

**New England Resource Recovery Centre  
Nr. Lee Mill, Devon**

**Technical Appendix 12-11 - Policy and Legislation**

**Viridor**

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## 1.0 INTRODUCTION

In 2009 SLR Consulting undertook an Environmental Impact Assessment of the proposed Resource Recovery Centre at the former New England Quarry site in Devon, on behalf of Viridor. The current planning application for the site will be assessed primarily against adopted policies in the Devon Waste Plan<sup>1</sup>; this appendix sets out those policies within the plan which are relevant to ecology and nature conservation (other policies are discussed in the other relevant ES chapters).

European and nationally protected sites have been identified in the local area and could potentially be affected by the development proposals; relevant legislation relating to these sites therefore is also provided, and the potential legal implications of development considered against these.

Several protected species are also present within the site and surrounding areas and could be affected by the proposed development; relevant legislation relating to these species is therefore also provided, and the legal implication of development considered against these.

Devon County Council is a lead partner in the Devon Biodiversity Action Plan (BAP)<sup>2</sup>, and has responsibilities to work towards objectives and targets through specified action agreed in the plan. Relevant BAPs are therefore highlighted and considered in light of the proposed scheme.

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<sup>1</sup> Devon County Council (2006) *Waste Local Plan*. DCC,

<sup>2</sup> Devon Biodiversity Partnership (2009) *Devon Biodiversity and Geodiversity Action Plan*.

## **2.0 PLANNING POLICY**

### **2.1 Devon County Council – Waste Local Plan (2006)**

The Devon Waste Plan sets the policy framework against which waste applications for the County should be determined. The Plan was adopted in 2006 and covers the period up to 2016. Although it was due to lapse in 2009, the Secretary of State has directed that all of its policies should be saved for an extended period.

Policies relevant to nature conservation are discussed below.

#### **2.1.1 WPP6 – Sites of Special Scientific Interest and National Nature Reserves**

*‘Proposals for waste management facilities will not be permitted if they are likely to harm, either directly or indirectly, the particular wildlife or geological interest of a Site of Special Scientific Interest, a National Nature Reserve, or a Marine Nature Reserve.’*

A total of 11 Sites of Special Scientific Interest have been identified within a 10km radius of the site, namely:

- Billacombe;
- Plymbridge Lane and Estover Road;
- Lady’s Wood and Viaduct;
- Piles Copse;
- South Dartmoor;
- Wembury Point;
- Erme Estuary;
- Yealm Estuary;
- Dendles Wood;
- Faraday Road; and
- Wheal Emily.

While no potential direct impacts upon these sites were identified, potential indirect effects of acid and nitrogen deposition through aerial pollution have been assessed through deposition modelling. This analysis has demonstrated that no significant impacts upon these sites are anticipated.

The Yealm Estuary and Wembury Point SSSIs also have the potential to be indirectly affected by aquatic pollutants reaching the sites via contamination of the River Yealm. The Hydrology chapter of the ES outlines mitigation measures to be applied to ensure that potential sources of pollution are controlled and contained throughout the construction and operational phases of development, and has concluded that the residual significance of any such impacts on the River Yealm and downstream receptors would be low.

A Hydrological Risk Assessment will be carried out to identify evaluate potential pollution levels and inform the design of appropriate Pollution Prevention and Control (PPC) measures to be incorporated into the design to ensure that water quality at the discharge point complies with Groundwater Regulations standards (no release of Schedule 1 pollutants) and meets the requirements of the Environment Agency's Environmental Quality Standards or Water Supply (Water Quality) Regulations 2000 (for Schedule 2 pollutants); given the dilution effects of the River Yealm and other sources such as Silverbridge Lake, Cofflete Creek and other tributaries, any negative impacts upon these downstream receptors are therefore considered highly unlikely.

The development proposals are therefore considered to comply with Policy WPP6.

### **2.1.2 WPP13 Local Conservation Designations**

*Proposals for waste management facilities which are likely to have an adverse effect on the following local sites of substantive nature conservation, geological or historic environment importance:*

- *County Wildlife Sites*
- *County Geological Sites*
- *Local Nature Reserves*
- *Sites listed on the Sites and Monuments Register*
- *Sites listed on the Devon Local Register of Parks and Gardens of Special Historic Interest; or*
- *Sites which following survey are shown to be of equivalent importance to those listed above, but are not designated as such*

