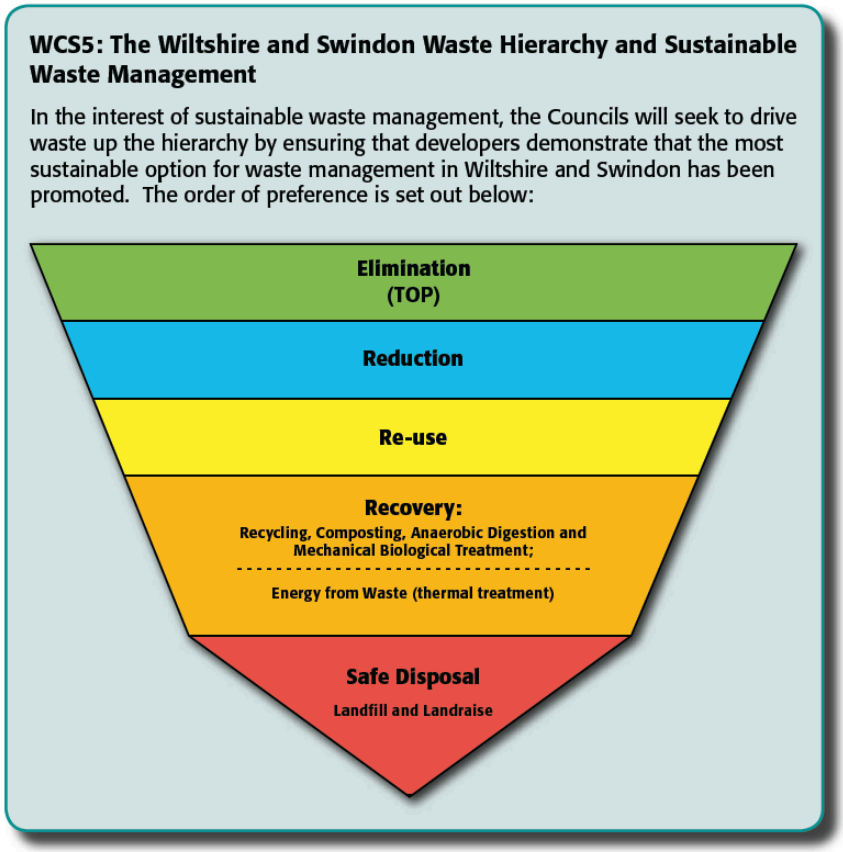
45. And so, whether it is to be EIA or something akin to an SEA, there is no basis for Miss Darrie's evidence[25] that the policy requires a particularly "rigorous" approach to alternatives. And there is no support for her contention that in order to apply for planning permission on an unallocated site, an applicant is required by WCS3 to "benchmark" its search for alternative sites against the SEA work that informed the Council's Allocations DPD. That is not what the policy says and it cannot possibly be what it means. It would be absurd to interpret WCS3 as imposing that kind of obligation on individual applicants for planning permission.

46. Remember all the time that the policy simply asks for "a full consideration of suitable alternative sites". Let's just stick to the words of the policy rather than over-reading it.

47. In any event, and as submitted earlier on, even if WCS3 *does* require an alternative sites assessment, one was supplied. One might agree or disagree with its conclusions but come what may, it met the terms of the policy.

[25] §3.2.43 PoE.

WCS5



48. The 2nd reason for refusal contends that the proposed REC is "contrary to" WCS5.

49. It is not.

50. WCS5 categorises EfW as "recovery", which is higher in its "order of preference" than landfill.

51. Accordingly, as Miss Darrie rightly accepted in c/ex, the proposed REC (a) does not breach WCS5, and (b) is consistent (and not inconsistent) with that policy.

52. Notwithstanding Miss Darrie's answers, Mr Maurici QC asked questions of several witnesses seeking to keep the Council's WCS5 objection alive. What was telling each time was how those questions were built on a long string of "ifs" – e.g. *if* there were in the future to be national EfW over-capacity, and *if* that national picture translated to

over-capacity within Keypoint's catchment (notwithstanding Mr Brown's evidence that it would not), and *if* that led to the REC's feedstock not being otherwise destined for landfill, and *if* faced with that challenge, the REC sought to fill the gap by diverting material which would otherwise have been re-used or re-cycled (and not e.g. by competing for RDF which would otherwise have been exported, or by taking residual waste from a wider catchment), *then* might there not be, Mr Maurici suggests, a "risk" - he does not say a likelihood or anything approaching a likelihood – that the order of preference in the waste hierarchy would be subverted.

53. But there is **no evidence** to substantiate Mr Maurici's "risk" that the REC would divert material away from being recycled. On the contrary, as Mr Crummack explained, all the evidence points in the other direction. There is considerable value in recyclable material which makes sending it to EfW uneconomical. When markets crash, producers tend to store it until it is economical to recycle it, rather than sending it to recovery. Further, as Mr Parkes explained, across Europe the countries with the greatest EfW capacity tend also to have the highest recycling rates, and those recycling rates are continuing to increase.

54. The point is a simple one. There is no need to make it obscure or complicated. Look at the hierarchy in WCS5 – the proposed REC is consistent with it.

Waste Development Control Policies Development Plan Document 2009[26]

55. The 2nd reason for refusal contends that the proposed REC would be "contrary to" three policies of the WDCP DPD, namely WDC1, 2 and 11.

56. The proposed REC is not contrary to any of these policies.

57. As best as we can tell, these policies are cited to tie in with that part of the reason for refusal which suggests that **"waste would need to be transported to the facility from beyond the local area"** - as we now know that "the local area" means Wiltshire the point concerns the movement of waste across the county boundary. In other words, it's a transportation point.

58. But, as we have seen earlier on, the WCS recognises that for strategic facilities like the proposed REC there will be cross-boundary movements of waste, and given the geographic location of Swindon in relation to Wiltshire, a strategic EfW facility is bound to rely to a greater or lesser extent on waste imported from outside the county.

59. This should be borne in mind as the context for the consideration of these policies. It is impossible to see how one can be contrary to the plan by doing the very thing that the plan contemplates.

60. **WDC1**[27] refers to keeping **"adverse impacts – including cross-boundary …impacts - …to an acceptable minimum"** and that **"where appropriate: …the impact of transporting waste to and from the site is minimised."**

[26] CD7.2.

[27] CD 7.2 page 11

61. As Miss Darrie confirmed in c/ex, the Council does not object to the proposed REC on transportation grounds; the Council does not specify any adverse impacts that have not been kept to an acceptable minimum, nor any transportation impact that has not been minimised.

62. **WDC2**[28] refers to avoiding, or mitigating, or compensating **"for significant adverse impacts relating to: …transportation of waste."**

63. Miss Darrie confirmed in c/ex that the Council takes no issue on transportation impacts under this policy. The Council has not specified any significant adverse impact that hasn't been avoided, or mitigated, or compensated for.

WDC11: -

> **WDC11: SUSTAINABLE TRANSPORTATION OF WASTE**
>
> Waste management development will be permitted where it is demonstrated that the proposals facilitate sustainable transport by (where they are relevant to the development):
>
> - Minimising transportation distances
> - Maximising the use of rail or water to transport waste where practicable
> - Minimising the production of carbon emissions
> - Ensuring a proposal has direct access or suitable links with the Wiltshire HGV Route Network or Primary Route Network
> - Establishing waste site transport plans
> - Mitigating or compensating for any adverse impact on the safety, capacity and use of a highway network.

64. On WDC11[29]:

(i) Of the 6 bullet points, it is only the 1st which appears to be in play – the Council takes no issue against the proposed REC in relation to the 2nd – 6th bullet points.

[28] CD7.2 page 15
[29] CD7.2 page 31

This is significant in its own right because the plan (and individual policies within the plan) needs to be read as a whole. A similar point arises from the words in the policy itself namely *"where they are relevant to the development."*

(ii) We consider that all 6 bullet points – including the 1st - are met.

(iii) The Council has made two arguments concerning the 1st bullet point. Argument (1) was made by Miss Darrie and referred back (once again) to the importation of waste from outside Wiltshire; we have repeatedly made the point earlier on in these submissions that this is a bad argument.

