Comments by PAIN on the issues arising from the request by Bond Pearce on behalf of Veolia for an adjournment in relation to whether Sherwood Forest should be treated as an Special Protection Area ('SPA') pursuant to the Wild Birds Directive (79/409/EEC)[1]:

Concerns about the SPA designation have been a consistent theme of submissions by the Nottinghamshire Wildlife Trust (NWT) throughout the consultation process – and indeed in their evidence to the inquiry. We also note that those representations have been fully endorsed, and strengthened, by the RSPB submission of 23rd September 2009.

Whilst the NWT has highlighted the issues it was, and remains, the responsibility of Veolia to ensure that the environmental statement is adequate as confirmed in the guidance "Environmental impact assessment: A guide to procedures"[2] (Department for Communities and Local Government 2000).

Furthermore the guidance emphasises:

> *35. Developers should consider at an early stage whether an assessment of environmental effects may also be required under another European Community Directive, such as the Habitats Directive (92/43/EEC), the Wild Birds Directive (79/409/EEC), the Integrated Pollution Prevention and Control Directive (96/61/EC) or the Control of Major Accident Hazards Directive (96/82/EC). Although the requirements of these and of the EIA Directive are all independent of each other, there are clearly links between them.*

It is regrettable that Veolia has consistently failed to act to ensure that such an assessment has been carried out.

On Friday 30th October, more than three weeks after receiving the NWT proof of evidence, Bond Pearce wrote to PINS asking that the ecology evidence should be adjourned – for an unspecified period. No indication was given in the letter of what the reasons for this request were, nor were details given of what it was proposed would be done during the adjournment. We note that the response from Bond Pearce came only after the NWT had to resort to detailed legal submissions from Graham Machin and assume that Veolia[3], and their advisors, have finally recognized the significance of this longstanding issue.

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[1] COUNCIL DIRECTIVE of 2 April 1979 on the conservation of wild birds (79/409/EEC) (OJ L 103, 25.4.1979, p. 1 as amended

[2] *34. Even where a local planning authority has adopted a scoping opinion, the developer is responsible for the content of the statement which is finally submitted. Developers should bear in mind that planning authorities have powers to call for additional information when considering environmental statements and planning applications, and that they are likely to use those powers if they consider that aspects of a submitted environmental statement are inadequate (see paragraph 48 below).*

[3] We note that the rebuttal evidence of David Bell says at para 2.13:
3.8.2 Mrs Bradley asserts that the importance of the Sherwood Forest area for nightjar qualifies it as a Special protection Area. This aspect will be the subject of legal submissions on behalf of the Applicant at the inquiry.

We assume that it is common ground that if further work is required on the Environmental Assessment then this must be completed and reviewed before any planning decision could be granted as per Regulation 3(2) of the 1999 Regulations (HMSO 1999)[4]:

(2) The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so.

It is assumed that the minimum additional requirement will be that Veolia will need to properly consider the existence of, and the potential effects of the development on, the significant breeding populations of both nightjar and woodlark in the Sherwood area.

MAIN made reference to these concerns only about seven weeks after the site was first made public and long before the planning application was submitted (in December 2006) in an e-mail sent on 1st September 2006 to Joy Armstrong (a planning officer at NCC) saying:

"This woodland and heathland site is the first site in the region recording nesting Egyptian Nightjars and they still nest here".

PAIN raised again in the planning submission to NCC in February 2008 (PAIN 1 at page 24) saying:

PAIN does not feel that adequate attention has been given to the application's potential negative impacts on local nature habitats and biodiversity. A proper account has not been taken regarding birds (including woodlark, nightjar, willow warbler, meadow pipit, skylark, green woodpecker and little ringed plover), grass snakes, frogs, lizards, bats, moths, chiff chaff, dingy skipper, and purple moor grass. PAIN has been supplied with evidence of these species relying on the proposed site, but we have seen little recognition of this in Veolia's applications.

