R. (ON THE APPLICATION OF BLEWETT) v DERBYSHIRE CC

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

(Sullivan J.): November 7, 2003[1]

[2003] EWHC 2775 (Admin); [2004] Env. L.R. 29

BPEO; Environmental statements; Groundwater; Landfill sites; Local authorities powers and duties; Planning permission; Planning policy; Waste management; Water pollution

H1 *Waste management—environmental assessment—obligations under Sch.4 Waste Management Licensing Regulations 1994—selection of Best Practicable Environmental Option—application of National Waste Strategy—adequacy of environmental statement*

H2 The claimant ("B") lived in close proximity to a large landfill site which was being filled with waste. The tipping had been phased. The first two phases had been granted planning permission in 1984 and 1995 respectively. The proposed third phase was the subject of a planning application made to the defendant County Council ("DCC") and submitted on March 11, 2002. The application was accompanied by an environmental statement in accordance with the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999. DCC granted planning permission on December 23, 2002. B applied for a judicial review of that decision to grant planning permission arguing:

(1) The environmental statement did not include an assessment of the potential impact of the use of the proposed landfill on groundwater. Instead DCC had left those matters to be assessed after planning permission had been granted by assuming that complex mitigation measures would be successful. This approach had been unlawful.
(2) DCC had failed to give effect to its obligations under Sch.4 of the Waste Management Licensing Regulations 1994 ("the 1994 Regulations") by failing to keep the objectives of avoiding, or at least minimising, nuisance from noise and smells in mind.
(3) DCC failed to comply with its obligations under the Government's Waste Strategy 2000 to carry out an assessment in order to determine whether the proposed landfill was the best practicable environmental option ("BPEO").

[1] Paragraph numbers in this judgment are as assigned by the court.

H3 **Held,** in allowing the appeal:

H4 (1) DCC's approach to the status of the policies relating to BPEO in the Waste Strategy 2000 was erroneous in principle because it effectively relegated BPEO to a material consideration to be taken into account but to be given such weight as DCC thought fit. Such an approach did not accord with the approach taken by the Court of Appeal in *R. v Derbyshire CC Ex p. Murray.* There was no recognition of DCC's duty, post the publication of the Waste Strategy 2000 and the implementation of the Landfill Directive, not to grant planning permission unless the proposed development was ''in line with'' the policies relating to BPEO in the Strategy. The question of whether the application site would be the BPEO had to be addressed in terms of the three key considerations set out in the Strategy, including the proximity principle. DCC did not address this issue at all beyond two minor references.

H5 (2) The environmental statement did contain a description of the effect of the operation of the proposed landfill upon groundwater. Although the description was relatively brief, it was open to B and others to challenge it as inaccurate and/or inadequate in the consultation process. It was also open to argue that more stringent mitigation measures should be adopted. Although general criticisms were made of the adequacy of the mitigation measures proposed in the environmental statement, no alternative mitigation measure, let alone a more effective mitigation measure, was advanced on behalf of B during the consultation process. It was significant that the Environment Agency raised no objection or concern about the information provided in the environmental statement. Against that background, DCC was fully entitled to leave the detail of the measures to deal with groundwater pollution to be assessed after planning permission had been granted.

H6 (3) It was clear that DCC, when granting planning permission, kept the relevant objectives found in the 1994 Regulations in mind. The objective was not to avoid noise or odours altogether. Such an objective would be wholly unrealistic in the context of a waste disposal operation. The objective was to avoid ''causing nuisance through noise or odours''. Thus an approach which sought to reduce the impact of noise and smells so that they would not cause a nuisance was in accordance with the objectives.

H7 **Legislation referred to:**

Directive 75/442 Framework Directive on Waste, Arts 4 and 7
Directive 91/689 on Hazardous Waste
Directive 99/31 on Landfilling Waste, Arts 6(3) and 8 and Annex II
Environmental Protection Act 1990, ss.30, 44A and 50
Landfill (England and Wales) Regulations 2002
Pollution Prevention and Control (England and Wales) Regulations 2000
Town and Country Planning Act 1990 ss.54A and 70(2)
Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 regs 2, 3(2), 17 and 19
Town and Country Planning (General Development Procedure) Order, Art.8
Waste Management Licensing Regulations 1994, Sch.4,

H8 **Cases referred to:**
Berkeley v Secretary of State for the Environment, Transport and the Regions [2001] 2 A.C. 603; [2001] 2 C.M.L.R. 38; [2001] Env. L.R. 16
Gillespie v First Secretary of State [2003] EWCA Civ 400; [2003] Env. L.R. 30
R. (on the application of Burkett) v Hammersmith and Fulham LBC [2002] UKHL 23; [2002] 1 W.L.R. 1593; [2003] Env. L.R. 6
R. (on the application of Thornby Farms) v Daventry DC [2003] EWCA Civ 31; [2003] Q.B. 503; [2003] Env. L.R. 28
R. v Bolton MBC Ex p. Kirkman [1998] Env. L.R. 719; [1998] J.P.L. 787
R. v Cornwall CC Ex p. Hardy [2001] Env. L.R. 25; [2001] J.P.L. 786
R. v Leicestershire CC Ex p. Blackfordby and Boothcorpe Action Group [2001] Env. L.R. 2
R. v North Yorkshire CC Ex p. Brown [2000] 1 A.C. 397; [1999] Env. L.R. 623
R. v Rochdale MBC Ex p. Milne [2001] Env. L.R. 406
R. v Rochdale MBC Ex p. Milne (No.1) [2000] Env. L.R. 1
Smith v Secretary of State for the Environment, Transport and the Regions [2003] EWCA Civ 262; [2003] Env. L.R. 32

H9 *Mr D. Wolfe*, instructed by Public Law Project, appeared on behalf of the claimant.
Mr A. Evans, instructed by Derbyshire County Council, appeared on behalf of the defendant.
Mr J. Barrett appeared on behalf of Derbyshire Waste Ltd as an interested party.

JUDGMENT

SULLIVAN J.:

1 **Introduction**

2 In this application for judicial review the claimant seeks a quashing order in respect of a grant of planning permission dated December 23, 2002 by the defendant to the interested party for ''land reclamation by waste disposal with restoration to agricultural, woodland, grassland and nature conservation uses at Smith's void, Former Glapwell Colliery, Palterton Lane, Sutton Scarsdale''.

Factual background

3 Glapwell Colliery closed in the mid-1970s leaving two spoil tips. Planning permission was granted for a reclamation scheme which involved tip washing, opencast mining of shallow seams under the spoil tips and the replacement of the opencast mine spoil and washed deep mine spoil into a landscaped profile. Smith's void was to be reprofiled as part of these operations but the contractor employed to carry out the coal recovery scheme went into receivership, leaving the scheme incomplete. Voids had been created within the reprofiled spoil tips as part of the reclamation works to facilitate landfills.

4 Glapwell 1 was the first of the voids to be filled. Over a five year period between 1983 and 1988 it accommodated some 750,000m^3 of waste. Planning permission was granted in 1984 for the filling of two further voids, Glapwell 2 and 3. Waste disposal in Glapwell 2 commenced in 1988, and finished in November 2002 after planning permission had been granted in 1995 for additional tipping. No tipping took place in Glapwell 3 (Smith's void) pursuant to the 1984 permission, but that planning permission remains valid until December 2003 (operations were limited to a period of 15 years from the start of tipping). The 1984 planning permission envisaged that Glapwell 3 would have a capacity of about 1 million m^3. The present proposal involves tipping around 850,000m^3 of domestic, industrial, commercial and inert waste over a period of four years, with the overall operational programme, including restoration to agriculture et cetera, taking six years.

5 The application site covers about nine hectares and is located within 1km of the villages of Glapwell, Palterton, Bramley Vale and Doe Lea. The claimant lives in Bramley Vale. In his witness statement he states that the nearest site boundary of Glapwell 3 is about 800m from his home, which is about 200m from the nearest site boundary of the existing tipped voids, Glapwell 1 and 2.