(iv) Argument (2) was made by Mr Maurici QC in c/ex and runs along these lines – the Appellant does not know where the waste would actually come from and therefore the Appellant cannot demonstrate that transportation distances would be minimised. **But** it must be kept in mind that a commercial "merchant" facility like the proposed REC (as opposed to a local authority sponsored facility designed e.g. to process its MSW) will never have feedstock supply contracts in place at the time of a planning application being made, and the very nature of a commercial facility is that it would seek to compete on price (and the effect of proximity in reducing transport costs) in the market. Accordingly, *and by definition,* the promoters of a proposal for a commercial EfW will never know at the planning application stage where the waste feedstock would actually come from and so, on Mr Maurici's "logic" would never be able to demonstrate that transportation distances would be minimised. This should tell us that Mr Maurici's approach involves a **false test**.

(v) Instead of being so unrealistic and over-exacting, the better approach for a facility of this nature is to take a reasonable and sensible catchment area for assessment purposes – that's what we have done by adopting a 1-hour drivetime (c27 miles) catchment for sourcing the proposed REC's feedstock. Miss Darrie does <u>not</u> suggest any smaller catchment area; indeed, she confirmed in c/ex that the 1 hour catchment was reasonable and sensible. Accordingly, as best as one can at this stage, that is sufficient to demonstrate that transportation distances have been minimised.

<u>Swindon Local Plan</u>

65. The final policy which the 2nd reason for refusal says we are "contrary to" is Local Plan policy **TR2.**[30]

66. The proposed REC is <u>not</u> contrary to TR2.

67. The policy is all about encouraging walking, cycling, the use of the bus and managing general traffic, access, highways, parking matters. No particular breach of policy TR2 is alleged. Mr Dewart's argument on this policy[31] relates only to cross-boundary transport of waste **but** that has nothing to do with TR2. It is ludicrous to suggest that when TR2 item a. refers to "reduc[ing] the need to travel" this in some way relates to transporting waste across the county boundary.

68. **That deals with all the development plan policies cited in the 2nd reason for refusal. The proposed REC is <u>not</u> "contrary to" any of them. Instead, the proposed REC is**

[30] CD 7.4 page 83/84
[31] DD PoE §4.19.

consistent with such of these policies as are relevant to determining the appeal. (As we have seen, not all of them are.)

69. We turn next to **the policies cited in the 1st reason for refusal**.

70. The 1st reason for refusal contends that the proposed REC (in fact, as we know now - the stack) is "contrary to" LP policies SD1, SD2, DE1, NC3 and RA3.

71. **As you know, it is our case that the stack would not be "visually dominant" nor would it prejudice the delivery of the New Eastern Villages but even if you disagree on one or other or both counts, *these policies would not be contravened as they have nothing to do with the points taken against the stack.***

72. SD1[32] aspires to *"high quality design"* but the Council takes no point on the design of the stack. Instead Mr Dewart alleged that there is a breach of the 2nd bullet point in SD1, that aspires to *"promote healthy …communities"* on the basis of widespread public perception of harm to health from the emissions from the stack. There is no objective justification for these fears. The evidence shows that they are unfounded.[33] But in any event the *perception* of harmful impacts has nothing to do with SD1. If it did, then any development – whether EfW, or any other type of development that has attracted an unjustified bad image - which gave rise to public concerns about health would contravene this policy and could not be permitted. That couldn't possibly be right.

[32] CD7.4, p.17.

[33] See page 79 of the Evidence Annex to DEFRA's December 2018 Waste Strategy

73. Similarly, Policy DE1[34] which is (another) policy which aspires to "high quality design" is simply not relevant to the points made about the stack in the reason for refusal. The Council has not made a design case. It doesn't like the stack but that's got **nothing to do with its design**. Further and in any event, DE1 simply sets out principles in respect of which a development "will be assessed" - it does not set tests which the stack could be "contrary to". Mr Dewart confirmed to the Inspector that he was not "concerned about tall structures *per se*" and if the stack were not associated with an EfW plant, there would be no DE1 objection. And so, we are back to public anxiety as to which see earlier on.

74. Policies SD2[35] and NC3[36] are not relevant to the stack, let alone breached. Both policies include the allocation of the NEV and set out details of the allocation. The requirement, for example, to provide an "improved gateway" at the White Hart junction[37] is imposed on the NEV development – **"The [NEV] development shall provide:" - i**t has nothing to do with the appeal scheme.

75. Policy RA3[38] does not apply because the appeal is outside the defined limits of South Marston – the policy is irrelevant to the points made about the stack - and the appeal site is outside the non-coalescence area too: see the plan at p.188 of CD7.4.

76. **That deals with all the development plan policies cited in the 1st reason for refusal. The proposed REC is not "contrary to" any of them. Instead, none of them are relevant**

[34] CD7.4, p.32.

[35] CD7.4, p.20.

[36] CD7.4, p.160.

[37] NC3 b and para. 5.79 CD7.4 pages 160 & 167

[38] CD7.4, p.185.

to the points made by the Council concerning the stack – even if the Council's points are accepted none of these policies would be contravened.

77. For these reasons, as Mr Burrell explained, the proposal is not "contrary to" any of the policies cited in the two reasons for refusal. Indeed, most of the policies – when properly read – are not even engaged by this proposal, let alone breached.

78. The plan needs to be read as a whole. There are many other policies in the development plan that the proposals accord with in relation to which the Council takes no issue – see Mr Burrell's proof at pages 22 – 36.

79. In consequence, under **section 38(6)** of the P&CP Act 2004 the determination which would be in accordance with the development plan would be to allow the appeal. Material considerations far from "indicating otherwise" support allowing the appeal, and we discuss these below.

80. To set the context for those material considerations, it is important to understand the consequence of the WCS' policies concerning the location of strategic EfW facilities.

It is an inevitable consequence of the WCS that EfW stacks will be highly visible

81. As we have seen, WCS2 seeks to locate strategic EfW facilities as close as practicable to Swindon and other towns and cities in Wiltshire.

82. A chimney stack is an integral part of any EfW plant.

83. The height of the stack depends in large part on the plant's capacity. Strategic scale plants tend to have tall, and sometimes very tall, chimney stacks. Mr Crummack submitted a table listing strategic EfW sites across the country, all of which have greater

(and sometimes substantially greater) stack heights than the 52m proposed for the REC. For several plants,[39] their stacks are more that 50% higher than what is proposed here. Mr Dewart put in a note which refers to two facilities with stacks less than 52m but neither is a strategic scale facility.

84. And so, it is an inevitable consequence of the WCS that:

(i) EfW plants will be located near to where people live; and

(ii) EfW stacks will be visible to large numbers of people.

85. We do not need to look far afield to see those points in action.

86. The SALP[40] allocated only 2 strategic waste treatment sites around Swindon, and only 1 of those was specifically earmarked for strategic scale EfW – Chapel Farm, Blunsdon.

87. The Chapel Farm allocation notes[41] that "there are a number of residential properties within the vicinity of the site" – Blunsdon is a village of around 2,000 people, with Swindon itself close by to the south – and that "a large mixed development area (Policy NC5) is located to the immediate south of the site". That allocation is Tadpole Farm.[42] It comprises, among a range of other elements, 1695 dwellings.[43]

[39] E.g. Staffordshire, SITA in Suffolk, Ardley, SITA in Cornwall, Riverside in Kent, Edmonton, Coventry and Kirklees.

[40] CD7.3.

[41] CD7.3, p.121.

[42] See the Council's Local Plan at CD7.4, p. 19.

[43] CD7.4, p.171.

88. The distance from the Chapel Farm EfW allocation to the residential part of the Tadpole Farm allocation is around **350m**.[44]

89. In the end, Mr Dewart had to accept in c/ex what is obvious from the WCS and the Allocations DPD: there is nothing inappropriate in principle about locating strategic EfW facilities close to existing and proposed residential development. That is what the Council's own plans provided for. It is inevitable.

90. That means that it cannot be a sensible objection to an EfW facility that e.g. its stack would be visible to people, even large numbers of people, and even people who are anxious that emissions from the chimney will harm their health. If there is to be new EfW development at all, as both the WCS and the Government think there should be, then such outcomes are inevitable.

