

## **North London Waste Plan Examination**

### **The Duty to Co-operate<sup>1</sup>**

(i) The consideration of the legal requirement to co-operate in the preparation of the North London Waste Plan (NLWP) is in two stages. The first stage, in a note dated 25 June 2012 (paras 1 to 20 below), has dealt with the legal submissions that, in effect, the North London Councils (the Councils) were absolved of the duty to co-operate with the planning authorities to which waste was exported.

(ii) The second stage is to consider whether co-operation as envisaged by the 2004 Act and the NPPF has been carried out. My overall conclusions are at paras 34 to 37.

### **Stage 1**

#### **Background**

1. The South East Waste Planning Advisory Group (SEWPAG) and the East of England Waste Technical Advisory Body (EoEWTAB), comprising the waste planning authorities of their respective areas, submitted representations about the North London Waste Plan (NLWP) and also a joint statement to be considered in the Examination at the hearing session on Main Matter 1: Legal Issues. In the submissions, they raised the “duty to co-operate” and claimed that the requirement had not been met by the NLWP.

2. The Councils submitted a paper; “CDNLWP41 Duty to cooperate – Borough’s response to Inspector” which is an answer to my request for a briefing note on how the requirements to cooperate had been met. The Councils also submitted a “Legal Response to SEWPAG and EoEWTAB from NLWP on Main Matter 1”. I have also seen a recent exchange of emails between the Regional Advisory Groups and the Councils forwarded to me by the Programme Officer. Further legal submissions were made by the parties at the hearing, including the North London Waste Authority (NLWA) who added to their earlier paper on Legal Issues. In addition, at the hearing, I heard further details about the degree of contact between the Councils and the planning authorities where waste was received from North London (the waste importing authorities). Subsequently, additional submissions have been received from SEWPAG and EoEWTAB, the NLWA and the Councils<sup>2</sup>.

3. There is no dispute about co-operation between the 7 North London Boroughs, other London Boroughs or other persons.

#### **The Substance of the Submissions**

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<sup>1</sup> S110 of the Localism Act inserted S33A into the Planning and Compulsory Purchase Act 2004: A duty to co-operate in relation to planning of sustainable development.

<sup>2</sup> The NLWP website links to the submissions are listed at the end of this note.

### ***Application of the duty to co-operate***

4. SEWPAG and EoEWAB jointly claim the NLWP has failed in the duty to co-operate in that it has failed in its obligation "to engage, constructively, actively and on an on-going basis" with regard to the development of the Plan. The Councils have not engaged actively with the planning authorities outside London when preparing the Plan and no evidence has been adduced to show any such co-operation.

5. The Councils responded, accepting that in relation to the preparation of development plan documents, S33A "imposes a duty on specified bodies to co-operate with one another if there are strategic matters planned in the Plan". They also submitted that S33A of the 2004 Act defines a "strategic matter" very narrowly. The relevant definition is *"sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas... ."*

6. The Councils stated that the Plan is not proposing any development or use of land which would have a significant impact outside the 7 Boroughs (which constitute "the Councils"). The Councils claim that the statute expressly limits itself to particular development proposals.

7. Moreover, the Councils submitted that a "planning area" as defined in the Act, does not include County Councils such as Essex, Oxfordshire, Hertfordshire, Surrey, Buckinghamshire and Northamptonshire. They are non-qualifying Councils for the purposes of the Plan.

8. The NLWA supported the Councils and added that in order to demonstrate that the duty was engaged in relation to areas outside London, it would be necessary to establish that policies for development or use of land would have a significant impact. No evidence has been produced to demonstrate such an impact.

### ***Inspector's Conclusions***

9. S33A (1) states that *"... each person who is: (a) a local planning authority, (b)...., or (c) ..., must co-operate with every other person who is within paragraph (a), (b) or (c) ... in maximising the effectiveness with which activities within subsection (3) are undertaken."*

10. Subsection (3) indicates that the activities within this subsection include *"(a) the preparation of development plan documents, and (e) activities that support activities within any of the paragraphs (a) to (c), so far as relating to a strategic matter."*

11. Subsection (4) defines "a strategic matter" for the purposes of subsection (3) as *"(a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection*

*with infrastructure that is strategic and has or would have a significant impact on at least two planning areas, and (b) sustainable development or use of land in a two tier area if the development or use (i) is a county matter, or (ii) has or would have a significant impact on a county matter."*

12. The definition of "planning area" in Subsection (5) includes "(a) the area of – (i) a district council (including a metropolitan district council), (ii) a London borough council, or (iii) a county council in England for an area for which there is no district council, but only so far as neither is in a National Park nor in the Broads, (b) ..."