6 The claimant is registered disabled and suffers from chronic bronchitis and also from asthma and angina. He contends that these conditions have been exacerbated by dust and smells from the landfilling operations on Glapwell 1 and 2. He also complains of noise from the landfilling operations, that some of his pet pigeons have been killed by rats living in the landfills, and that he is plagued by the noise and droppings of the many seagulls who are attracted to the landfills. The claimant has actively opposed the grant of planning permission for Glapwell 3. He made representations to the defendant both personally and in his capacity as a member of the ''Stop the Landfill Group''.

7 The defendant County Council is both the waste planning authority, and thus responsible for granting planning permission for landfilling operations, and the waste disposal authority for its area. Derbyshire Waste Ltd (the interested party) was set up by the County Council, pursuant to arrangements made under s.30 of the Environment Protection Act 1990, to dispose of Derbyshire's waste. The company remains 20 per cent owned by the County Council and disposes of the County's waste under a long term contract with the County Council.

8 The development proposed in the application for planning permission was a ''Schedule 2'' development as defined by the Town and Country Planning (Environmental Impact Assessment) (England and wales) Regulations 1999 (''the Regulations''). An environmental statement was required if the development was likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The application was accompanied by an environmental statement which was submitted to the County Council on February 8, 2001.

9 The defendant's Regulatory Planning and Control Committee first considered the application on March 11, 2002. The defendant's Director of Environmental Services advised members as to the merits of the application in a 55-page report

("the report"). He recommended that planning permission should be granted, subject to no less than 53 conditions.

10 On the morning of the meeting the Secretary of State issued an Art.14 direction preventing the defendant from determining the application. Members resolved that had they been in a position to determine the application they would have granted planning permission, as recommended in the report, subject to a minor amendment to one of the recommended conditions.

11 Application for permission to apply for judicial review of the Committee's resolution was lodged on April 22 on a precautionary basis, since at that time it was unclear whether the three month period prescribed by CPR Pt 54.5(1)(b) ran from the date of the resolution to grant planning permission or from the date of the permission itself. I adjourned consideration of the application pending the outcome of the Secretary of State's Art.14 direction. In the event, the Secretary of State decided not to call in the application, but the judicial review challenge had by then been overtaken by the decision of the House of Lords in *R. (on the application of Burkett) v Hammersmith and Fulham LBC* [2002] 1 W.L.R. 1593. Although the challenge to the resolution to grant planning permission was premature in the light of that decision, the application for permission to apply for judicial review was adjourned to enable the claimant to challenge the grant of planning permission in due course, if so advised. On November 4, 2002 the Committee reconsidered the application for planning permission. In addition to the report, members were provided with a joint report of the County Secretary and Director of Environmental Services. The joint report responded to the contentions which were being advanced in the judicial review proceedings. The officers recommended that planning permission should be granted. Members resolved to grant planning permission and permission was granted on December 23, 2002.

12 Having considered the amended claim form, Collins J. granted permission to apply for judicial review on April 29, 2003.

Submissions

13 On behalf of the claimant, Dr Wolfe submitted that the decision to grant planning permission was unlawful on three grounds:

(1) The environmental statement did not include an assessment of the potential impact of the use of Glapwell 3 for landfill on groundwater and on human health and instead unlawfully left those matters to be assessed after planning permission had been granted. So far as groundwater is concerned, the defendant had impermissibly approached the issue by assuming that contemplated "complex" mitigation measures would be successful ("Environmental Statement").

(2) The defendant failed to give effect to its obligations under Sch.4 to the Waste Management Licensing Regulations 1994 ("the 1994 Regulations") by failing to keep the objectives of avoiding, or at least minimising, nuisance from noise and smell, in mind ("relevant objectives").

(3) The defendant failed to comply with its obligations under the Government's Waste Strategy 2000 to carry out an assessment in order to determine whether the proposed landfill was the Best Practicable Environmental Option (''BPEO'') for the waste stream(s) in question.

14 In his submissions before me Dr Wolfe placed ground 3 in the forefront of the claimant's case.

Analysis and conclusions

15 I find it convenient to begin with ground 2, I will then consider ground 1 and finally ground 3.

Ground 2 (Relevant Objectives)

16 Schedule 4 to the 1994 Regulations implements certain provisions of Council Directive 75/442 (''the Waste Framework Directive''). Article 4 of the Directive provides:

> ''Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular—
>
> . . .
>
> without causing a nuisance through noise or odours . . .''

Paragraph 2(1) of Sch.4 states that:

> ''. . . the competent authority shall discharge their specified functions insofar as they relate to the recovery or disposal of waste with the relevant objectives.''

The wording of para.2(1) is, to say the least, inelegant. It appears that a word or words may have been omitted in the process of transposing the requirements of the Directive.

17 In any event, the defendant is a competent authority and when it granted planning permission it was discharging a specific function: see paras 1 and 3 and table 5 in Sch.4.

18 Paragraph 4 in Sch.4 sets out the relevant objectives in relation to the disposal or recovery of waste. They include:

> ''ensuring that waste is . . . disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without . . .
>
> (ii) causing nuisance through noise or odours.''

19 The nature of the obligation imposed by paras 2 and 4 of Sch.4 was considered by the Court of Appeal in *R. (on the application of Thornby Farms Ltd) v Daventry DC*; *R. (on the application of Murray) v Derbyshire CC* [2002] Q.B. 503

[2002] EWCA Civ 31. Having reviewed the authorities, Pill L.J., with whom the other members of the court agreed, concluded in para.[53] of his judgment:

> ''An objective in my judgment is something different from a material consideration. I agree with Richards J that it is an end at which to aim, a goal. The general use of the word appears to be a modern one. In the 1950 edition of the *Concise Oxford Dictionary* the meaning now adopted is given only a military use: 'towards which the advance of troops is directed'. A material consideration is a factor to be taken into account when making a decision, and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept in mind when making a decision even while the decision-maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others. On occasions, the giving of weight to other considerations will mean that little or no progress is made. I accept that there could be decisions affecting waste disposal in which the weight given to other considerations may produce a result which involves so plain and flagrant a disregard for the objective that there is a breach of obligation. However, provided the objective is kept in mind, decisions in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful. I do not in any event favour an attempt to create an hierarchy of material considerations whereby the law would require decision-makers to give different weight to different considerations.''

20 Thus, the question is whether the Committee kept the objective, of avoiding causing nuisance through noise or odours, in mind when deciding to grant planning permission. It is common ground that, in the absence of any evidence to the contrary, members approached these issues on the basis set out in the report and joint report.

21 The report said this under ''Noise'':

> ''Existing ambient noise levels have been measured at four sensitive noise locations around the proposed site boundary and a detailed analysis of the potential impacts has been submitted with the application. It shows the predicted noise impact to be within MPG 11 criterion at all properties. In the event of a grant of planning permission the Environmental Health Officer agrees that it would be appropriate to condition noise levels as above and to require ongoing monitoring.''

22 Under the heading ''Odour'' the report said this:

> ''There are two principal sources of odour from landfill sites; freshly deposited waste and landfill gas (LFG). Like dust, the generation and dispersal of odours is dependent on the wind speed, temperature and precipitation. The applicant is proposing to adopt a number of good working practices that can substantially reduce the generation and disposal of odour. These are:
> - minimising the extent of the operating area;

- the daily application of cover materials, such as inert soils;
- progressive restoration;
- any waste previously identified with an odour problem should be deposited directly in pre-prepared trenches excavated into dry waste and immediately covered.

In the long-term, the applicant proposes that upon cessation of landfill operations, continued odour mitigation would be provided by the engineered containment liner and cap preventing the escape of odourous gases to the atmosphere and the active abstraction and burning/flaring of landfill gas.

Some objectors have raised odour as an issue and I acknowledge that some individuals may be more sensitive to smells than others. To minimise future odour impact I recommend that a detailed scheme for the control of odour should be submitted for approval if planning permission is granted and that the following are incorporated as agreed by the Environmental Health Officer:

- implementation of a monitoring scheme;
- results of smell monitoring to be submitted to the Council together with details of any remedial action taken and any complaints received by the operator about smell.

I am satisfied that, subject to rigorous adherence to the above practices and conditions that could be imposed as part of a planning permission, long term nuisance impacts associated with odour should not arise.''