And again in PAIN 2(page 84 para 9.3):

It would have been helpful to have seen a copy of that submission in advance of the inquiry so that we had a more clear indication of what was to be proposed. Unfortunately Veolia, unlike NWT, has not provided an advance copy of their submission.

[4] As the comments of Lord Hoffman (with whom the remainder of their Lordships agreed) in R v. North Yorkshire C.C., ex p. Brown and Another [1999] 1 All ER 969) where he explained at page 971G that: -

"… This directive was adopted to protect the environment throughout the E.U. by requiring member states to ensure that planning decisions likely to have a significant effect were taken only after a proper assessment of what those effects were likely to be. It requires that before the grant of development consent for specified kinds of project, Member States should ensure that an environmental impact assessment is undertaken".

Proximity to local Nature Reserve and Sites of Special Scientific Interest pose threats to wildlife and their fragile and unique habitats, including nightjar nesting sites, etc.

We would now add that Liley, for example, (Liley and Clarke 2003), in reviewing the impact of urban development and human disturbance on the numbers of nightjar (Caprimulgus europaeus) on heathlands in Dorset, recognises the relevance of studies of other species have showing that birds will, during the breeding season, avoid areas with a high level of human activity[5].

To avoid duplication of evidence for this inquiry, however, PAIN has left this issue in the competent hands of NWT.

How any additional work and information is brought to the inquiry is important. Circular 02/99 (Department for Communities and Local Government 1999) (at para 52) confirms:

> *Where an environmental statement has been prepared to accompany a planning application, the information which it contains will be among the material considerations which an Inspector will take into account in considering an appeal. The Secretary of State (or the Assembly) and Inspectors, like the planning authority, have power to request the developer to provide further information where they consider that the environmental statement is inadequate as it stands. Any additional information provided by the developer in response to such a request will be made available to all parties to an appeal.*

Regulation 19 of the 1999 EIA Regs says, in relation to further information and evidence respecting environmental statements:

19. *- (1) Where the relevant planning authority, the Secretary of State or an inspector is dealing with an application or appeal in relation to which the applicant or appellant has submitted a statement which he refers to as an environmental statement for the purposes of these Regulations, and is of the opinion that the statement should contain additional information in order to be an environmental statement, they or he shall notify the applicant or appellant in writing accordingly, and the applicant or appellant shall provide that additional information; and such information provided by the applicant or appellant is referred to in these Regulations as "further information".*

This guidance confirms :

> *By virtue of regulation 19(2), if the request specifically states that the information is to be provided for such purposes, the publicity procedures set out in regulation 19(3)-(9) do not apply. Rather, such information will be regulated by the Rules relating to the submission of evidence to local planning inquiries (see endnote 26). These Rules already require material*

[5] Citing (Schulz and Stock, 1993; Liley, 1999)

provided by the applicant to be publicised appropriately. Further details of procedures relating to public inquiries are contained in Circular 15/96.

Whilst the implications of this are not entirely clear it appears that the additional evidence should be provided in advance of the opening of the inquiry so that the case for the applicant could be heard together. We note that in the event that no environmental statement had been provided and that one was subsequently required in relation to the specific issues associated with the "should be" SPA then the guidance says:

50. Applicants should bear in mind that if the need for EIA only arises after the planning application has been submitted, consideration of the application will be suspended pending submission of an Environmental Statement (regulation 32(2)(b)).

However this is approached it is clearly vital that the "should be" SPA concerns raised by NWT should be properly and fully addressed. It is equally clear, however, that the outcome of any review may have a profound effect on other aspects of the application – most notably the site selection process.

It is quite possible that the additional focus on this issue attracted by the RSPB and others will cause Natural England, who remain concerned about the potential impacts of emissions and associated road traffic on the Rainworth Heath SSSI, may renew their own interest in the site itself and thus want to attend the Inquiry.

It is, of course, also possible that after careful consideration of all the information Veolia will conclude that it would be irresponsible to continue with an application to develop such a sensitive site in the way that is currently proposed. They may withdraw, or at least heaving modify, the application.