91. But the story of Chapel Farm does not end there. Because in October 2018 this Council granted planning permission for a primary school on the site.[45] The officer's report noted that "*the material considerations of the benefit of providing a school in line with policy CM1 outweigh the loss of the waste allocation*". So, the premise of Miss Darrie's evidence, i.e. that Swindon's need for waste treatment will be served by a plan-led network of allocated waste sites (and no *other* sites) is obviously wrong. Only 1 strategic scale EfW was allocated near Swindon. It was around 350m from a major residential allocation. And it is now not coming forward for EfW. As we explain above, in that

[44] CD7.4, p.173.

[45] CD17.11.

context, the need for flexibility for unallocated sites to come forward as recognised by the WCS inspector and as enshrined in WCS3 is particularly important.

92. As we have submitted, the determination which would be in accordance with the development plan would be to allow the appeal. However, if – against the above – the Inspector disagrees, then the benefits listed at §9.39 of Mr Burrell's proof indicate that permission should be granted in any event. The first of those is the need for the facility.

There is a need – waste is being landfilled and exported overseas

Policy framework

93. As Miss Darrie accepted in c/ex, the development plan does not require need to be demonstrated.

94. The requirement in national policy to assess need arises only if the Inspector reaches the view that the appeal scheme is **not consistent** with the development plan:

(i) The National Planning Policy for Waste states that:[46]

> 7. When determining waste planning applications, waste planning authorities should:
>
> - only expect applicants to demonstrate the quantitative or market need for new or enhanced waste management facilities where proposals are not consistent with an up-to-date Local Plan. In such cases, waste planning authorities should consider the extent to which the capacity of existing operational facilities would satisfy any identified need;

N.B. that even where need is to be demonstrated under that policy, it is only to be assessed against existing operational facilities. We return to Mike Brown's

[46] CD7.8.

approach below, but Miss Darrie accepted in c/ex that it cast its net far wider than required by this policy.

(ii) The point is repeated in the PPG on "Waste"[47] which states at §046 that (with **emphasis** added):

> "If the proposal is consistent with an up to date Local Plan, there is **no need to demonstrate 'need'**."

95. Both main parties agree that the waste plans are "up to date".

96. In any event, whether the requirement to show it arises or not, Mr Brown's evidence shows that the meeting of need for residual waste treatment in the REC's catchment is a substantial benefit in favour of granting permission.

Context for the reason for refusal

97. The 2nd reason for refusal cites the "*absence of a local need*". Miss Darrie confirmed in c/ex that "local" was intended to mean need within Wiltshire. **However,** she also accepted that it is inevitable that an assessment of need should look both inside and outside the county, and that adopting a 1-hour catchment area around Keypoint was a reasonable and sensible approach –and given the location of Swindon, this inevitably brings in a large area outside the county.

Steps in Mike Brown's analysis

98. Mike Brown's analysis comprises 12 steps.

[47] CD7.6.

99. The 12 steps are as follows:

(i) **Step 1**: **Assessment period**. Mr Brown fixed a period to assess to 2035, to coincide with recycling targets for the Circular Economy Package and the Waste Strategy, and a payback period on the investment. Miss Darrie does not dispute this.

(ii) **Step 2**: **REC Catchment**. Mr Brown fixed a catchment area of 1 hour's drivetime[48] around Keypoint, i.e. an average of 27 miles. Miss Darrie does not dispute this. She thought it sensible, logical and reasonable. In c/ex of Mr Brown, Mr Maurici QC suggested that the Local Plan Inspector's conclusions on capacity in Wiltshire were somehow relevant, but as Mr Brown explained – and Miss Darrie agrees, the waste market does not respect local authority boundaries. The issue is what the need is **within the REC's catchment area** – a point Miss Darrie accepts – not within Swindon or Wiltshire.

(iii) **Step 3**: **Competitor facilities catchment**. Mr Brown doubled the 27 mile REC radius to a 54 mile radius for competitor facilities. Miss Darrie did not initially understand that step, and cannot be criticised for that. But now that it has been explained, her continued assertion that the catchment should be increased to e.g. a 2 hour drive time, as Mr Brown explained, would have made no material difference because of the weightings applied to competitor sites, which we return to below.

[48] MB's PoE at §4.5-6.

Miss Darrie *queried* whether the catchment for competitor sites should have been expanded so as to bring in more distant sites with high capacity facilities. But as Mr Brown explained in c/ex, if a greater radius is taken for competitor facilities then similarly a greater radius should be taken for Keypoint as well and in both these respects, more waste feedstock would be available for Keypoint to compete for. Thus, as he explained, his analysis tends to the conservative as by drawing the radii as he has, he has excluded waste in areas of low waste treatment capacity just outside his assumed catchment area. *The most sensible course is to do as he has done and take the same radius for Keypoint's catchment and for the catchment of potentially competing facilities.*

(iv) **Step 4: Total Arisings.** Mr Brown calculated the municipal, commercial and industrial waste arising within Keypoint's catchment.[49] Miss Darrie challenges this step – at least in respect of C&I waste – and we return to it below, although **NB** Miss Darrie offers no alternative figure for the waste arising within Keypoint's catchment.

(v) **Step 5: Exclude recyclables.** Mr Brown excludes waste that is reused or recycled. Miss Darrie agrees that this should be done. Mr Brown has proposed two recycling scenarios – the central (60% by 2035)[50] and the high (65% by 2035)[51] – and has decided that the most realistic forecast is somewhere between the two.[52] Miss Darrie agreed in her written evidence (she wrote that "*a more realistic*

[49] MB's PoE at §4.10-12.

[50] MB's PoE at §4.25.

[51] MB's PoE at §4.25.

[52] MB's supplemental PoE at §3.3.

assumption, could be a hybrid assumption"[53]) but now appears to prefer the high scenario.

(vi) **Step 6: Exclude non-combustibles**. Mr Brown then excludes non-combustible waste.[54] Miss Darrie accepts that this exclusion should be made, but *queries* the amount of the reduction – although she offers no alternative figure. We return to this below.

(vii) **Step 7: Exclude contracted waste**. Mr Brown excludes waste which would otherwise have been available to Keypoint but is committed elsewhere on long-term local authority contracts.[55] Miss Darrie agrees with this.

(viii) **Step 8: Exports**. Mr Brown assumes that RDF exports will continue at the same level.[56] Miss Darrie thinks they will increase. We return to this below.

(ix) **Step 9: Competitors**. Mr Brown identified the operational and consented competitor sites within the 54 miles catchment.[57] Miss Darrie agreed with the principle of applying a wider catchment for competitor facilities, i.e. looking outside the 27 miles radius of Keypoint, however she suggested that a number of other sites should have been included but, with two exceptions which we return to, they were outside the 54 miles catchment.

[53] MD's reply proof at §6.5.9.
[54] MB's PoE at §4.27-30.
[55] MB's PoE at §4.31.34.
[56] MB's PoE at §4.35.
[57] MB's PoE at §4.7.

NB: BY INCLUDING FACILITIES WHICH HAVE PERMISSION BUT WHICH ARE NOT OPERATIONAL MR BROWN HAS ADOPTED A MUCH MORE ONEROUS APPROACH THAN REQUIRED BY GOVERNMENT POLICY WHICH ONLY REQUIRES THE INCLUSION OF "EXISTING OPERATIONAL FACILITIES". THIS INEVITABLY MEANS THAT ON THE GOVERNMENT'S APPROACH THERE IS LESS COMPETITION THAN MR BROWN HAS ALLOWED FOR.

(x) **Step 10**: **Operational capacity**. Mr Brown then identified the operational capacity of the competitor sites.[58] In doing so, he assumed that MBT facilities treat an amount of waste equal to 33% of their operational capacity. Although not accepted in her evidence, [59] it now emerges from point 16 on the "*Need Assessment Schedule: matters agreed and in dispute*" table that Miss Darrie accepts Mr Brown's approach on MBT.

(xi) **Step 11: Weighting.** Mr Brown then applied weightings to the competitor sites.[60] Miss Darrie accepted in c/ex that weighting was, in principle, an appropriate exercise. She also accepted that each of the weighting criteria used by Mr Brown is sensible and relevant. She offered no further or different criteria of her own. She did not challenge how any of Mr Brown's criteria were applied. She now calls the weighting system "complicated" – which it is not, but even if it is, that would not make it *wrong* – and she says that its results "seem unrealistic" – which they are not. She offers no alternative results of her own.

