

Response to Inspector's Supplementary Note dated 5 March 09:29 (CD 13.54.5)
By Anthony Crean QC on behalf of Gloucestershire County Council

1. The Inspector's concern is that there is a continuing evidential lacuna in the plan owing to a failure to provide specific evidence about the development of thermal facilities on all (or some combination of) the four identified sites even though this possibility is not excluded by the plan. The Inspector's concern is that some combination of facilities might lead to some material impact which is out with the evidential base covered by the ERM report.

2. It is understandable that the Inspector should express this concern in the context of the ERM report. However, there is no need for the County Council to produce any further evidence on this issue regardless of the limitations in the ERM report. The reason for this is a combination of:
 - (i) a current understanding of Regulation 102 and, specifically, what it requires; and

 - (ii) the Feeney qualification.

Regulation 102

3. Regulation 102 is the origin of the Inspector's concern in this regard and it is therefore essential that it is construed correctly as to its requirements. Regulation 102(1)(a) includes the qualifying adjective 'likely'. This requires the Plan making authority to form a judgment about what is probably going to happen. This in turn requires a fact and degree assessment of realistic outcomes. This requires an important distinction to be drawn between theoretical possibilities (which are immaterial) and realistic probabilities (which are material). This is the same dichotomy to which Carnworth LJ referred in rejecting an application to appeal in Feeney. The Court was clear that the system required consideration of real as distinct from merely theoretical possibilities.

The Feeney Qualification

4. The ERM report was written with the intention of trying to establish thresholds of effects and was the proposed means of dealing with the Habitats Directive issue before the County Council became aware of the Feeney qualification. The County now suggest that the function which the ERM report was supposed to fulfil has now been overtaken by MM10(c). Incorporating this qualification into the plan has the effect of rendering the ERM report redundant. It follows that any limitation in the evidential scope of the report is irrelevant since the function of the report has now been overtaken by MM10(c).
5. Thus, Regulation 102 is only concerned with likely significant effects which requires the judgment to be made in the realistic factual context of the plan. The qualifying language of MM10(c) ensures there will not be any such effects in any combination of sites or proposals coming forward. That is by itself a sufficient guarantee of the future integrity of the European protected sites regardless of what was or was not contained in the ERM report.
6. Having said this, the ERM report is not withdrawn. It continues to have importance as the underlying evidential basis of the plan because it provides supporting information as highlighted in general development criteria to the site schedules in appendix 5.