*will only be approved if:*

1. *there is a need for the waste management facility which outweighs the need to safeguard the nature conservation, geological or historic value of the site; and*
2. *there are no reasonable, less damaging alternative solutions; and*
3. *the development incorporates satisfactory provision for the mitigation of its impacts in the form of habitat creation/re-creation, landscaping or planting, conservation of geological or other features, and the recording, excavation and subsequent reporting of any historic or archaeological sites or features to be affected.*

The site incorporates part of two County Wildlife Sites (CWS), namely *New England Fields* and *Mackells Park, Southwood Woods and Strashleigh Hams*. The ES has identified direct impacts upon both of these sites through habitat loss; New England Fields CWS through creation of an attenuation pond, and Mackells Park, Southwood Woods and Strashleigh Hams CWS through the creation of an access road and associated bridge and attenuation pond. Although this habitat loss would have a negative impact upon the CWSs, the integrity

of these sites would not be completely lost and they are likely to still qualify as being of County importance after development<sup>3</sup>.

The components of the development which will result in the damage to the CWSs (access road and surface water drainage features) are integral to its function, and while attempts have been made to explore options for alternative access routes and locations for the attenuation ponds, no alternatives that would avoid habitat loss were found to be feasible. Mitigation for damage of these features will be provided through the favourable management and monitoring of retained areas and habitat creation elsewhere within the ownership boundary, however a residual negative impact is anticipated.

It will be necessary for Devon County Council (DCC) to assess whether the need for the waste management facility outweighs the residual negative impact upon the CWS designations. Mitigation and compensation for anticipated impacts should be implemented through a detailed Ecological Management and Monitoring Plan which could be secured through planning conditions.

### **2.1.3 WPP14 – Maintenance and Enhancement of the County’s Nature Conservation Resource**

*‘Proposals for waste management facilities shall include provision to maintain or enhance the extent, diversity and local distinctiveness of the County’s nature conservation resource. Planning conditions and planning obligations will be used to mitigate or compensate for any adverse impacts. Opportunities will be sought to manage, restore and enhance key conservation interests, including landscape features which may provide wildlife corridors and links between habitats.’*

The development proposals have the potential to reduce onsite biodiversity through habitat damage and loss, and disturbance of fauna. A mitigation strategy has been proposed which would significantly reduce any such loss of biodiversity, while opportunities also exist to enhance areas of land within the applicant’s ownership e.g. converting species-poor grassland to species-rich neutral grassland and woodland, or enhancing the buildings to support roosting bats. These opportunities for maintenance and enhancement of biodiversity at the site should be implemented through an Ecological Management and Monitoring Plan, to be secured through planning conditions.

In this respect, the development proposals should generally comply with the requirements of WPP14.

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<sup>3</sup> Devon Biological Records Centre (2009) *The Devon Wildlife Sites Manual – Policies and Procedures for Identification and Designation of County Wildlife Sites*. DBRC, Exeter.

### 3.0 LEGISLATION

#### 3.1 Conservation (Natural Habitats, &c.) Regulations 1994 (as amended)

##### 3.1.1 *European Protected Species*

Species protected under the Habitats Regulations are referred to as European Protected Species (EPS). Under regulation 39 of the Habitats Regulations 1994 (as amended 2007 and 2009), it is an offence to:

- (a) **deliberately** capture, injure or kill any wild animal of an EPS;
- (b) **deliberately** disturb wild animals of any such species  
For the purposes of paragraph (1)(b), disturbance of animals includes in particular any disturbance which is likely—
  - (a) to impair their ability—
    - (i) to survive, to breed or reproduce, or to rear or nurture their young; or
    - (ii) in the case of animals of a hibernating or migratory species, to hibernate or migrate; or
  - (b) to affect significantly the local distribution or abundance of the species to which they belong.
- (c) **deliberately** take or destroy the eggs of such an animal; or
- (d) damage or destroy a breeding site or resting place of such an animal.

Whilst not tested by law, it has been advised (ref.) that a *deliberate* act includes those acts that could have reasonably foreseen the consequences and 'being sufficiently informed' that an offence may occur as a result. The offence of damage or destruction of a breeding site or resting place is a strict liability offence. Anyone who commits this offence, even by accident, will now be open to prosecution.

Guidance may be published by Ministers or the appropriate nature conservation bodies as to the application of the offences in paragraph (1)(b) or (d). In proceedings for an offence under paragraph (1)(b) or (d), a court shall take into account any relevant guidance published.

The (Amendment) Regulations 2007 and 2009 have amended the defences in Regulation 40 of the 1994 Regulations. There is now no defence where it cannot be shown that—

- (a) there was no satisfactory alternative; and
- (b) the action was not detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.