[58] MB's PoE at §4.39-40.

[59] MD's reply proof at §6.8.8.

[60] MB's PoE at §4.42-48.

Miss Darrie & Mr Maurici QC made great play of the "96% reduction" point – i.e. the reduction from the *full* capacity of consented and operational sites, to the degree of competing capacity modelled for by Mr Brown. But Miss Darrie accepts that facilities should be weighted for e.g. distance from the REC, she accepts that the weighting criteria were sensible, and she does not criticise how the weighting was done. So, again with respect, it makes no sense to criticise **the outcome** of that exercise just because she does not think it "seems" to be "realistic". If one agrees the criteria used in the weighting – as Miss Darrie does – the outcome is simply the result of applying the agreed criteria. Again, Miss Darrie offers no alternative.

(xii) **Step 12**: **Outputs**. Mr Brown's tables show that whether in a central or high recycling scenario (or by extrapolation in a hybrid in-between the two) there is a need for the proposed REC as there is waste which is going to landfill, as well as RDF which is being exported overseas, which would provide sufficient feedstock for Keypoint.

100. We now deal with some of the steps in more detail.

Step 4 – total arisings

101. To calculate the commercial and industrial waste arising within Keypoint's catchment, data is required which:

(i) Calculates waste arisings (rather than e.g. waste managed in permitted facilities); and

(ii) Is divisible by waste management method, waste stream, region and business type.

102. Miss Darrie does not suggest otherwise.

103. The most recent data available for that purpose is the 2009 sector survey carried out by Jacobs on behalf of DEFRA[61], which was updated in 2014. That data is the basis for Mr Brown's projection for total waste arisings in Keypoint's catchment to 2035.[62]

104. Nonetheless, Miss Darrie apparently "would have expected"[63] a different data set to be used – the October 2018 iteration of DEFRA's "Reconcile" figures.

105. However, as Mr Brown explained, the most recent Reconcile figure which Miss Darrie advocates could not credibly inform a conclusion on waste arisings **in the REC's catchment** because:

    (i) The Reconcile data does not actually calculate waste arisings. It calculates waste being managed by permitted waste management companies through operator returns which, as Mr Brown explained, are notoriously unreliable and will exclude e.g. waste managed by permit-exempt facilities.

    (ii) The Reconcile data is not divisible by waste management method, waste stream, region and business type.

106. Point (i) was recognised in DEFRA's October 2018 "revisions" to its Reconcile Methodology which noted[64] that:

[61] App 9 to MD's reply.

[62] MB's PoE at p.28, Figure 5.1.

[63] MD's reply proof §5.5.6.

[64] MD reply appendices p.72.

Note: The new methodology makes no attempt to estimate waste processed under exemption that is not captured within the recycling data at end-point. Therefore, figures may underestimate the "true" tonnages of C&I waste arisings, but are the best estimate we can produce from the available data.

107. Although the Note says "may underestimate" this is a euphemism as there is no doubt at all about it – the figures are an underestimate, one can't exclude exempted waste and still end up with a "true" figure.

108. Also although the Note says here (and lower down on the same page) that this is "the best estimate that we can produce *from the available data*" it's the available data that's the problem – it's like saying "we've made the best of a bad job" – and in any event even if the figures in question are the best estimates *they are not of use as they are national – not regional – figures.*

109. Point (ii) was recognised by DEFRA's December 2018 Waste Strategy[65] which notes that a "step change" in data collection is required to improve the "national deficiency in data" which includes assembling waste produced by type and sector.

110. So even DEFRA does not put its Reconcile data forward as a sound basis for reaching conclusions on local C&I waste arisings. In any event, having advised that Mr Brown should have used that national and undifferentiated data set, Miss Darrie does not assist the inquiry with any attempt of her own to derive a figure for C&I waste arising within Keypoint's catchment. This is not surprising. She cannot derive such a figure because the Reconcile data set is unfit for that purpose.

[65] CD11.17, p.135-137.

111. In any event, Mr Brown's approach to calculating C&I arisings is standard in the waste industry, which is another point Miss Darrie did not dispute.

112. Miss Darrie makes the point in the "*Need Assessment Schedule: matters agreed and in dispute*" that Mr Brown's approach to C&I data only became clear to her during his evidence at this inquiry. But even if that is so, it has nothing to do with whether Mr Brown's approach is right or wrong. As we have explained, Mr Brown's analysis is the only sensible way of trying to derive realistic localised data on C&I arisings, and Miss Darrie presents no alternative to the figures he has derived.

Step 6 – exclude non-combustibles

113. Miss Darrie "absolutely" agreed in c/ex that it is right to try to understand how much of the waste is non-combustible because that is not a suitable feedstock.

114. As Mr Brown explained, in 2009 around 18.5% of industrial waste and 17% of commercial waste was non-combustible[66] so is to be excluded from overall arisings.

115. Those figures are a combination of the proportion of C&I waste managed by (i) recovery to land[67] and (ii) specialised waste treatment processes. On (ii), data is not available, so Mr Brown made what he called in c/ex a "reasonable assumption" informed by decades of professional experience. Miss Darrie points out that it is an assumption, not data. That is right. If there were data, Mr Brown would have used it. But the evidence is that

[66] See e.g. MD's reply appendix p.3.

[67] 5% in 2009: see table ES4 in MD's reply appendix p.82.

his assumption is robust. Miss Darrie does not criticise the correctness of Mr Brown's assumption, and she offers no alternative of her own.

116. Mr Brown then models for the proportion of non-combustible waste to reduce by 2030 to 12.5% for industrial waste and 12% for commercial waste.[68] That reduction is a function of Mr Brown's optimistic view of increasing recycling rates.

117. Again, Miss Darrie offers no alternative figures. *In any event, as Mr Brown explained in chief, this debate does not materially affect his conclusions*. *Even if he is wrong, the difference would be contained within the thickness of a line on his graphs.*

Step 8: Exports

118. Mr Brown assumes RDF exports will continue at current levels.[69] That view is consistent with DEFRA's approach in the December 2018 Waste Strategy,[70] and is more conservative than the other industry predictions that RDF exports will fall.[71] None of those industry commentators share Miss Darrie's opinion that RDF exports will rise, and nor does the Government.

119. As Mr Brown explained in chief, the idea that the UK is the only customer to fill the spare capacity in northern European EfW plants (e.g. in Holland, Germany or Sweden) is simply wrong. On the contrary, there are major drivers to encourage exports to those

[68] See e.g. MD's reply appendix p.3.

[69] His PoE §3.30.

[70] See the Evidence Annex at p.78: "*The analysis assumes refuse derived fuel (RDF) exports remain at current levels*."

[71] See CD9.3, p.25, §5.4.

countries from eastern and southern European countries which are subject to the landfill directive, but have a shortage of EfW capacity.

120. In any event, as Mr Brown explained in c/ex, whether RDF exports go up or down is not material to his conclusions because on either view Keypoint would have the potential to intercept waste from being exported.

Step 9: Competitors

121. Mr Brown identified the operational and consented competitor sites within 54 miles of Keypoint.[72] Miss Darrie suggested some further sites for inclusion.

122. The locations of the facilities within 54 miles of the appeal site is now agreed and shown on a plan. *In any event, as Mr Brown's updated calculations have shown, Miss Darrie's additional consented sites add only 2,354 tonnes per annum[73] to his model, which has no tangible impact on his overall conclusions*. Just to unpick this – Miss Darrie suggested the inclusion of 10 additional sites but 8 of them are outside the 54 miles zone; of the other 2, the Milton Keynes gasifier [MD site 4] should have been included but applying the weighting to it, it would add only c.700 tpa; the other site is Eastleigh [MD site 1] in respect of which the permit application was withdrawn in 2014 and so really doesn't count but were it to be included it would make precious little difference.

123. Some dispute arose on what categories of site should be included. National policy requires only an assessment of existing operational facilities.[74] The 2018 Waste Strategy

[72] MB's PoE at §4.7.

[73] 1627 for Eastleigh, 727 for Milton Keynes.