23 The joint report responded to the contention in the application for permission to apply for judicial review that the defendant had failed to give effect to the relevant Waste Framework Objectives in these terms:

''This ground of the challenge relates to the objectives under the ' Waste Framework Directive' relating to human health and harm to the environment. The claimant refers to an obligation on the part of the County Council to have had in mind the objective of avoiding impacts such as noise and dust, as explained by the Court of Appeal in *Thornby Farms v Daventry District Council*; *Murray v Derbyshire County Council* [2002] EWCA Civ 31 by refusing permission rather than just reducing them to below a threshold.

Your reporting officers consider that the report of 11 March does demonstrate that the Council did keep the relevant objectives in mind.''

24 The officers recommended conditions in relation to noise and odour control which were included in the planning permission, as follows:

''(18) All plant and machinery shall be silenced at all times in accordance with the manufacturers' recommendations.

(19) The noise levels arising from the developments, with the exception of temporary operations, shall not exceed 55dB(A)Leq (1hr) at any noise sensitive property.

(20) Noise levels arising from temporary operations shall be minimised as far as is practicable, shall not exceed 70dB(A)Leq (1hr) measured at any noise sensitive property and shall not continue for more than eight weeks in any 12 month period. Any bund or mound constructed under this exemption shall be in accordance with a scheme that shall have received the prior approval of the Waste Planning Authority. The scheme shall provide for the minimum impact on the landscape and upon nearby residential property. The commencement of all temporary operations carried out in accordance with this condition shall be notified to the Waste Planning Authority before such works commence.

(21) No development authorised by this permission shall take place until a scheme for noise monitoring at the site has been submitted to and approved by the Waste Planning Authority. The noise levels from the site shall be monitored in accordance with the approved scheme.''

25 ''Olfactory assessment'' was dealt with in condition 22:

''(22) A scheme for the monitoring of smells generated by the site shall be submitted to the Waste Planning Authority three months before the first deposit of waste. Monitoring and control of smells shall be undertaken in accordance with an approved scheme or as subsequently modified in writing by the Waste Planning Authority. The scheme shall include: . . .

(vi) what would trigger remedial action;

(vii) details of remedial action that would be taken . . .''

26 In my judgment it is plain from these references that the Committee, when granting planning permission, did keep the relevant objectives in mind. The objective is not to avoid noise or odours altogether. Such an objective would be wholly unrealistic in the context of a waste disposal operation. The objective is to avoid ''causing nuisance through noise or odours''. Thus, an approach which seeks to reduce the impact of noise and smells so that they will not cause a nuisance is in accordance with the objectives. Dr Wolfe drew a distinction between an approach which merely sought to reduce noise below a threshold, and an approach which sought to minimise the impact of noise or smell. Provided the threshold is set with the objective of avoiding the creation of a noise or smell nuisance, I can see no objection to the former approach. That is the objective of the noise limits recommended in MPG11, which was referred to in the report. In effect, conditions 19 and 20 impose the noise limits recommended in MPG11. Dr Wolfe points to the fact that MPG11 explains that the recommended limits are not intended ''to become the norm at which operations work. Operators are asked to take any reasonable steps they can to achieve quieter working wherever this is desirable and technically feasible having regard to the principle of BATNEEK [(Best Available Techniques Not Entailing Excessive Cost)]'' (para.31). He contrasts condition 20, which follows this advice—''noise levels

from temporary operations shall be minimised as far as practicable''—with condition 19 which contains no such requirement, merely an upper limit of 55dB(A)Leq (1hr). The difference between the two conditions is readily explained by the fact that noise levels at the upper limit set by condition 20 would be perceived as very noisy indeed. The purpose of the high upper limit is to enable such operations as the construction of baffle mounds around the perimeter of a landfill site. Temporary inconvenience is the price residents will have to pay for long term benefits (para.61 of MPG11). It is reasonable to expect that an operator will try to minimise such high levels of noise as far as practicable.

27 As explained in para.34 of MPG11, the lower limit in condition 19 ''is roughly equivalent to a noise made by a person talking normally, and is generally thought to be a tolerable noise level; above this level, continuous noise could well cause annoyance''. Limiting the noise of operations to such a threshold is wholly in accordance with the objective of not causing noise nuisance. Moreover, even if condition 19 was deficient in this respect, because it should have incorporated a requirement to minimise the noise levels arising from operations as far as practicable, the deficiency would not mean that members had not kept the objective in mind when deciding to grant planning permission. The fact that a decision taker has not imposed the most effective condition that might (with the benefit of hindsight) have been devised does not mean that he failed to keep the relevant objective in mind.

28 The original claim form in these proceedings, to which the joint report responded, criticised the report's treatment of noise and odour issues, but did not suggest any amendment to the proposed conditions. Nor is any such criticism made in the replacement claim form challenging the grant of planning permission on December 23, 2002.

29 So far as odour control is concerned, it is difficult to see what more could reasonably have been done by the defendant. It was submitted that the scheme required by condition 22 merely provided for monitoring, but that is clearly wrong. The scheme must cover not merely the monitoring but also the ''control of smells'', and ''shall include . . . what would trigger remedial action'' and ''details of remedial action that would be taken''.

30 In his skeleton argument Dr Wolfe referred to a ''proof of the pudding test''. Applying such a test, the proof of the pudding under ground 2 is that the claimant has not cast any doubt on the conclusions in relation to noise and smell in the report, and has not suggested any better conditions, save for the addition of a general requirement to reduce noise below the threshold set in condition 19. By no stretch of the imagination could such an omission indicate that there had been a failure to keep the relevant objectives in mind. Accordingly, I reject ground 2 of the challenge.

Ground 1 (Environmental statement)

31 As mentioned above, the application for planning permission was accompanied by an environmental statement. The environmental statement was a lengthy document comprising 15 chapters and 7 technical appendices. It is not

suggested that the environmental statement failed to mention the potential impact of the proposed development on groundwater and human health, rather it is submitted that the manner in which these issues were dealt with was inadequate. In summary, the assessment of likely impact and the description of the necessary mitigation measures were left over for subsequent determination.

32 Where there is a document purporting to be an environmental statement, the starting point must be that it is for the local planning authority to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in reg.2 of the Regulations:

> "'environmental statement' means a statement—
>
> (a) that includes such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part II of Schedule 4."

33 The local planning authority's decision is, of course, subject to review on normal Wednesbury principles: see *R. v Cornwall CC Ex p. Hardy* [2001] J.P.L. 786, per Harrison J. at para.[65], applying *R. v Rochdale MBC Ex p. Milne* [2001] Env. L.R. 416 at para.[106].

34 Information cable of meeting the requirements of Sch.4 to the Regulations must be provided: see Hardy (*ibid.*) and *R. v Rochdale MBC Ex p.Tew* [1999] 3 P.L.R. 74 at 95G.

35 Part I of Sch.4 requires the environmental statement to provide "a description of the likely significant effects on the environment . . ." (para.4) and "a description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment". Part II of Sch.4 requires:

> "1. A description of the development comprising information on the site, design and size of the development.
>
> 2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.
>
> 3. The data required to identify and assess the main effects which the development is likely to have on the environment.
>
> 4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for his choice, taking into account the environmental effects.
>
> 5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

36 Dr Wolfe referred to the speech of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603 at pp.615–616, which, he submitted, "emphasised the absolute nature of the requirement to produce an environmental statement in the correct form and to comply with the procedural requirements". Lord Hoffmann's speech must be considered in its context. *Berkeley* was a case

where there had been no environmental statement. Even in such a case the House of Lords was prepared to accept that "an EIA by any other name will do as well. But it must in substance be an EIA" (see p.617). If an application for planning permission has been accompanied by a document purporting to be an environmental statement, can it be said that that document falls outside the definition of environmental statement in reg.2 (so that the local planning authority is unable to grant planning permission: see reg.3(2)) because it has failed to describe a likely significant effect on the environment subsequently identified by the local planning authority, or a particular mitigation measure thought necessary by the local planning authority? The omission might have been due to an oversight on the part of those preparing the environmental statement, or to a deliberate decision because it was not considered by the author of the environmental statement that a particular environmental effect was likely, or, if likely, that it was likely to be significant, or because the author of the environmental statement was unfamiliar with the particular mitigation technique, or because he considered that mitigation was unnecessary.