The 2007 regulations removed the defence in regulation 40 that covered acts which were the incidental result of a lawful operation and could not have been reasonably avoided (commonly known as the "incidental result defence"). The defences for EPS occurring in dwelling houses have also been removed and a derogation licence would now be required to damage or destroy a breeding site or resting place of an EPS or deliberately disturb an EPS within a dwelling house in any circumstances.

Actions which may otherwise cause an offence to occur may be licensed under the provisions of Regulation 44 of the Habitats Regulations. A licence must not be issued unless there is no satisfactory alternative and unless the action authorised by the licence would not be detrimental to maintaining the population of the species concerned at a favourable conservation status in its natural range.

Natural England and the Countryside Council for Wales are the licensing authority for granting licences for the purposes in regulation 44(2)(a)-(d), which include “scientific or education purposes”, e.g. surveying and licences under regulation 44(2)(e)-(g). Regulation 44(2)(e) contains the purpose : “ preserving public health or public safety, or for reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment”.

EPS known to be present at the site include:

- Otter;
- Dormouse; and
- Bats.

A mitigation scheme has been proposed to avoid, mitigate and / or compensate for potential impacts to these EPS. In the case of otter impacts should be largely avoidable through careful design and implementation, and is it considered that any residual impact is likely to be negligible and would not require licensing, however habitat loss for bats and dormouse would be unavoidable, and would therefore be subject to a EPS licence issued by Natural England.

The development proposals would therefore be carried out in accordance with the requirements of the Habitats Regulations in respect of EPS.

### **3.1.2 Special Areas of Conservation**

Special Areas of Conservation (SACs) are strictly protected sites designated under the EC Habitats Directive. Article 3 of the Habitats Directive requires the establishment of a European network of important high-quality conservation sites that will make a significant contribution to conserving the 189 habitat types and 788 species identified in Annexes I and II of the Directive (as amended). The listed habitat types and species are those considered to be most in need of conservation at a European level (excluding birds). Of the Annex I habitat types, 78 are believed to occur in the UK. Of the Annex II species, 43 are native to, and normally resident in, the UK.

In a UK context, candidate SACs have been selected by the Joint Nature Conservancy Council, of which 608 have been adopted by the European Council, and these and are protected under the Habitats Regulations. Regulation 48 requires that all ‘competent authorities’ (minister, government department, public or statutory undertaker, public body of any description or person holding a public office):

*‘...before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which-*

*(a) is likely to have a significant effect on a European site in Great Britain (either alone or in combination with other plans or projects), and*

*(b) is not directly connected with or necessary to the management of the site,*

*shall make an appropriate assessment of the implications for the site in view of that site's conservation objectives’.*

Planning Authorities are required to consider the need for Appropriate Assessment (AA) of all consents from spatial strategies and land use plans down to individual planning

applications. Where AA is considered necessary for planning applications it is generally the responsibility of the applicant to provide sufficient information to inform such an assessment.

Two SACs have been identified within 10km of the application site, and potential impacts of aerial and aquatic pollutants upon these receptors have been considered within the ES. On the basis of the information provided in the ES it is considered unlikely that the development would have an impact upon the integrity of either site, however it is DCCs responsibility as the 'competent authority' to decide if an AA is necessary, and if so to request any additional information required to inform such an assessment and carry out the assessment.

### **3.2 Wildlife and Countryside Act 1981 (as amended)**

#### **3.2.1 Sites of Special Scientific Interest**

Sites of Special Scientific Interest (SSSIs) give legal protection to the best sites for wildlife and geology in England. The first SSSIs were identified in 1949 when the then Nature Conservancy notified local authorities of SSSIs, so their conservation interest could be taken into account during the development planning process. Natural England is responsible for identifying, designating and protecting SSSIs in England under Section 28 of the Wildlife and Countryside Act. Local authorities are also required to protect SSSIs through their planning policies (see above) and must consult Natural England on any individual planning applications which might affect the integrity of such sites.

No significant impacts upon SSSIs are anticipated as a result of the development proposals (see Section 2.1.1 above).

#### **3.2.2 Protection of Birds**

Section 1 of the Wildlife and Countryside Act prohibits intentional killing, injuring or taking of any wild bird and the taking, damaging or destroying of the nest (whilst being built or in use) or eggs. It also prohibits possession of wild birds (dead or alive) or their eggs. The mitigation strategy for the site will ensure that no wild bird nests are damaged or destroyed during the construction phase by timing habitat removal to avoid sensitive periods and prevent potential breaches of the law.