[74] CD7.8, §7, first bullet.

only takes account of these and facilities which are financially closed.[75] So Mr Brown's analysis which took account of sites simply with planning consent casts a wider net either than that required by national policy, or cast by DEFRA in its Waste Strategy.

124. It is surprising then that Mr Brown was criticised in c/ex for not casting the net further still, and taking account of allocated sites in respect of which there is not even yet a planning application, let alone a permission. As Mr Brown explained, trying to take account of waste treatment capacity which does not even have planning permission would "make a nonsense of any need assessment", would not be informed by e.g. proposed treatment capacities or facility types, and is certainly not encouraged (still less required) by central Government.

Step 12: Mr Brown's overall outputs

125. In either the central or the high recycling scenarios (and by extrapolation in a hybrid between the two), there is a need for the proposed REC as there is waste which is going to landfill, as well as RDF which is being exported overseas, which would provide sufficient feedstock for Keypoint.

126. It is noteworthy that despite all the harping, the Council has no alternative assessment.

127. Mr Maurici QC has made great play of the research which suggests a risk of future national over-capacity for EFW. But that has nothing to do with whether there is now, or will be in the future, a local need for this facility. As Mr Brown explained, Swindon is at the centre of a clear gap in EfW capacity.

[75] Evidence Annex to the Waste Strategy, o.77.

128. In that context, it was put to Mr Brown in c/ex that if Keypoint failed to intercept RDF from being exported, it would divert material from recycling. As we have explained above, the Council has put forward no evidence to support that assertion, and – as Mr Brown explained – the opposite has happened in countries like Sweden, Holland and Germany where (a) there is excess EfW capacity, and yet (b) recycling levels have continued to rise.

129. The outcome, even on the high recycling scenario Miss Darrie is keen to emphasise, is unambiguous. Without the REC, very significant quantities of waste will simply continue to be sent to landfill or exported overseas as RDF.

The proposed REC readily meets the proximity principle

130. The WFD requires Member States (not local authorities, still less individual applicants for planning permission) **"to enable waste to be disposed of or …to be recovered in one of the nearest appropriate installations"**.[76]

131. The 1 hour (27 miles radius) catchment for feedstock for Keypoint by definition would enable waste to be recovered in one of the nearest appropriate installations to the arisings in question. Miss Darrie accepted that proposition in c/ex. (Nor would the principle be offended in the event that waste is transported in the future to the REC by rail from e.g. West London. We return to that below.)

[76] Article 16 of the Waste Framework Directive, set out at §6.4.3 of Miss Darrie's PoE.

132. Finally, we note the irony (the pot and kettle nature) of the Council's case given that its own municipal waste is exported as SRF to Poland, and when Wiltshire's waste is sent to the Lakeside EfW facility near Heathrow airport.

133. We also note that Swindon's contract to export to Poland expires this year and, although the Council expresses "no intention" of utilising Keypoint, Mr Brown was quite right that the decision on what to do with Swindon's waste cannot lawfully be pre-determined; there will need to be a procurement process. On the face of it, there are obvious sustainability advantages in recovering energy from Swindon's waste in Swindon, rather than in Poland, and it is an oddity of the Council's opposition to this appeal that the REC would give it the opportunity it needs to move toward the "self-sufficiency" at the heart of the WCS.

There would be less greenhouse gases than landfill

134. Mr Parkes' WRATE analysis is the only analysis of GHGs before the inquiry which (i) follows the peer-reviewed and EA-approved model, (ii) is conducted on a life-cycle basis. It demonstrates that the REC would generate substantially less greenhouse gas emissions when compared to landfill.

135. As Mr Parkes explained, the conclusion that the REC would reduce GHG emissions compared to landfill would remain the same regardless of which gasification technology is ultimately selected, not least because some 95% of GHG emissions are accounted for by the waste itself.

136. That reduction in GHG emissions is a benefit of the scheme which should attract significant weight.

The REC would have to achieve Recovery i.e. "R1" status

137. A condition is agreed with the Council to ensure that work could not commence on the REC unless and until it had achieved R1 design stage certification from the Environment Agency. The Secretary of State has endorsed this kind of condition elsewhere[77] and plainly it can be imposed here.

138. It is important to be absolutely clear on the test the Inspector must apply for imposing this kind of *Grampian* condition. It is found in the PPG on the "Use of Planning Conditions" at §009 (with highlighting added):

> **When can conditions be used relating to land not in control of the applicant?**
>
> Conditions requiring works on land that is not controlled by the applicant, or that requires the consent or authorisation of another person or body often fail the tests of reasonableness and enforceability. It may be possible to achieve a similar result using a condition worded in a negative form (a Grampian condition) – ie prohibiting development authorised by the planning permission or other aspects linked to the planning permission (eg occupation of premises) until a specified action has been taken (such as the provision of supporting infrastructure). Such conditions should not be used where there are no prospects at all of the action in question being performed within the time-limit imposed by the permission.

139. A negatively worded ("*Grampian*") condition would be lawful and would satisfy the requirements of national policy so long as there is something more than **no prospect at**

[77] E.g. Bilsthorpe APP/L3055/V/14/3001886 at CD17.1.

all of the action being performed within the time-limit imposed by the permission. That test has been the settled position of national policy for many years.[78]

140. Miss Darrie **accepts**[79] that the proposed condition **passes the test in the PPG**.

141. To address one of the Inspector's comments, the test in the PPG does **not** require there to be a "likelihood" that R1 status will be achieved, although the evidence on that from Mr Crummack's absolute confidence on that issue has not been substantively challenged and indeed it is supported by DEFRA's December 2017 Waste Strategy which makes clear[80] (with emphasis added) that:

> In addition, we will work closely with industry to secure a substantial increase in the number of EfW plants that are formally recognised as achieving recovery status, and will ensure that all future EfW plants achieve recovery status[107].
>
> 107 'R1' Recovery status acts as a proxy for the energy-generating efficiency of facilities. Facilities which achieve the status are classed as a recovery operation for the purposes of the waste hierarchy and so are a level up from the bottom rung of 'disposal'.

142. Note also Mr Crummack's schedule, which demonstrates that there are 3 gasification plants in the UK which have already attained R1 design-stage certification. As he said, given the substantial improvements to plant efficiency in recent years, there is no reason that a modern well-designed plant of the type proposed here would ***not*** achieve R1 certification.

143. In any event, all that is required to pass the PPG test is something more than no prospect that the appeal scheme would achieve R1 certification. The material before the inquiry

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[78] See e.g. the High Court's judgment in *Merritt v Secretary of State for the Environment, Transport and the Regions* [2000] 3 P.L.R. 125, a 25.11.02 letter from the Secretary of State to all planning authorities and Planning Inspectorate Good Practice Advice Note 16/2010.

[79] SoCG [**CD6.3**], p.27, Issue 6(q) and in Maureen Darrie's PoE at §7.1.40.

[80] CD11.17, p.77.

readily passes that test. Indeed, as Mr Ayers for SKIP has repeatedly confirmed,[81] it is not even a part of *his* case that there is no prospect R1 status would be achieved.

144. Miss Darrie accepted in c/ex that imposing the R1 condition proposed would lead her objection on this point to "fall away". The scheme's movement of waste up the hierarchy which is secured by the condition is a planning benefit which should be afforded significant weight.

There is the potential to bring in waste by rail

145. There is a rail terminal near the site. Miss Darrie accepted in c/ex that there is the potential to import some of the REC's feedstock by rail. Mr Dewart confirmed that this potential could be realised without the need for a further planning permission.

146. In particular:

(i) The terminal is operational and, unlike in 2016 when the planning application was prepared, is soon to be available for use.

(ii) A comprehensive pathing study demonstrates rail access is possible.[82] Of course, matters like the impact of Crossrail cannot yet be taken into account. But we can only assess the current, known, position. And, as Mr Burrell said, the route is a main strategic rail freight corridor which would, irrespective of Crossrail, need to be maintained if not improved.

[81] See e.g. SKIP's opening at §5.2.

[82] Paul Burrell's Appendix 2.