This puts PAIN, and other Rule 6 parties, in a difficult position because that aspect of the application is central to our case and we obviously want to test the evidence provided applicant in relation to this. PAIN envisages that this will involve cross-examination of not only Dr. Bell but certainly also Mr. Standen (on Policy and Alternative Site Appraisal) and Mr. Mitchell (Company overview and the history of the site selection process). It would not be surprising if the evidence of Mr. Smythe (Air quality) and Mr. Kirkman (technology) become more relevant depending, to some extent, on any further work and possible proposals for mitigation.

It would certainly be prejudicial to the presentation of our case, to embark upon partial cross-examination of these key witnesses with the intention of coming back to them at some unspecified time in the future on such an important aspect of the evidence.

Veolia has been aware of these concerns from the outset (see ES Ecology section page 9-8 where the scoping consultation had highlighted that "Implications for the proposed Sherwood nightjar SPA should be assessed.") Their failures to

research the ecological issues associated with the SPA concern and their delays in responding appropriately are clearly the responsibility of the applicant and should not be allowed to prejudice the case of objectors.

Furthermore we note that the implications of opening the inquiry, partly hearing the evidence, delaying for an unspecified period, and then reconvening would place an excessive financial burden on the local community – costs which have already been stretched beyond reasonable bounds by the abortive legal actions initiated by Veolia in their attempts to prevent the collection of information necessary for our evidence to the inquiry.

We would therefore suggest that the most euitable solution might be that the inquiry should not proceed until the full case to be presented by Veolia has been completed and presented in accordance with the rules of evidence. This would have the additional benefit that PAIN would be able to update our own evidence to include the information that the Courts have now agreed we are entitled to see but to which Veolia's legal proceedings have so far delayed access.

Other benefits that we envisage of a postponement of the whole Inquiry at this stage include the completion of the long over-due s.106 agreement and planning conditions – which were promised before the Inquiry and that we should see before Veolia give their evidence.

It would also give an opportunity for the County Council/ Veolia to answer Inspector's request for information about the use of the new Nottingham incinerator capacity which was raised at the pre-inquiry meeting:

The need for an energy from waste facility of this capacity, given the importance of treating waste as close to its source as possible and bearing in mind the Secretary of State's recent (12 February 2009) decision to grant planning permission to Waste Recycling Group Ltd for an additional 100,000 tonne capacity at the Eastcroft combined heat and power plant in Nottingham. In this respect, I will want to understand what opportunity exists to make greater use of the Eastcroft facility, given the Council's PFI contract with Veolia, and how this might affect the arrangements for managing residual waste that are set out in Table 3 of the officer's report to the 9 January meeting of the Planning and Liaison Committee;

This has not, so far as we are aware, been addressed by either NCC nor Veolia yet is an important aspect of the discussions on 'need' – not least because the WRG obviously felt able to manage with that capacity for the whole of the City and County when they tendered against Veolia. PAIN considers this information should be available to the Inquiry before Veolia give their evidence.

An alternative approach could be for the Inspector to either hear the evidence on Ecology first and then perhaps to make a ruling on the position that could guide future progress of proceedings.

We hope this note may be useful to inform the Inquiry of how the latest developments are likely to affect PAIN. We are, as always, very happy to accept

whatever decision the Inspector reaches in relation to the best and most equitable way to proceed with the Inquiry.

Refs:

Department for Communities and Local Government (1999). Circular 02/99: Environmental impact assessment 12 March 1999.

Department for Communities and Local Government (2000). Environmental impact assessment: A guide to procedures (amended reprint 2001) <http://www.communities.gov.uk/documents/planningandbuilding/pdf/157989.pdf>.

HMSO (1999). Statutory Instrument 1999 No. 293 The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999

Liley, D. and R. T. Clarke (2003). "The impact of urban development and human disturbance on the numbers of nightjar Caprimulgus europaeus on heathlands in Dorset, England." Biological Conservation **114**(2): 219-230.