37 In my judgment, the fact that the local planning authority's consideration of the application leads it to conclude that there has been such an omission does not mean that the document is not capable of being regarded by the local planning authority as an environmental statement for the purposes of the Regulations.

38 The Regulations envisage that the applicant for planning permission will produce the environmental statement. It follows that the document will contain the applicant's own assessment of the environmental impact of his proposal and the necessary mitigation measures. The Regulations recognise that the applicant's assessment of these issues may well be inaccurate, inadequate or incomplete. Hence the requirements in reg.13 to submit copies of the environmental statement to the Secretary of State and to any body which the local planning authority is required to consult. Members of the public will be informed by site notice and by local advertisement of the existence of the environmental statement and able to obtain or inspect a copy: see reg.17 of the Regulations and Art.8 of the Town and Country Planning (General Development Procedure) Order 1995.

39 This process of publicity and public consultation gives those persons who consider that the environmental statement is inaccurate or inadequate or incomplete an opportunity to point out its deficiencies. Under reg.3(2) the local planning authority must, before granting planning permission, consider not merely the environmental statement, but "the environmental information", which is defined by reg.2 as "the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development".

40 In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does

not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of Sch.4 are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

41 Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Sch.4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that ''an EIA application'' (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R. v North Yorkshire CC Ex p. Brown* [2000] 1 A.C. 397, at p.404, the purpose is ''to ensure that planning decisions which may affect the environment are made on the basis of full information''. 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 (*Tew* was an example of such a case), but they are likely to be few and far between.

42 It would be of no advantage to anyone concerned with the development process—applicants, objectors or local authorities—if environmental statements were drafted on a purely ''defensive basis'', mentioning every possible scrap of environmental information just in case someone might consider is significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail.

43 Against this background, I turn to the manner in which this environmental statement dealt with the impact of the proposed development on groundwater and human health. Chapter 13 referred to human health in two paragraphs as follows:

> ''13.4.36. The potential health effects of landfill sites have been the subject of epidemiological studies, and the presentation of the findings of a recent study has caused some concern in respect of proposed new facilities. How-

ever, the evidence available does not support a causal link between the health effects studied and proximity to landfill sites.

13.4.37. The proposed landfill at Smiths Void would be operated to the highest environmental standards and the operation would be independently regulated by the Environment Agency. The management and regulation of the site would ensure that the potential risk to the site employees, local communities and the wider environment were minimised.''

44 It is submitted on behalf of the claimant that the environmental statement did not provide any assessment of the potential health impacts arising out of the proposal. On the contrary, it is plain from para.13.4.36 that the authors of the environmental statement considered that there were not likely to be any significant effects on human health. It was therefore unnecessary for them to describe mitigation measures in any detail. Those who disagreed with this assessment had an opportunity to put their views to the local planning authority in the consultation process. The report summarised the responses of consultees. They included the North Derbyshire Health Authority, which raised no objection:

''A report subsequently amended to include congenital anomalies data has been produced on the impact of the proposal on the local population. It is held in the Environmental Services Department for Members' inspection and will be available at Committee. The covering response states:

'There are concerns in relation to the recent study from the Small Area Health Statistics Unit on health effects in people living adjacent to landfill sites. The results of this study, however, were not conclusive. Landfill sites could potentially be harmful if toxic substances are released into the environment and ingested/absorbed (in toxic doses) by the local population. It is essential therefore that all landfill sites are engineered to a high standard with appropriate control and monitoring of any emissions (landfill gas/leachate).

If planning permission were granted, I would expect the applicants to undertake a health risk assessment as part of the Integrated Pollution and Prevention Control (IPPC) application process for a waste management licence. Any application would be scrutinised by our environmental toxicology advisors and us at this stage.

I do not feel there is sufficient evidence to object to landfill sites on health grounds. However, I would need to be satisfied by the proposed control measures detailed in a waste management licence application.'

The amended report indicates that '*from our routine data sets, there is no evidence that the local communities have suffered health effects from the existing landfill sites.*'

The Lancet has recently reported further findings from the Eurohazcon study relating to selected landfill sites in Europe.

Whilst this study relates to hazardous sites only and is therefore of marginal relevance in this case, I refer to it given the medial interest shown and renewed public concern about landfill sites.

The AHA has commended that the Study fails to demonstrate a statistically significant association between those living near a hazardous landfill site and chromosomal abnormalities and that further work is needed.

I address the question of the perception of risk associated with certain hazardous waste types and a method of providing some comfort to the local community in the Planning Considerations section of this report.''

45 The Director dealt with ''Health, Perception of Risk and the Living Environment Considerations'' as follows:

''I accept that in this case fear regarding adverse health effects as expressed by objectors should not be viewed as baseless, since the possibility of risk to health cannot entirely be dismissed. Accordingly, it is appropriate to afford some weight to this genuinely held view. The Area Health Authority's (AHA) amended report and correspondence evaluates recent studies, takes account of specialist advice and examines rates of congenital anomalies in the electoral Wards adjacent to Glapwell compared to the North Derbyshire average. The results over a four year period from 1997 to 2000 illustrate no significant difference. The AHA's conclusions would not, in my view, support a rejection of the application on health related grounds.

I am also mindful of the fact that the ongoing 'health' debate has not led to health issues being accorded significance within national planning policy guidance relating to waste management facilities including landfill.

Notwithstanding the above, the AHA has pointed out that anxiety relating to operations at landfill sites can lead to a variety of health concerns. I would agree with its conclusion that this could largely be avoided if the local population have confidence in the site operator to maintain a clean and safe site. The early establishment of a Liaison Committee for the duration of the operations as agreed by the applicant can also be an effective way of alleviating concerns.

Additionally, I have raised with the applicant the possibility of a condition specifically restricting the deposit of hazardous waste as a means of providing assurance to the public. While I believe that there is general recognition of the meaning and character of municipal domestic waste, there is less public understanding of the terms commercial and industrial waste. There is also widespread concern that this is likely to involve toxic substances as evidenced by the objection notices displayed locally.

I have suggested a condition to the application the wording of which makes reference to the Hazardous Waste Directive 91/689/EEC. As described in Article 6(c) of the Directive, only non-hazardous commercial and industrial waste would be acceptable at the site with the exception of stable, non-hazardous wastes that have for example been solidified or vitrified. I consider that a condition linking the range of waste coming to the site to the Landfill Directive's classification of waste would be appropriate and would be warranted on planning grounds as a means of calming public fear.

> The applicant has agreed that such a condition would be acceptable to them.''

Condition 7 in the planning permission imposes a restriction on waste types as follows:

> ''In relation to commercial and industrial waste, the site shall be used for the landfill of only non-hazardous waste, except for stable, non-reactive hazardous wastes as described in article 6(c(iii) and Annexe II of the Landfill Directive 1999/31/EC.''

46 This was an eminently reasonable response to fears expressed by objectors which, while they did not raise any *likely significant* effect, nevertheless raised a possibility of risk to human health which ''cannot entirely be dismissed''.

47 Turning to the effect of the proposed development upon groundwater, the assessment of operational impacts and mitigation in ch.12 of the environmental statement has to be considered against the background of the description of the proposals given in ch.4. Under ''Engineering'', para.4.5 of the environmental statement said:

> ''4.5.1 On completion of the initial earthworks, the engineering of the landfill void would be carried out for Cell 1.
>
> 4.5.2 The formation below the lining system would be graded to falls of approximately 1 in 50, to ensure positive drainage. The proposed lining system, comprising a minimum of 1.0m of mineral liner, with a maximum permeability of 1 × 10–9 m/s, or equivalent, would then be installed. The installation would be the subject of a rigorous Construction Quality Assurance programme.
>
> 4.5.3 The clay would be excavated from the area of Cell 3, above the cell formation levels. During the landfilling of Cell 1, Cell 2 would be constructed, taking further clay from the area of Cell 3.
>
> 4.5.4 The construction of Cell 3 would comprise completion of the formation levels. The quantity of clay above the formation levels would be sufficient to construct the clay liner within the cell.
>
> 4.5.5 Each cell would be constructed independently, and would be separated from adjacent cells by internal bunds constructed to a similar standard to the basal lining.
>
> 4.5.6 The liner would be overlain by a comprehensive leachate collection system, comprising 300 mm of free draining material, within which would be situated a network of slotted pipes to collect leachate. The leachate would be directed via this system to leachate collection points situated at the low point of each cell.
>
> 4.5.7 Upon completion of landfilling in each cell, the waste would be capped. The capping system would include a stabilisation layer, overlain by a mineral liner or equivalent geosynthetic material to minimise rainfall infiltration and leachate generation within the waste mass.
>
> 4.5.8 Typical details of the proposed engineering systems are indicated on Figure 11; Typical Construction Details.''