(iii) There is an expression of interest from Seneca in supplying up to 50k tonnes a year in waste feedstock to the REC by rail.[83]

147. Taking all of that together, as Mr Burrell explained, it is a benefit of the proposal that there is the potential for importation of waste by rail.

148. Nor would importing waste by rail offend the state-level proximity principle. The UK would still "enable waste to be disposed of or …to be recovered in one of the nearest appropriate installations"**.**

149. For completeness, the suggestion that further environmental impact assessment would be required to deal with leaving waste overnight in sealed containers really is hopeless. EIA only needs to address significant environmental effects. The same goes for the two train paths which would be required.

There would be other benefits as well

150. As Mr Burrell explained:

(i) EfW is a form of renewable energy generation; the REC would support achievement of UK targets and assist in tackling climate change.

(ii) Jobs. (At a significantly higher density per sq. m. than the adjacent Bodleian facility.)

(iii) On the potential to export energy, the REC is very close to a range of major local businesses including the Honda car plant.

[83] Paul Burrell's Appendix 1.

151. We turn next to the material considerations said to weigh against the grant of permission.

The landscape and visual impacts of the stack have been overstated

152. The Council has confirmed repeatedly that its only issue in landscape and visual terms relates to the 52m stack, and that the REC building would, as Mr Potterton put it, "broadly sit in the character of area". No issue is taken on the B8 building.

153. The contextual points for examining landscape and visual impacts of the stack are that:

(i) All EfW plants have stacks. And they cannot be situated so as to be invisible. Both Mr Potterton and Mr Dewart accepted that self-evident point.

(ii) As Mr Crummack's table of stack heights across the country shows, there is nothing exceptional about the 52m stack height for a *strategic-scale* EfW facility.

(iii) WCS2 seeks to locate strategic EfW plants as close as practicable to its largest towns and cities, e.g. Swindon. Indeed, the Chapel Farm allocation anticipated a strategic EfW plant at around 350m from a major residential allocation.

(iv) If EfW plants are to come forward at all (as the WCS **and Government policy which welcomes investment in EfW** expects them to) they will inevitably be widely visible.

(v) And if they are widely visible, for as long as people refuse to accept the evidence and Government statements to the effect that EfW does not harm human health, there will always be public anxiety about the perceived harm to health which Mr

Potterton relied upon to accentuate the impact of the stack – quote unquote with regards the REC "it's a nasty thing"

Landscape impacts:

154. The REC would not harm the physical elements of the landscape of the site, and indeed would provide some benefit by planting new trees. It would be consistent with the "landscape" (in truth "industry-scape") character of the area within which the appeal site sits, namely a sea of industry and warehousing, including a number of stacks.

155. Mr Potterton's evidence of "major adverse effects" on landscape character within 1km[84] of the scheme was exaggerated. This level of landscape impact is within his methodology the worst (the greatest) level of impact possible. On his own scale, those effects only arise if the proposals "degrade, diminish or destroy a highly valued landscape or its characteristics, features or elements"[85] – see as a proxy, and well within Mr Potterton's 1km, Mr Cook's viewpoint 18 Appendix 18.8. Similarly, Mr Potterton's view that landscape character effects at 1-3km would be "moderate" – so would "leave an adverse impact on a landscape of recognised quality or on vulnerable and important characteristics, features or elements" – was also over-stated: see as another proxy Mr Cook's viewpoint 6 at appendix 19.2.

Visual impacts:

156. As Mr Cook explained, direct lines of site to the REC's stack from residential areas would be limited. That is primarily because of the local screening effects of e.g. houses and

[84] Mr Potterton's PoE, §4.93.

[85] Mr Potterton's PoE, §4.86.

trees, as well as the structural planting belts alongside the A419 and the A420. The broad effect is illustrated by Mr Cooks ZTV[86] - albeit a worst-case model because it takes no effect of localised screening elements.

157. What is striking from the ZTV and, once properly interpreted, also from Mr Potterton's drone images is quite how limited the direct opportunities to see the stack from residential properties in Stratton St Margaret or South Marston will actually be. And as Mr Cook explained, that localised screening effect will in due course be replicated by the layout of the NEV. (Mr Cook referred to the Brunel tower in Swindon – at 83m high – and the very limited opportunities to see the tower as one moves around the town because of adjacent buildings.)

158. Mr Potterton's conclusion that visual harm would be "major adverse" in residential areas within 2km of the site[87] overstates the position. This level of visual impact is within his methodology the worst (the greatest) level of impact possible. On his own scale, major adverse impacts require a "*total permanent loss or major alteration to key elements and features of the landscape*", the introduction of "*elements that are wholly uncharacteristic in the surrounding landscape*" as well as the disruption of "***fine and valued views***".[88] For views like Mr Cooke's appendix 16.17 or 16.23, Mr Potterton accepted in c/ex that there would *not* be major adverse effects, but he maintained his position on e.g. Mr Cook's appendices 19.12, 17.7, 16.5 and 16.13. He even maintained it for appendix 18.11, where the REC would be entirely screened by vegetation.

[86] App 17.1.

[87] Mr Potterton's PoE, §4.65.

[88] Mr Potterton's PoE, §4.45.

159. Overall, Mr Potterton's approach very substantially exaggerated the extent of landscape and visual impacts that the stack would cause.

160. The explanation for Mr Potterton's conclusions appears to relate to his view that the REC and thus its stack would be perceived by the public as a "nasty thing". He confirmed in c/ex that this perception played a "big part" in his assessment. But as Mr Cook explained, this approach is unprecedented and not supported in GLVIA. It seems an odd thing to do as surely the *landscape and visual* impacts of the stack would be the same whether the building in question is something that the public isn't anxious about (e.g. Honda) or it is (e.g. an EfW facility). **If** public anxiety has a role to play in deciding the appeal, the point belongs somewhere else and not in a landscape and visual impact assessment.

Perceived health risks should be given no weight

161. The evidence shows that EfW plants do not harm human health. [89] That position is confirmed by DEFRA.[90] As the Inspector noted on the inquiry's opening day, the REC would be tightly regulated by the Environment Agency.

162. Indeed, the Council's planning officer noted, "the UK Government's policy position is that a well-regulated waste facility does not pose a risk to human health",[91] and that accords with the advice of both Public Health England and the World Health Organisation. There was no objection on health grounds from the relevant statutory

[89] Ian Crummack's PoE §3.44-45

[90] Waste Strategy Evidence Annex, p.79.

[91] [**CD4.2**], §5.184.

consultees, and the Council does not present any evidence to this inquiry that the REC would cause any risks to the health of members of the public.

163. Accordingly, it is unsurprising that perceived health risks are not mentioned as part of the Council's case against the REC in the officer's report or in the reasons for refusal or in the Council's Statement of Case. The "project fear" point arose for the first time in Mr Dewart's proof of evidence.

164. Of course, a good point made late doesn't become a bad point, just as a bad point made early doesn't become a good point!

165. But, of course, it is a bad point. If one relied on a point like this, it would prevent EfW facilities from coming forward anywhere. An unfortunate feature of this part of Mr Dewart's evidence is that – rather than seeking to reassure people that their fears, even if genuinely held, are misplaced – he has positively relied on those fears in an effort to "amplify" the Council's reasons for refusal. As a public body, the Council's responsibility is to correct misinformation, not to rely on it in cases where public misunderstanding seems to assist its arguments at a public inquiry.

166. In any event, albeit public perceptions of health risks from EfW plants are capable of being a material planning consideration, the **weight** that can be attributed to those perceptions depends on whether or not they are objectively justified.

167. These fears cannot be justified. Mr Crummack's evidence was clear on that, and Mr Dewart did not contend otherwise. Accordingly, the public's perception of adverse health consequences from the REC cannot attract any weight in the planning balance.

Assertions that the REC could slow down build-out rates at the New Eastern Villages ("NEVs") should be given no weight

168. This is another aspect of the Council's case with is riddled with a string of hypotheticals:

(i) Promoters of the NEV may form the view that REC's stack may be perceived to be harmful by some possible future purchasers of homes within the NEV;

(ii) If that view is in fact formed, one of two possible consequences may follow;

(iii) The first possibility is said to be some of the delivery rates for homes within the NEV could be slowed down;

(iv) The second is said to be the risk that some parts of the NEV development may be abandoned altogether.