13. I agree with the Councils that S33A does not state explicitly that waste management is a strategic matter. Nevertheless, the National Planning Policy Framework (NPPF) includes "*the provision of infrastructure for ..., waste management, ...*" as one of the strategic priorities for the area in the Local Plan. (para 156) In addition, the NPPF states (a) that "*local planning authorities should work with authorities and providers to assess the quality and capacity of infrastructure for ... waste ... and its ability to meet forecast demands; ...*" (para 162); and (b) "*Public bodies have a duty to cooperate on planning issues that cross administrative boundaries, particularly those which relate to the strategic priorities set out in paragraph 156.*" (para 178) Therefore, I consider that waste management is capable of qualifying as a strategic matter for the purposes of S33A. Indeed, given that there are extant Regional Advisory Bodies which have been created to examine the regional element of waste management, and that waste which arises in one council area is often managed or disposed of in another, I would say that there is every expectation that waste management should be treated as a strategic matter.

14. The Councils also submit that the "planning area" where there has to be a significant impact does not include county councils if they have district councils within them. I have had regard to this interpretation of S33A but, in any event, a district council (including a metropolitan district) is defined as a planning area. Accordingly, at the very least, notwithstanding that waste management is a county matter in a two tier area, I consider that where there is (or could be) a significant impact involving a strategic matter, there would be a duty to co-operate with either the county council or the district council where at least two planning areas were affected. Additionally, county councils which are waste planning authorities would qualify as a "person" with whom there must be co-operation under S33A(1)(a) because they are the local planning authority for waste management.

15. Finally, I turn to the submission by the Councils that the Plan does not propose any development or use of land which would have a significant impact outside the 7 Boroughs. The Councils reinforce this claim by referring to the lack of any proposal for a new waste site on the border of the Plan area and then examining each of the policies in the Plan. The policies would have the effect of continuing the waste uses at sites in two lists (Schedules A and B) and proposing allocations at sites in Schedule C. The Councils state that new waste development on Schedule

C sites would have to satisfy other policies in the Plan and, in so doing, would not have any significant impact on planning areas outside the 7 Boroughs. I do not dispute their submissions on this point. Furthermore, I have no evidence to dispute the claim that the existing Schedule A and B waste sites do not give rise to significant impacts on particular planning areas outside the 7 Boroughs.

16. Nevertheless, this stance ignores the fact that waste which arises in the NLWP area is being exported to be managed elsewhere and the cumulative effect of the policies in the Plan is to perpetuate the pattern. Indeed, as the NLWP acknowledges, *"However, even at the end of the plan period, waste will continue to cross boundaries for treatment."*(para 2.31); and *"There are no sites for landfill in north London. Historically the area has been reliant on landfill sites outside the region. This reliance will decline as north London's new waste facilities come on line and waste is treated higher up the waste hierarchy. However, even when greater self-sufficiency has been achieved there is still likely to be a requirement for some types of landfill, particularly for non-biodegradable and non-recyclable waste."* (para 2.32)

17. Therefore, whereas I accept that it is possible that waste related development on sites in Schedules A, B and C of the NLWP would not have a significant impact on planning areas outside the 7 Boroughs, the lack of provision for managing all the waste arising from within north London will result in its continued export, albeit perhaps at a reduced level. SEWPAG and EoEWTAB have calculated that in 2009 about 480,000 tonnes (t) of household (MSW) and commercial and industrial (C&I) waste was exported from north London to landfill outside London. The significance of the movements is a matter of judgement. However, the transport of about 144,000t to Buckinghamshire, 100,000t to Northamptonshire, 71,000t to Bedfordshire, 66,000t to Hertfordshire and 52,000t to Essex, in my opinion, is likely to have a very significant impact on the areas where the waste is received and possibly on the transport routes along which it is moved. The import of waste could also take up landfill or other waste management capacity which might be better used by locally produced arisings.

18. Accordingly, I conclude that the absence of policies or proposals in the NLWP to manage all the waste arisings and the consequent continuation of the export of waste would be likely to have a significant impact on at least two planning areas by virtue of the waste being managed or deposited in them. Consequently, the North London Councils have a duty to co-operate with the councils representing the "planning areas" in which the waste would be managed or deposited.

19. I note the claim by the NLWA that the NLWP is based upon the apportionment in the London Plan, that the London RTAB has engaged with representatives from the South East and the East of England and that there is no need to repeat the engagement process. However, the London Plan was prepared before the coming into effect of S110 of the Localism Act and I do not consider that the Councils are absolved from the duty to co-operate as described in the 2004 Act and the NPPF.

20. I shall now consider whether co-operation as envisaged by the 2004 Act and the NPPF has been carried out but, in the meantime, ask the Councils themselves to consider whether there has been any co-operation which has been constructive, active, ongoing and effective.