48 Figure 11 contained diagrams of a typical basal liner, typical capping liner, typical leachate collection point, and typical internal bund.

49 Chapter 12 dealt with the effects of the proposed development under the heading of "Geology, Hydrogeology and Hydrology".

50 Under "Introduction" paras 12.1 and 12.2 said:

> "12.1.1 The landfilling of biodegradable wastes has the potential to cause environmental impact on the local water environment. The source of this potential impact is leachate produced through the percolation of rainwater through the waste mass. Leachate has the potential to pollute any adjacent water bodies it is able to reach.
>
> 12.1.2 In order to assess the potential impact, an examination of the geological, hydrogeological and hydrological conditions at the site has been undertaken."

Against the background of that assessment, para.12.3 described the Construction Impacts and Mitigation. They included:

> "12.3.1 During the construction phase of the landfill, the principal potential impact would be the discharge of polluted surface water run-off to the local watercourses.
>
> 12.3.2 To mitigate the potential impact of polluted discharges, a system of perimeter cut-off ditches would be installed, to intercept polluted run-off and direct it to settlement facilities where suspended solids would be removed prior to discharge.
>
> 12.3.3 Such measures would be designed to ensure that surface water discharges complied with the requirements of a Consent to Discharge issued by the Environment Agency."

Paragraph 12.4 described the Operational Impacts and Mitigation as follows:

> "12.4.1 The potential impacts associated with the operation of the landfill would include those identified during the construction phase, and in additional potential impacts from the uncontrolled discharge of leachate from the site.
>
> . . .
>
> 12.4.9 The uncontrolled discharge of landfill leachate has the potential to pollute any adjacent water it is able to reach. Given the position of the site in relation to surface watercourses, and the groundwater table, it is predicted that potential impacts would be low to medium.
>
> 12.4.10 To minimise the potential for such impacts, the following mitigation measures would be implemented:
>
> - The installation of a full containment system, constructed within a rigorous Construction Quality Assurance regime, to prevent uncontrolled discharge of leachate
> - The provision of a comprehensive leachate collection system
> - Regular monitoring and removal of excess leachate

12.4.11 The design of the above measures would be finalised based upon the results of a quantitative Risk Assessment, in agreement with the Environment Agency.

12.4.12 With the implementation of the above measures, and good working practices, the operation of the site would be in accordance with Environment Agency policy, and the residual impact associated with the operation of the landfill would be low.''

51 The Environment Agency was one of the consultees. It raised a number of matters in a letter dated April 24, 2001. The interested party sought to address the Environment Agency's concerns in an addendum report dated July 2001. This gave further information in relation to the geological and hydrogeological setting of the proposal. The proposed development was described in para.2.3:

''The site will be operated as a containment site with a liner equivalent to or better than a clay composite liner as required by the IPPC Regulations and Landfill Directive. The appropriateness of the lining system and the site design will be assessed as part of the assessment of emissions to groundwater (Regulation 15 Risk Assessment) as part of the PPC Permit application.

. . .

Leachate management systems at the site will result in the leachate levels being maintained at 1m above the base of the site. This is approximately 1 m below the water levels within the made ground and consequently the site will be hydraulically contained with respect to the shallow groundwater.''

A conceptual design of the site was presented in a diagram.

52 Chapter 4 described the historical contamination of the site and para.4.2 described the remediation options available:

''The remediation options currently available which are considered suitable for the site include the interception of potentially contaminated groundwater adjacent to the development area and/or capping the area to reduce the infiltration and the production of contaminated groundwater.''

Paragraph 4.3 dealt with the effect of the development on remedial design, and concluded that:

''In summary by developing the site, the reduction in infiltration will improve the quality of the Stockley Brook by decreasing the impact from contaminated groundwater on the stream from that observed today and will not limit the application of future remediation operations.''

53 The addendum report concluded in para.5.0:

''Based on the conclusion that the contamination is disseminated throughout the colliery spoil the potential remediation options which could be implemented include the interception of groundwater and/or capping of the site to reduce the infiltration. By developing Smith's void as a landfill site, the groundwater quality would be improved by:

- Reducing the infiltration to the made ground and therefore the volume of contaminated groundwater;
- Decreasing the residence times of the groundwater within the made ground therefore potentially decreasing the contaminant loading.

In addition, the development would not impeded the interception of groundwater, should it be required at a later date.

The risks posed by the landfill development to the perched groundwater (and consequently surface water streams) and the groundwater in the Coal Measures will be assessed as part of the PPC application for the assessment of emissions to groundwater."

54 The Environment Agency responded to the addendum report in a letter dated July 3, 2001. That said, in part:

"Generally speaking the report satisfies the majority of the matters raised.

The issues pertaining to managing existing contamination have been discussed but no final remediation strategy has been proposed.

The other outstanding matters that have not been addressed in this submission will need to be resolved through the IPPC authorisation application process.

The Agency has no objections, in principle, to the proposed development but recommends that if planning permission is granted the following planning conditions are imposed:

CONDITION: No development approved by this permission shall be commenced until:

(a) The application site has been subjected to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Local Planning Authority.

(b) Detailed proposals for the removal, containment or otherwise rendering harmless any contamination (the 'Reclamation Method Statement') have been submitted to and approved in writing by the Local Planning Authority.

REASON: To protect the environment and ensure that the remediated site is reclaimed to an appropriate standard.

. . .

CONDITION: There shall be no discharge of foul or contaminated drainage from the site into either groundwater or surface waters, whether direct or via soakaways.

REASON: To prevent pollution of the water environment.

CONDITION: No soakaway shall be constructed in contaminated ground.

REASON: To prevent pollution of groundwater.

INFORMATION

The waste disposal operations shall be subject to an IPPC permit under the Pollution Prevention and Control Regulations 1999."

55 The addendum report and the Environment Agency's response were part of the environmental information considered in the report. The claimant's solicitors had argued that the environmental statement was deficient in its treatment of the impact of the proposal on human health and hydrology. The Director commented in his report:

> "I have received an 'Addendum Report' from the applicant dealing with ground water issues in response to a request from the Environment Agency. The Agency's observations upon it are referred to below. Additional ecological information to that contained in the Environmental Statement has also been supplied and, subject to conditions that could be required as part of a planning permission, the relevant statutory consultees are content with the development proposal. Further background noise assessment has also been submitted at the request of the District of Bolsover Environmental Health Officer. I am satisfied that, with the inclusion of the additional material referred to above, these issues have been thoroughly covered. My assessment of these issues is addressed with the Planning Considerations section of this report. The submission of additional information on these issues does not in any event detract from the adequacy of the Environmental Statement which I am satisfied meets relevant legal requirements.

The claimant's solicitors had complained:

> "● The application does not deal adequately with ground water issues and this matter should be properly addressed as part of the planning process rather than being left to the Integrated Pollution Prevention Control Authorisation application.
>
> Comment: The Environment Agency has confirmed that its Hydrology Section has examined the planning application and the Addendum Report requested by the Agency and has reiterated that it has no objections in principle to landfilling at this location. The Agency indicates that further detailed work will be required through the IPPC process to ensure that the requirements of the relevant legislation can be met. A ground water risk assessment will be required as part of this process, to address ground water protection issues in greater detail. Planning Policy Guidance (PPG) Note 23 gives advice to planning authorities on whether or not concerns about potential releases can be left for the pollution control authority or, in the case of wider impact of potential releases, may appropriately be considered unacceptable on planning grounds. PPG 23 also advises that planning authorities should work on the assumption that pollution control regimes will be properly applied and enforced. In this case I am satisfied that it would be appropriate for this issue to be addressed within any IPPC Authorisation application that would have to follow a grant of planning permission. Of course, planning permission would not pre-empt the Agency's proper consideration of an IPPC Authorisation application. If matters could not be resolved to the Agency's satisfaction then Authorisation would not be granted and the development could not proceed."