169. There is **no evidence** at all before this inquiry to substantiate these points; none from the Council, and none from those promoting parcels of the NEV for development. This part of the Council's case is a house of cards – assertion layered on assertion, speculation and inference without any objective foundation.

170. Absent any evidence, the Council's case has turned on repeated and mutually reinforcing expressions of "concern". Mr Dewart relies on the developers' supposed "concern"[92], which is said to "relate back to" the public's "concern"[93] and to the "concern of potential future house buyers in the NEV". That leads Mr Dewart to view

[92] Mr Dewart's PoE, §8.25.

[93] Mr Dewart's PoE, §8.25.

the REC with "great concern".[94] The difficulty is that the promoters' concerns are themselves predicated on and are said to be "apparent" from *the Council's* concerns.[95] Indeed Taylor Wimpey and Hallam land are said to *share* the Council's concerns,[96] and those concerns are themselves said to be that members of the public may develop concerns.[97]

171. Lots of concern, but no proof, no substantiation.

172. In particular:

(i) As we have already explained, the Council accepts that public anxiety is not objectively justified; and

(ii) Even if those concerns do arise, there is **no evidence** to suggest that they would actually impact on delivery rates. David Locke's written statement of case refers e.g. to "concerns" on marketability, but says **nothing** to substantiate those concerns. It does nothing more than to note a theoretical possibility that demand for homes in the NEV *could* decrease. And even if that decrease occurs, it is only said to lead to "a prospect" (not even a likelihood, still less a certainty) – not of the NEVs being abandoned altogether – but of delivery slowing to some (unspecified) extent.[98]

[94] Mr Dewart's PoE, §8.27.

[95] 14.1.19 David Locke letter at §5.

[96] 14.1.19 David Locke letter at §9.

[97] 14.1.19 David Locke letter at §9.

[98] See e.g. §13 of 14.1.16 David Locke's statement of case "**If** public concern […] translates into fewer people wanting to buy a new home in the NEV, then there is the prospect of a slower delivery trajectory […]"

173. That possibility too lacks any evidential foundation. It is not said, for example, by how much it is thought that delivery rates might decrease or why. There is **nothing** to substantiate or explain Ridge's assertion that the REC is "weighing heavily" on NEV developers, or what that is actually likely to mean in terms of e.g. delivering new homes. In fact, when the detail of the promoters' "concerns" is read, what is striking is the lack of any assertion that NEV delivery rates would actually slow, let alone stall.

174. Mr Dewart's view was that it would be "impossible to prove" that the REC would hinder delivery rates in the NEV. David Locke accepted that any deterrent effect could not be quantified.[99] If it cannot be proved, and it cannot be quantified, how can the Appellant's so-called failure to prove the unprovable or quantify the unquantifiable count against the REC application? (!)

175. The point is all the more artificial because its premise – that an EfW facility is somehow incompatible with nearby new housing development – is a bad one.

176. One does not need to search far afield to prove that point. Even within Swindon, this Council was positively *planning* – through the carefully managed network of allocations Miss Darrie was keen to rely on – to locate the Chapel Farm strategic EfW only 350m or so from the new housing at Tadpole Farm.

177. But the story does not end there. As Mr Barefoot explained, the Wiltshire Council recently granted permission at Northacre, Westbury for an EfW facility with a **75m stack** some **375m** from proposed housing – under the same waste planning policies which apply in Swindon. And the Javelin Park EfW facility at Gloucester has a 70m stack in flat

[99] §14 of 14.1.16 David Locke's statement of case.

landscape under 1km from a major residential allocation. Mr Barefoot also gave the example of Didcot power station where Taylor Wimpey – one of the NEV developers – is building out a portion of the Great Western Park site in plain view of a 200m chimney and 130m cooling towers.

178. On Javelin Park, Mr Maurici put to Mr Barefoot in c/ex that that the relevant housebuilder, Crest Nicholson, had not objected to the EfW scheme. It had not. But the reasons they did not object only serve to prove Mr Barefoot's point. The inspector's report records the position in that case in this way:

> "373. Mr Aumonier's firm consulted with Crest Nicholson in the preparation of the heat demand survey. Mr Jones confirmed that agents acting for the developer had confirmed that they have prepared an application for the 500 dwelling extension to Hunts Grove […[He also acknowledged in XX that neither the pace of development nor the value of sales had been adversely affected by the appeal proposal. Furthermore, **Crest Nicholson has not objected to the appeal proposal and, in fact, had obtained planning permission for a large scheme at Crawley which includes a large scale waste treatment facility** […]"[100]

179. Mr Dewart accepted in c/ex that:

(i) There is **no evidence** that sales of properties in residential areas have been inhibited or that prices have dropped because of the prospect of EfW at Keypoint;

(ii) **None** of the letters from NEV promoters before this inquiry contend, let alone explain or substantiate, why and how a REC at Keypoint would be likely to either render the NEVs unmarketable or significantly less marketable;

[100] CD17.9.

(iii) There was **no evidence** that anything which should have happened by now at the NEV has not happened as a consequence of the REC application; and

(iv) There was **no evidence** that the REC application has hindered the NEV's delivery.

180. Further, Mr Freer of David Locke accepted in c/ex that there is **no evidence** to substantiate his "concern" – that word again – that EfW facilities near to new housing inhibit build-out rates.

181. In sum, this point lacks substance. The reality is that by far the bigger potential impediments to the NEV are the massive infrastructure costs (hundreds of £m) and landownership and site assembly issues. The delivery of the NEV has already fallen behind schedule. There is nothing which even tries to demonstrate the scale of the additional impact the REC might have.

182. No weight should be given to these concerns.

Alternative Site Assessment ("ASA")[101] – we've done one, it's fine – the Council doesn't suggest that there is an alternative site; no surprise there as the only site that was allocated for strategic EfW in Swindon has now been permitted for a school.

183. We have already submitted that the ASA does what WCS3 requires, if it applies.

184. Miss Darrie's criticisms of the ASA exercise were misconceived. In particular:

(i) Mr Burrell's area of search is consistent with the development plan, i.e. WCS2 and its aim to locate strategic facilities within 16km of and as close as practicable to e.g.

[101] Appendix 3 to CD6.1.

Swindon, with only local-scale facilities outside those areas. That accords with the "locational imperative" of WCS2 with which Miss Darrie accepts the scheme accords. Miss Darrie's alternative approach (i.e. to include all sites within a 1 hour's drive even if more than 16km from Wiltshire's towns and cities) could have resulted in sites being added to the list only to see them being excluded at the next stage for being inconsistent with the plan's spatial strategy.

(ii) Mapping is not available to distinguish between Grades 3a and 3b agricultural land. Including Grade 3 land within the BMV criterion in stage 1 of the assessment would only have served to exclude more land, and potential sites, from the assessment of alternatives.

(iii) On Stage 2 of the process, Miss Darrie's criticisms are misplaced: see Mr Burrell's ASA table (submitted on 1st February) which shows that the each of the various excluded sites are either stated to be unsuitable to accommodate EfW at a strategic scale in the Site Allocations DPD or have incompatible planning permissions. Mr Maurici QC complained that this more detailed stage explanation came only when Mr Burrell gave evidence to the inquiry. But that has nothing to do with whether the analysis was right or wrong.

(iv) On Stage 3, of the 28 sites assessed, Miss Darrie criticised the assessment of 12 (thus not questioning most [16] of them). 11 of those related to her argument that the lack of potential to import waste by rail should not have been used against these [11] sites, but Miss Darrie accepted in c/ex that (a) the potential for rail access is a "perfectly sensible" criterion and that (b) the REC *has* that potential. The only other site she queried is the Lafarge Cement Works, Westbury (Site 25) but the now

permitted slab track manufacturing facility, together with a solar farm and a capped landfill as well as a lake mean that there isn't any room left to add a strategic scale EfW.

185. It's no bad thing to remember that whilst criticising the ASA, the Council does not contend that there is a suitable alternative location for the proposed REC. That shouldn't come as a surprise given that the one and only site in Swindon that was allocated for strategic scale EfW in the much-vaunted Site Allocations DPD now has planning permission for a school instead.