## **Stage 2**

21. Since the issue of my first note on 25 June, there have been further submissions on behalf of the North London Councils (the Councils) dated 27 July; the East of England WTAB and SEWPAG dated 30 July; and the Councils dated 8 August.<sup>3</sup> I have taken these submissions into account in reaching my final conclusions. I have not taken into account other representations which were also submitted on this topic but which were not duly made within the statutory timetable or which were not as a result of my invitation.

## **Inspector's Comments**

22. The Councils refer to the meaning of "engagement" which appears to derive from S33A(2): *"In particular, the duty imposed on a person by subsection (1) requires the person – (a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken..."*.

23. I agree that the 2004 Act gives no definition of what constitutes "engagement". However, a starting point in assessing what is involved in the duty to co-operate is the Concise Oxford Dictionary definition of co-operate *"... work together..; concur in producing an effect..."*. Moreover, the NPPF includes phrases such as *"...joint working on areas of common interest..."* (para 178); *"...work collaboratively with other bodies..."* (para 179). Finally, NPPF para 181 states that *"Co-operation should be a continuous process of engagement from initial thinking through to implementation, resulting in a final position where plans are in place to provide the land and infrastructure necessary to support current and future levels of development."*

24. There is also a consideration of what might be perceived as falling short of co-operation. The Act and the NPPF use the term "co-operation" and not "consultation". If the duty had been merely to consult, the Act and subsequent advice would have said so. It is a familiar term in planning practice. Consultation has been defined by the Court of Appeal in the following terms:

*"Whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response;*

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<sup>3</sup> The web site links to the submissions are on the final page of this note.

*adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.*<sup>4</sup>

25. It is reasonable to conclude that engagement as part of co-operation is more than the process of consultation outlined above and, as described in the Act, co-operation should be constructive and have active engagement which is ongoing. The Councils submit that advice in the NPPF about what constitutes “engagement” should not be given any weight. However, the Introduction to the NPPF states that it must be taken into account in the preparation of local plans (para 2).

26. The duty to co-operate as provided for in Section 110 of the Localism Act came into effect on 15 November 2011 and there was no formal duty to co-operate before that date. Nevertheless, the date triggered the legal requirement and all DPDs submitted after that date must comply. I realise that co-operation with some S33A bodies may well have continued as illustrated by some of the minor modifications to the Plan. Furthermore, I have no reason to doubt that other modifications might have been submitted during the Examination as a result of further engagement, whether they had been agreed with S33A bodies or not. However, the key issue is whether or not there has been active and ongoing engagement with all the relevant planning authorities.

27. I note that reports were submitted to the London Regional Technical Advisory Board (RTAB) about the progress of regional plans and strategies and that representatives of the South East of England RTAB (now SEWPAG) and the East of England RTAB (now East of England WTAB) were invited to the London RTAB meetings. I have no doubt that inter-regional movements of waste were a constant topic for discussion at those meetings and that the progress of the NLWP was reported.

28. The Councils have also listed some of the representations made in response to the consultation at the Issues and Options stage of the preparation of the Plan in October 2009, which include 9 separate comments from the East of England Regional Assembly (as it then was), all of which have been the subject of responses by the Councils. The consultation on the draft Plan in May 2011 resulted in further representations from Essex County Council, Hertfordshire County Council and East of England Regional Assembly to which responses were again made by the (North London) Councils.

29. Nevertheless, the evidence is that no representative of any London borough or the GLA has attended either the South East or the East of England Regional meetings on waste during the last 8 years. The Councils note that there was no concern expressed about the NLWP from Buckinghamshire County Council, Northamptonshire County Council, Bedfordshire County Council or its replacements Central Bedfordshire Council and Bedford Borough Council, Thurrock Council and Milton Keynes Council, all of whom, it is claimed, receive significant imports of waste

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<sup>4</sup> *R. v North and East Devon Health Authority Ex p. Pamela Coughlan* [2001] Q.B. 213.

from North London. However, this only serves to illustrate the lack of dialogue. There was a single meeting each with representatives of Essex County Council and Hertfordshire County Council in order to exchange information.

30. The various tasks to undertake in order to co-operate and to demonstrate co-operation are being developed in more detail since the coming into effect of S110 of the Localism Act, especially in guidance issued by the Planning Advisory Service (PAS) and the Planning Officers' Society (POS). The PAS is part of the Local Government Association and is funded by DCLG. Whereas the guidance is non statutory and so carries less weight than the NPPF, it shows how to meet the duty to co-operate<sup>5</sup>. Similarly, the POS has published an Advice Note on Transition to the Localism Act and the National Planning Policy Framework in which further guidance is given<sup>6</sup>.