56 The claimant's concerns in relation to groundwater and human health were also addressed in the joint report. Under the heading ''Groundwaters'' the joint report said this:

> ''Chapter 12 of the Environmental Statement provides information relation to Geology, Hydrogeology and Hydrology. It identifies groundwater levels including those from 'perched' groundwater within the colliery spoil deposits at the site. It identifies the potential for impacts on local water resources. The proposed mitigation measures include a full containment system for the landfill cells.
>
> Apart from the ES itself, the 'Addendum Report' that the applicant subsequently submitted to the Council gives further technical details in relation to, amongst other things, hydrogeology, groundwaters and mitigation measures. This report was not produced at the Council's request, but was submitted following discussions between the applicant and the Environment Agency. The report made it quite clear that the leachate management system that was proposed would be designed to maintain leachate levels within the site below the groundwater levels in the colliery spoil. The proposals included a free draining groundwater drain and the hydraulic containment of the landfill by means of an impermeable liner system
>
> The Council is always particularly mindful of the responses made by the Environment Agency (EA), which is a statutory consultee, on such matters. The Agency, after careful consideration of the geological and hydrogeological details, raised no objections to the application in principle and recommended a number of conditions to be included if planning permission was granted. The EA letter in response to this application confirmed that other outstanding matters which it had discussed with the application would be resolved through its Pollution Prevention and Control (PPC) authorisation application process. These matters would include a 'groundwater risk assessment'. Your reporting officers understand this to be a reference to an assessment that would be carried out under the PPC process in order to ensure that the final detailed technical specifications for the liner system of the landfill cells would be adequate to fully contain the leachate as proposed in the planning application.
>
> There is a specific allegation within this ground of the challenge that the ES did not provide any estimate of emissions to soil and water including, in particular, of leachate to groundwater, nor of the likely effect of the landfill on soil or groundwater of such emissions.
>
> The ES did identify potential impacts of the proposed landfill on groundwaters. Measures are included in the proposals in order to ensure that any negative impacts are prevented from happening. Your officers have no reason to doubt that this will be achieved through the detailed PPC process referred to above. The ES's estimate of the emissions to groundwater and soils is that there would not be any because the landfill cells would be fully contained.

> The ES also identified potential benefits in reducing the impact on groundwaters of the site compared to that which would be expected to continue into the future if the site were to be left in its existing undeveloped state. The proposals include the continued monitoring of groundwater quality which is considered to be a sensible precautionary approach.
>
> In our opinion the ES should not be regarded as deficient.''

The report continued:

> ''Regulation 19 of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 requires a planning authority, if it considers that a submitted Environmental Statement should contain additional information in order to be an Environmental Statement, to so notify the applicant in writing . . .
>
> These circumstances did not apply in this case, the Council never has taken such a view on the ES and the submission of the Addendum Report was not in response to a notification by the Council. The Council nevertheless considered the contents of the Addendum Report once it was received, and duly forwarded it to consultees for their comments and it was placed on the planning register.''

57 So far as conditions are concerned, the defendant accepted the Environment Agency's suggestions. Under ''Water Resources and Pollution Prevention'' condition 29 provided:

> ''No part of the development shall be commenced until:
>
> (a) The application site has been subject to a detailed desk study and site investigation, and remediation objectives have been determined through risk assessment, and approved in writing by the Waste Planning Authority.
>
> (b) Detailed proposals for the removal, containment or otherwise rendering harmless of any contamination (the 'Reclamation Method Statement') have been submitted to and approved in writing by the Waste Planning Authority.''

Condition 32 provided:

> ''There shall be no discharge of foul or contaminated drainage from the site into either ground water or surface waters, whether direct or via soakaways.''

58 It is against this background that the claimant submits that the assessment of the impact of the proposed development on groundwater was impermissibly left over to another decision maker (the Environment Agency) after the grant of planning permission, and that the environmental statement did not adequately describe the mitigation measures, because it left significant matters over for subsequent determination and proceeded on an assumption that remedial measures, whatever they might be, would work.

59 In advancing these submissions Dr Wolfe relied on two decisions of the Court of Appeal: *Smith v Secretary of State for the Environment* [2003] EWCA Civ 262 and *Gillespie v Secretary of State for the Environment* [2003] EWCA Civ 400. In *Smith*, Waller L.J. distilled a number of principles from the authorities which he set out in para.[24] of his judgment. The first and second principles in para.[24] relate to the grant of outline planning permission. The planning permission in the present case, for engineering operations, is a detailed permission. The third and fourth principles are as follows:

> "Third, the planning authority or the Inspector will have failed to comply with article 4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given . . .
>
> Fourth, (and here it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the final details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case."

Waller L.J. continued in para.[33] of his judgment:

> "In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision-maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision-maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision-maker will act competently. Constraints must be placed on the Planning Permission within which future details can be worked out, and the decision-maker must form a view about the likely details and their impact on the environment."

60 In *Gillespie* there was no environmental statement and Richards J. quashed a planning permission granted by the Secretary of State on the basis that he had erred in concluding that no environmental statement was required. Part of the site was a former gas works, which was extensively contaminated. The Secretary of State had relied upon the imposition of a condition (condition (VI)) which required a detailed site investigation to be carried out. That investigation would have proposed a remediation scheme. Pill L.J. rejected a submission that the Secretary of State, in deciding whether an environmental statement was required, was obliged to shut his eyes to the remediation scheme. In para.[37] he said this:

> "The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration."

He continued in paras [40] and [41]:

> "40. In my judgment the Secretary of State erred in the test he has expressed in paragraph 19 of his final decision letter. I read the second part of paragraph 19 as including an assumption that Condition VI provides a complete answer to the question whether significant effects on the environment are likely. That is too narrow an approach. In the circumstances, it was necessary to consider the stage which the site investigation had reached (Condition VI requires a further site investigation in detail to be undertaken), the nature and extent of the scheme for remediation, including its uncertainties, the effects on the environment during the remediation and the likely final result. The condition is properly drafted but itself demonstrates the contingencies and uncertainties involved in the development proposal, as does the evidence of Mr Simmons already quoted.
>
> 41. When making the screening decision, these contingencies must be considered and it cannot be assumed that at each stage a favourable and satisfactory result will be achieved. There will be cases in which the uncertainties are such that, on the material available, a decision that a project is unlikely to have significant effects on the environment could not properly be reached. I am not concluding that the present case is necessarily one of these but only that the test applied was not the correct one. The error was in the assumption that the investigations and works contemplated in Condition VI could be treated, at the time of the screening decision, as having had a successful outcome."

Laws L.J. agreed, saying in para.[46]:

> "Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably

> cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA.''

Arden L.J.'s judgment in para.[49] is to a similar effect.

61 The facts of the present case are very different. Here there was an environmental statement which did contain a description of the effect of the operation of the landfill upon groundwater: the potential impacts of uncontrolled discharge of landfill leachate were described as ''low to medium''. With the implementation of the mitigation measures described in the environmental statement the residual impact was described as ''low''.

62 The description was relatively brief, but it was open to the claimant and others to challenge it as inaccurate and/or inadequate in the consultation process. It is significant that having received the addendum report, the Environment Agency raised no objection. The environmental statement did describe the proposed mitigation measures. The claimant complains that the description was brief, and that the proposals are in effect purely standard, providing for no more in terms, for example of the permeability of the proposed lining system in the cell, than would be required by the Landfill (England and Wales) Regulations 2002 in any event.

63 That may well be so, but it was open to the claimant to argue that more stringent mitigation measures should be adopted. Although criticisms have been made in general terms of the adequacy of the mitigation measures proposed in the environmental statement, no alternative mitigation measure, let alone a more effective mitigation measure, was advanced on behalf of the claimant during the consultation process.