186. Mr Maurici QC takes another procedural point on the ASA to the effect that it was only commissioned in response to the 2nd reason for refusal. But that is another of those points that has nothing to do with whether the document's conclusions are right or wrong. There is nothing in the requirement for an ASA in WCS3, if it even applies to this scheme, which requires the assessment to be undertaken at or before the time of an applicant selecting a site.

There would be no significant adverse impact on air quality

187. As Dr Ford explained, even on a conservative analysis, the REC would have no meaningful influence on local air quality, including at the Bodleian Storage Facility. Nonetheless, as a further precaution, the Appellant now proposes to fit selective catalytic reduction into the REC, and a condition is proposed for that purpose. As Dr Ford explained, the effect of SCR would typically reduce nitrogen dioxide emissions by in excess of 90% (or even 95%) and would mean that these would be some 50 – 75%

less than assessed in the ES. This would not only benefit the Bodleian, but the wider public too.

188. At the roundtable session held on 5th February, Mr Kirtley of the Bodleian "welcomed" the suggestion of SCR, and said it would have a "significant impact" on reducing nitrogen oxides – the key point of his concern – at the Bodleian facility.

The exact technology that would be utilised is beside the point

189. This is a planning application for gasification. It is not an application for a particular type of gasification technology. The details of the specific technologies to be used would be an issue for the Environment Agency to consider and regulate in due course. But they are not a planning matter.

We do not agree a number of the Inspector's key issues

190. For completeness, we briefly explain our points of departure from the Inspector's note of "main issues" circulated before the inquiry which will be obvious from the submissions set out above:

(i) §1(a) – there is no development plan requirement to show need.

(ii) §1(b) – there is no development plan requirement to show any particular degree of "carbon output".

(iii) §1(c) – there is no development plan requirement to adhere to the "proximity principle". Further, WCS3 does not, for the reasons above, require an alternative sites assessment for preferred locations for EfW.

(iv) The three "overarching objectives" for sustainable development at §8 NPPF "should be delivered through the preparation and implementation of plans and the application of the policies in [the] Framework; they are not criteria against which every decision can or should be judged".[102]

In overall conclusion, we ask that you allow the appeal

191. For all these reasons the determination which would be in accordance with the development plan would be to allow the appeal; material considerations do not indicate otherwise than allowing the appeal.

192. But if the Inspector disagrees in relation to compliance with the development plan, other material considerations would indicate that the appeal still should be allowed.

193. In consequence, we ask you to allow the appeal.

Christopher Katkowski QC

Zack Simons

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6th FEBRUARY 2019

[102] §9 NPPF.

Legal annexe on approach to alternatives in SEA / EIA Regulations

Environmental Assessment of Plans and Programmes Regulations 2004 ("**the SEA Regulations**")

1. The SEA Regulations apply **only to plans or programmes**: Regulation 3. They do not apply to applications for planning permission.

2. Plans or programmes are defined by Regulation 2(1):

> ""*plans and programmes*" means plans and programmes, including those co-financed by the European Union, as well as any modifications to them, which–
>
> (a) are subject to preparation or adoption by an authority at national, regional or local level; or
>
> (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and, in either case,
>
> (c) are required by legislative, regulatory or administrative provisions"

3. The requirement for an "environmental assessment" of plans or programmes[103] in respect of e.g. waste management relates only to plans or programmes which set "**the framework** for future development consent of projects listed" in the EIA Directive: Regulation 5(2)(b).

4. An environmental report under Regulation 12 is only required when such a **plan or program** requires environmental assessment: Regulation 12(1).

[103] In respect of which the first preparatory act came on or after 21st July 2004.

5. The contents of the report relate to the proposed plan or program. Regulation 12(2) requires that:

> "The report shall identify, describe and evaluate the likely significant effects on the environment of–
>
> (a) implementing **the plan or programme**; and
>
> (b) reasonable alternatives taking into account the objectives and the geographical scope of **the plan or programme**."

6. Regulation 12(3) states that:

> "The report shall include such of the information referred to in Schedule 2 to these Regulations **as may reasonably be required**, taking account of–
>
> […]
>
> (b) the contents and level of detail in the plan or programme […]"

7. The information referred to in Schedule 2 relates to the potential impacts of the plan or programme, for example:

(i) An outline of the contents and main objectives of the **plan or programme**: §1.

(ii) The relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the **plan or programme**: §2.

(iii) The environmental protection objectives, established at international, European Union or Member State level, which are relevant to the **plan or programme** and the way those objectives and any environmental considerations have been taken into account during its preparation: §5.

(iv) A description of the measures envisaged concerning monitoring in accordance with regulation 17: §9

8. Regulation 17 requires that:

> "**17.— Monitoring of implementation of plans and programmes**
>
> (1) The responsible authority shall monitor the significant environmental effects of the implementation of each plan or programme with the purpose of identifying unforeseen adverse effects at an early stage and being able to undertake appropriate remedial action […]"

9. The requirement at §9 of Schedule 2 to describe monitoring measures to accord with Regulation 17 cannot possibly relate to an individual project, rather than to a plan or programme.

10. In any event, the purpose of the Regulation 12 report is to inform a consultation on the draft **plan or programme**: Regulation 13(1).

Alternatives under the EIA Regulations

11. The regulations relevant to this appeal are the Town and Country Planning (Environmental Impact Assessment) Regulations 2011[104] ("**the EIA Regulations**"),

12. An Environmental Statement under those Regulations must include:

> "An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects."[105]

13. On the scope of that requirement:

[104] Regulation 76(2)(a) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017.

[105] Regulation 2(1), and §4 in Part 2 of Schedule 4 to the 2011 Regulations.

(i) It is an obligation to cover only the alternatives which the developer has in fact considered. The Regulations do **not** require alternatives which have not been considered by the developer to be covered, even though the local planning authority might consider that they ought to have been considered.[106]

(ii) There is no requirement for *full* environmental assessment of alternatives. The purpose is to provide the "main reasons" (and not a full environmental assessment) for selecting the preferred option to enable people to comment on the alternatives.[107]

Alternatives under the SEA Regulations

14. Even on Mr Maurici's case, i.e. that the ASA should adhere to the standards of the SEA Regulations, under those regulations which alternatives are "reasonable" is a question of evaluative judgment for the plan-maker over which it has a broad discretion[108] which cannot be disturbed unless irrational.[109]

15. Determining whether and to what extent alternative options will achieve a plan's objectives raises a further question of evaluative judgment for the plan-maker, which cannot be disturbed unless irrational.[110]

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[106] *R (Bedford and Clare) v London Borough of Islington* [2002] EWHC 2044 (Admin) at §224.

[107] *R v Secretary of State for the Environment, Transport and the Regions, ex p Challenger* [2001] Env LR 12 at §60-§61.

[108] *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government* [2014] EWHC 406 (Admin), Sales J at §90,

[109] Richards LJ in *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government* [2016] P.T.S.R. 78 at §42; *R. (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2016] Env. L.R. 1, Hickinbottom J at §88(iii).

[110] *R. (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2016] Env. L.R. 1, Hickinbottom J at §88(vi).

16. The SA must include reasons for selecting its preferred option over the reasonable alternatives, but those reasons only need to be outline.[111] The SA only needs to include the main reasons so that consultees and other interested parties are aware of why reasonable alternatives were chosen as such and, similarly, why the preferred option was chosen as such.[112]

17. Finally, as Sullivan J said in *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin) at §41:

> "In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations … but they are likely to be few and far between."[113]

18. For those reasons, the analysis in the ASA was plainly adequate whether measured against the tests in the EIA or SEA regulations.

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[111] §8 of Schedule 2 to the Environmental Assessment of Plans and Programmes Regulations 2004.

[112] *R. (Friends of the Earth England, Wales and Northern Ireland Ltd) v Welsh Ministers* [2016] Env. L.R. 1, Hickinbottom J at §88(xii).

[113] See, applying that statement to SEA, *Shadwell Estates Ltd v Breckland DC* [2013] EWHC 12 (Admin), Beatson J at §76; *Cogent Land LLP v Rochford DC* [2013] 1 P. & C.R. 2, Singh J at §126; *No Adastral New Town Ltd v Suffolk Coastal DC* [2015] Env. L.R. 28, Richardson LJ at §52.