Those species listed on Schedule 1 of the Act are also afforded special protection from disturbance while at the nest. Kingfisher is known to breed along the adjacent stretch of the River Yealm, although the exact location is not known. Construction of the bridge crossing could potentially disturb nesting birds along the riverbank, therefore this work will be timed to commence outside of the breeding bird season to avoid disturbance of active nests.

#### **3.2.3 Schedule 5 Species**

Several of the species present at the site are protected under Section 9 of the Wildlife and Countryside Act, 1981 through their inclusion on Schedule 5. As such, these animals are protected from:

- **intentional** killing, injury or take;
- **intentional or reckless**
  - (a) damage or destruction of any structure or place used for shelter or protection;
  - (b) disturbance of any such animal while it is occupying a structure or place which it uses for shelter or protection; or
  - (c) obstruction of access to any structure or place which any such animal uses for shelter or protection.

A person shall not be guilty of an offence if it was the incidental result of a lawful operational could not reasonably have been avoided.

Species at the site included on Schedule 5 of the Wildlife and Countryside Act include:

- Otter;
- Dormouse;
- Bats;
- Badger; and
- Reptiles (killing and injury only).

The proposed mitigation strategy provided in Chapter 12 of the ES should avoid significant impacts to these species, although a detailed implementation plan will be required to ensure delivery. Licences will be required from Natural England for unavoidable damage / destruction of dormouse, bat and badger habitats. Killing / injury of reptiles will be avoided through the use of a translocation scheme, while impacts to otter should be avoided through careful scheme design and implementation.

It should therefore be possible to deliver the development proposals without breaching Section 9 of the Wildlife and Countryside Act.

### **3.3 The Badger Act (1992)**

Badgers are protected under the Protection of Badgers Act 1992, and the following offences may be committed by a person:

- damaging a badger sett or any part of it;
- destroying a badger sett;
- obstructing access to, or any entrance of, a badger sett;
- causing a dog to enter a badger sett;
- disturbing a badger when it is occupying a badger sett; or
- intending to do any of those things or being reckless as to whether his actions would have any of those consequences.

Construction of the second landfill cell is likely to result in the disturbance of badgers which may be present in Sett 7 during the construction phase and may also result in damage of this sett, while it may also be necessary to remove the sett completely if this poses a risk to the Pollution Prevention and Control system. A licence will be obtained from Natural England to close Sett 7, ensuring that this is carried out in compliance with the requirements of the Badger Act.

#### 4.0 BIODIVERSITY ACTION PLANS

DCC is a lead partner in several of the local Biodiversity Action Plans for the County<sup>4</sup>, including several of those for species and habitat types present within the site, and have responsibilities to protect these habitats and species within the County to help reach the targets and objectives in each of the respective plans.

The Devon BAP sets out the role of local authorities in achieving BAP Targets:

*Many of the roles and responsibilities of local government have a direct or indirect bearing on bio- and geodiversity conservation. As planning authorities, the County and District Councils, the Unitary Authorities and the National Parks determine the impact of almost all development subject to planning law on the natural environment. The degree to which planning authorities appraise themselves of the environmental features of land subject to planning proposals, the extent to which they seek to develop policies which recognise the need to steer development away from land rich in biodiversity or with key geodiversity features, and the nature of the working relationships they develop with outside sources of expertise and advice on conservation matters, will determine their effectiveness in using the planning system to serve the interests of the natural environment. Local authorities also exercise discretionary powers which can be used to promote conservation initiatives and facilitate a more co-ordinated approach to land use and management, in partnership with others.*

Action plans within the Devon BAP relevant to the site and the current application include those for:

- Alder / willow wet woodland;
- Flower-rich meadows and pastures;
- Pits, quarries and cuttings;
- Rivers, streams, floodplains and fluvial processes;
- Atlantic salmon;
- Dormouse;
- Greater horseshoe bat; and
- Otter.

It should be possible to provide mitigation to avoid negative impacts to most of these resources and also provide opportunities for enhancement for some through an Ecological Management and Monitoring Plan, helping DCC to meet its responsibilities to deliver objectives and targets under each of these BAPs. Further input into the final version of this Ecological Management and Monitoring Plan by DCC is welcomed.

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<sup>4</sup> Devon Biodiversity Partnership (2009) *Devon Biodiversity and Geodiversity Action Plan*.

## **5.0 CLOSURE**

This report has been prepared by SLR Consulting Limited with all reasonable skill, care and diligence, and taking account of the manpower and resources devoted to it by agreement with the client. Information reported herein is based on the interpretation of data collected and has been accepted in good faith as being accurate and valid.

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