64 The measures were described in sufficient detail to enable informed criticism of them to be made. Dr Wolfe placed reliance on the words ''The appropriateness of the lining system and the site design will be assessed . . . as part of the PPC permit application'' in support of his submission that the defendant had left over questions relating to the effectiveness of mitigation. That submission takes the words out of context. Reading the environmental statement and the addendum report as a whole, it is plain that a particular cell design, which is not in the least unusual, and a lining system were being proposed. The details of that system could be adjusted as part of the IPPC authorisation process. This case falls squarely within Waller L.J.'s fourth principle (above). The defendant had placed constraints upon the planning permission within which future details had to be worked out. Condition 6 provided:

> ''Except as may otherwise be required by conditions of this permission, the development shall be implemented in accordance with the submitted details and accompanying Environmental Statement dated 8 February 2001 as amended by letters dated 18 June 2001, 17 July 2001 and 29 August 2001

with enclosures and Addendum Report, provided that nothing otherwise required or prohibited by this condition shall prevent the making of any alterations to any detailed technical specifications and operations of waste management processes that the Environment Agency might require in accordance with the Landfill Regulations 2002.''

65 The claim form did not criticise condition 29 (above). In his skeleton argument and submissions Dr Wolfe contended that the condition (which is concerned with the existing contamination on this former site) left over a significant environmental impact for future assessment and was, in this respect, similar to condition (VI) relied upon by the Secretary of State in the *Gillespie* case. It is clear from the letter dated July 3, 2001 that the Environment Agency was initially concerned that existing contamination had not been adequately addressed in the environmental statement. The addendum report was the response to this concern. Having considered the addendum report the Environment Agency acknowledged that the issue had been discussed but said that ''no *final* remediation strategy had been proposed'' (my emphasis).

66 If the Environment Agency had had any concern in the light of the geological and hydrogeological information provided in the addendum report as to the remediation proposals contained therein, then it would have said so. Against this background the defendant was fully entitled to leave the detail of the remediation strategy to be dealt with under condition 29.

67 I therefore reject ground 1 of the challenge.

68 I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Sch.4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on the basis of ''full information'', but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the ''environmental information'' of which the environmental statement will be but a part.

Ground 3 (BPEO)

69 Under the heading ''Planning Considerations'' the report explained that planning policies were developed at national, regional and local levels. Having reminded members of the obligations imposed by ss.70(2) and 54A of the Town and Country Planning Act 1990 identifying the plans comprising the Statutory Development Plan, the report stated that ''It is also necessary to have regard

to Government Policy on waste issues, planning guidance at national and regional level and objectives and requirements obtained in relevant EC directives. The report mentions Council Directive 1999/31 on the landfill of waste (The Landfill Directive) and refers to Waste Strategy 2000:

> ''Waste Strategy 2000, which is the current national waste strategy sets out the changes considered necessary to deliver more sustainable waste management. It sets a series of challenging targets to increase the value that is recovered from municipal waste and to reduce the amount of biodegradable municipal waste that is sent to landfill.
>
> Waste Strategy 2000 expects planning decisions on suitable sites for treatment and disposal to be based on a local assessment of the 'Best Practicable Environmental Option' (BPEO) for each waste stream. However, the courts have held that, whilst BPEO is material to land use planning, it is for local planning authorities to decide how much weight to attach to it. The BPEO process was defined in the 12th Report of the Royal Commission on Environmental Pollution as:
>
> > 'The outcome of a systematic and consultative decision-making procedure which emphasises the protection of the environment across land, sea and water. The BPEO establishes for a given set of objectives, the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term.'
>
> In determining the BPEO, decision-makers are expected to take account of three key considerations.''

Those three considerations are the Waste Hierarchy, the Proximity Principle and Self-sufficiency.

70 Under ''National Planning Policy Guidance'' reference is made to PPG10:

> ''The document advises that Waste Planning Authorities should consider the provision of waste management facilities within the context of the following . . .
>
> the best practicable environmental option for each waste stream including consideration of the 'Waste Hierarchy' and 'Proximity Principle'.''

71 Under the heading ''Regional Policy'' reference is made to RPG8, which advises that waste planning authorities should adopt the targets for waste recycling and reduction set out in Waste Strategy 2000. Under ''Local Policy'' the report states that the Derby and Derbyshire Joint Structure Plan:

> ''. . . reflects national policies. In particular Chapter 10: Waste Management Policies, acknowledges the strategic principles set out in Waste Strategy 2000 and confirms that its policies accord with the framework established in national, regional and local waste strategies.
>
> The principle policies that are relevant to consideration of this application are as follows:

Waste Management Policy 1: Waste Management Sites and Facilities states:

'Provision will be made for sufficient sites and facilities to cater for the waste management needs of Derbyshire, having regard to the national, regional and local strategies for waste management. Particular account will be taken of:

(1) The need to pursue objectives which further the aim of achieving sustainable waste management, such as to find the Best Practicable Environmental Option for individual waste streams.'

Waste Management Policy 2: Waste as a Positive Resource states that:

'Where waste disposal activities are justified, preference will be given to proposals that assist the reclamation of derelict or despoiled land or mineral sites, subject to the environmental acceptability.'

Waste Management Policy 3: Environmental Criteria states that:

'Waste management sites and facilities will be permitted only where their impact on the environment is acceptable, in particular where:

(1) in accordance with the proximity principle, they are well located to serve the main sources of waste, are well related to the transport network . . .'"

72 The report also refers to a non-statutory policy document, Derbyshire Waste Management Strategy (DWMS). That in turn refers to BPEO and the report states that:

"The Strategy recognises that movement up the waste hierarchy will take time to achieve and, secondly, despite being at the bottom of the waste hierarchy, indicates that landfill will continue to be the best environmental option for some waste types. This is particularly likely to be so for municipal waste."

73 Having identified the relevant policies, the Director then set out his own Policy Assessment. He considered that the issues to be addressed included the relationship of the application to the policies in the Structure Plan, in PPG10 and in Waste Strategy 2000 for England and Wales.

74 The applicant for planning permission had claimed that there was a shortfall in final disposal capacity in Derbyshire for non-inert wastes of approximately 4.1 million m^3 for the remainder of the plan period in the DWMS to 2011. Perhaps as a consequence, the environmental statement did not address BPEO in terms. Under the heading "Need for the Development", it was said in para.3.2.1 that:

"The need for the development is two-fold; to deliver the comprehensive reclamation of the current despoiled site and to facilitate the disposal of wastes arising in the area."

Having referred to the shortfall in the county as a whole, paras 3.2.11 and 12 of the environmental statement said:

"3.2.11 The proposed development of a landfill site at Smiths Void is intended to address at least part of this shortfall and to provide continuity of waste disposal capacity at the locality. The proposed waste void has a capacity of approximately 850,000m^3, which represents 4 to 5 years life at an input rate of approximately 200,000 tonnes per annum. The capacity generated would be available during the plan period.

3.2.12 The development of the landfill would also enable Derbyshire Waste Ltd to fulfil its obligations under the long term contract with Derbyshire County Council in the surrounding area, ensuring that MSW [Municipal Solid Waste] arising continues to be disposed of locally, thus complying with the 'proximity principle'."

Having examined the figures provided by the interested party and the Environment Agency, the Director did not accept that there was a shortfall of capacity:

"Work that I am currently undertaking in connection with the production of a waste local plan, does not assume an increase in waste due to economic growth contrary to the DWMS. My calculations suggest that there may be a sufficiency of landfill within the county as a whole up to 2010 provided that there is no growth in waste and the Government's recovery targets are achieved. However, further work and refinement of figures is ongoing and as yet there is no published information. At that stage the methodology would be open to public scrutiny.

. . .

. . . given my preparatory local plan work and having regard to the degree of uncertainty on this issue, I can only conclude that the case in relation to need is, in my view, not proven although seems not to be in conflict with Waste Management Policy 1."