31. Whatever constitutes best practice will evolve with the experience of successive DPD Examinations. Therefore, it would be unreasonable to expect a plan which underwent practically all its preparation prior to the commencement of "the duty" to display best practice in co-operating with other appropriate planning authorities. However, as a basic minimum, engagement has to be "*constructive, active and ongoing*" (S33A(2)(a)) and, as stated in the Framework, "*... a continuous process of engagement from initial thinking through to implementation, ...*" (para 181). This has not occurred between the Councils and Hertfordshire County Council and Essex County Councils. Nor have I any evidence that co-operation has occurred between Northamptonshire County Council, Buckinghamshire County Council or the Bedfordshire Councils where a significant amount of waste from North London is also transported for management or disposal.

32. I do not doubt that consultation during the various stages of the preparation of the Plan reached most, if not all, of the planning authorities which comprise the planning areas with whom I consider there is a duty to co-operate. However, I do not accept that the level of engagement with them has approached what is envisaged by the duty to co-operate as described in the Act and the further guidance in the Framework. It has been consultation rather than co-operation.

33. I appreciate that various technical papers have been produced on the inter-regional flows of waste which, although important, are merely gathering evidence on which to base any future decisions. A waste session was held when the Replacement London Plan (2011) was examined in 2010 with attendees including bodies representing the East of England and the South East Regions, Essex County Council and Hertfordshire County Councils. I note the submissions by the (North London) Councils and the Regions about paras 5.82 and 5.83 of the Panel

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<sup>5</sup> <http://www.pas.gov.uk/pas/core/page.do?pageId=2133454>

<sup>6</sup> [http://www.planningofficers.org.uk/POS-Library/POS-Publications/Advice-Note-on-Transition-to-the-Localism-Act-and-the-National-Planning-Policy-Framework\\_342.htm](http://www.planningofficers.org.uk/POS-Library/POS-Publications/Advice-Note-on-Transition-to-the-Localism-Act-and-the-National-Planning-Policy-Framework_342.htm)

Report and also the Councils' view that the London Plan Examinations were the primary level for matters such as the amount of waste to be exported from London to be discussed and agreed. However, this view ignores the subsequent introduction of the duty to co-operate as now described in S33A of the 1994 Act. The Replacement London Plan was prepared and submitted before the commencement of the duty to co-operate on 15 November 2011. The NLWP was submitted after that date and so must comply with the relevant legal requirement. Moreover, discussion at inter-regional forums is not a substitute for a dialogue between planning authorities.

### ***Overall conclusions***

34. Accordingly, I conclude that the NLWP does not comply with the legal requirements of S33A of the 2004 Act (as amended) in that there has not been constructive, active and ongoing engagement during the NLWP's preparation between the North London Councils and the planning authorities to which significant quantities of waste are exported.

35. In reaching my conclusion in this case, I have considered carefully all the representations and have also taken into account the potentially significant implications of my decision. However, I consider no alternative conclusion can be reached, especially as it is claimed that there has been no liaison between the (North London) Councils and Buckinghamshire County Council, Northamptonshire County Council, the Bedfordshire Councils, Essex County Council and Hertfordshire County Council, other than as described above. Therefore, contact has been scant.

36. The consequence of my conclusion is that the submitted NLWP is not legally compliant and so I cannot continue any further with the Examination. The Councils may choose to receive my report on the Plan which will not deal with any planning issues and, following Section 20(7B) of the 2004 Act as inserted by Section 112 of the Localism Act 2011, will recommend non adoption of the Plan.

37. Alternatively, the Councils may choose to withdraw the Plan from submission and so return to the stage of preparation (S33A(3)(a) of the 2004 Act). Were the Councils to follow this latter route they may seek to remedy any defects which have been identified. In my opinion, this would include a continuation of the inter-regional communications via the London RTAB, but also involving meeting the RTABs, or their equivalents, of other relevant regions. In addition, a dialogue should be initiated with those planning authorities where significant quantities of waste are imported from North London to be managed or disposed in order to establish the acceptability or not of those movements and, if necessary, explore the degree to which reasonable alternatives exist, aiming to achieve a positive outcome. A series of memoranda of understanding could be established with each of the planning authorities. This process, in turn, may lead to alterations to the Plan and the need to revisit the Sustainability Appraisal, but, in my opinion, it would constitute an appropriate level of co-operation and should enable the duty to co-operate to be fulfilled.



**Andrew Mead  
Inspector**

**31 August 2012**

[www.nlwp.net/downloads/submission/duty\\_to\\_cooperate\\_boroughs\\_response\\_to\\_Inspector\\_final.doc](http://www.nlwp.net/downloads/submission/duty_to_cooperate_boroughs_response_to_Inspector_final.doc)

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[note submitted on behalf of SEWPAG and East of England Waste TAB dated 30 July.](#)

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