The only passage in the report that deals directly with the question whether the proposed development would be the BPEO for the waste stream in question is in the following terms:

"Glapwell 2 has, until its recent closure, taken waste including a large proportion of municipal solid waste, from Chesterfield, North-East Derbyshire and the Bolsover area. The applicant indicates that municipal waste from this area is currently deposited at the Hall Lane, Steveley landfill site and at Sutton Landfill in Nottinghamshire. As an extension of an existing disposal facility, this site would make an effective, albeit small, contribution to the facilities available. Notwithstanding the Sub-Area supply position, I am satisfied that the proposal is not large enough that it would transform the local supply situation and, of itself, create substantial excess capacity. Whilst the application site is particularly accessible from the north-east of the County, the site also has good connections to the M1 Motorway and A38 trunk route to serve the wider needs of Derbyshire and I am mindful of the imminent shortage of landfill space in the south-east of the county. Thus, I consider that landfilling at this site would be in accordance with the key considerations—Proximity Principle and Regional Self-sufficiency

and technically suitable for landfilling as proposed thereby providing a Best Practicable Environmental Option for the disposal of waste in accordance with criteria 1 of this policy.''

75 The Director's planning conclusions were:

> ''The case for additional landfill space within the County for the period specified in the Derbyshire Waste Management Strategy to 2011 is not proven although I am satisfied that the proposal is not of a sufficient size that it would transform the local supply situation and, of itself, create substantial excess capacity. Further, preparatory waste local plan works suggests that a shortage of landfill space in the county as a whole will arise by 2010 and in the south-east of Derbyshire, a shortage is imminent. This site could help meet that shortage.
>
> Notwithstanding the availability of alternative sites both currently, and which may become available in the north-east of the County within the Waste Management Plan period referred to this report, I consider that there are compelling reasons to accept the infilling/land raising/restoration of the site as submitted to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. I consider that there is no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed.''

76 The minutes of the meeting of the Planning and Control Committee on March 11, 2002 state that:

> ''The Director of Environmental Services written report referred to there being no shortage of landfill space within the County as a whole to 2010, provided that reduced waste production and landfill targets were achieved. If waste arisings increased due to economic growth as forecast by the applicant then a shortfall of landfill space would arise. There was some uncertainty on this issue but he was satisfied that the proposal was not large enough that it would transform the local supply situation and create substantial excess capacity. He was mindful that preparatory waste local plan work showed that a shortfall of landfill space was about to arise in the south east of the County and given its good accessibility, this site could assist in meeting the waste disposal needs of that area.
>
> The officer also reported verbally that ongoing work in connection with the production of the waste local plan for Derby and Derbyshire now indicated that there was likely to be sufficient landfill space both in the North East Derbyshire Sub-Area and the plan area as a whole up to the end of the current Structure Plan period in 2011, but that an overall shortage was currently predicted to develop in the subsequent period up to 2015 (the year to which that plan would run).
>
> In his report the Director of Environmental Services considered that there were compelling reasons to accept the infilling/landraising/restoration of the site as submitted, to restore the site satisfactorily and conserve and enhance its ecology thereby providing a significant benefit. He considered

that there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed.

. . .

Members of the Committee commented on the proposal, and asked for clarification from officers on a number of issues raised, to which officers responded. Members, having considered the report and heard the comments made and explanations provided by officers, generally considered that there were not any substantial planning grounds for refusal of the application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own. An officer explained that satisfactory restoration without use of waste was a technical possibility but was not feasible except at great expense and that no such alternative scheme was likely to be being promoted.''

77 In the original claim form in the judicial review proceedings one of the grounds of challenge was that there was no proper BPEO assessment. The joint report responded as follows:

''Lack of a Compliant Best Practicable Environmental Option (BPEO) Assessment

The report to Committee of 11 March explained the concept of BPEO (*i.e.* the option that provides the most benefits or the least damage to the environment as a whole, at acceptable cost, in the long term as well as the short term), and analysed it in the context of this proposal.

The challenge essentially alleges that the Council's treatment of BPEO, as referred to in the Government's published Waste Strategy 2000, was insufficient. In particular, the level of detail that should be taken into account in determining a planning application, including the lack of identification of the specific BPEO for particular waste streams.

The Courts have held that in appropriate cases BPEO is an objective to which planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it. In this case the waste hierarchy and the proximity principle were considered and reference was made to the relevant Planning Policy Guidance, Waste Strategy 2000, Regional Planning Guidance and the Derbyshire Waste Management Strategy. The ES made reference to the applicant's own waste management strategy and proposed recycling rates. In particular, the report identified the waste hierarchy, the proximity principle and self sufficiency as considerations. It addressed the issues of the targets for reducing, re-using and recovering value from waste and the requirements for landfill capacity for the residual wastes. In the context of Structure Plan policies it identified the use of waste as a positive resource to reclaim this site.

Although extensive reference has been made under this ground of challenge to Chapter 3 in Part 2 of Waste Strategy 2000 ('the decision making framework'), this Part of the Strategy appears to be concerned with waste management decisions by local authorities in general rather than with

waste planning authority decision-making on particular planning applications.

Your reporting officers remain of the view that the relevant factors relating to the planning application in terms of BPEO were properly taken into account.''

78 It would appear from the defendant's summary grounds of opposition to the claim and from Mr Evans' skeleton argument on its behalf that the words ''the Courts have held'' were a reference to the dicta of Carnwath J. (as he then was) in *R. v Bolton MBC Ex p. Kirkman* [1998] J.P.L. 787 at p.799, which were followed by Richards J. in *R. v Leicestershire CC Ex p. Blackfordby & Boothorpe Action Group* [2001] Env. L.R. 2, see paras [46] to [49], whose dicta were in turn followed by Maurice Kay J. in *R. v Derbyshire CC Ex p. Murray* [2001] Env. L.R. 26, see paras [13] to [15].

79 Since *Murray* went to appeal, it is curious that reference was not made in this context to the conclusions of Pill L.J. in para.[53] of his judgment given on January 22, 2002 (see above).

80 It is submitted on behalf of the claimant that the approach to be BPEO in the report and the joint report—''BPEO is an objective to which local planning authorities should have regard as a material consideration. It is for local planning authorities to decide how much weight to attach to it''—does not accord with Pill L.J.'s conclusion that an objective is more than a factor to be taken into account, since it is an objective which is obligatory it must always be kept in mind when making a decision.

81 It is further submitted that the weight to be given to BPEO has increased since the government implemented the 1999 Landfill Directive by making the Landfill (England and Wales) Regulations 2002, which came into force on June 15, 2002. It should be noted that *Thornby Farms* was an incinerator, not a landfill, case and that the decision in *Murray* predated the implementation of the Directive, and did not consider Waste Strategy 2000 which had been published in May 2000. The pre- Landfill Directive position, which was that considered by the Court of Appeal in *Murray*, was as follows. The relevant objectives in para.4 of Sch.4 to the 1994 Regulations included: ''(b) implementing so far as material any plan made under the plan making provisions.'' Paragraph 1, as amended, defines the plan making provisions as follows:

> '''plan making provisions' means paragraph 5 below, section 50 of the 1990 Act . . . Part II of the Town and Country Planning Act 1990 . . . and section 44A of the Environmental Protection Act 1990 . . .''

Section 44A, which was inserted by the Environment Act 1995 makes provision for a national waste strategy:

> ''(1) The Secretary of State shall as soon as possible prepare a statement ('the strategy') containing his policies in relation to the recovery and disposal of waste in England and Wales.
>
> (2) The strategy shall consist of or include—

(a) a statement which relates to the whole of England and Wales; or.
(b) two or more statements which between them relate to the whole of England and Wales.

(3) The Secretary of State may from time to time modify the strategy.
(4) Without prejudice to the generality of what may be included in the strategy, the strategy must include—
(a) a statement of the Secretary of State's policies for attaining the objectives specified in Schedule 2A to this Act . . .''

The objectives in paras 1 and 2 of Sch.2A are, in substance, the objectives in Arts 4 and 5 of the Waste Framework Directive.

82 Waste Strategy 2000 for England and Wales is the national waste strategy prepared for the purposes of s.44A (see para.5.1 of the document). Thus, the defendant in the present case was obliged to keep in mind the objective of implementing, so far as material, the provisions of the strategy. BPEO is dealt with in the strategy as follows. Under the heading ''Delivering Change'' the second bullet point in the introduction to Ch.4 states:

> ''Decisions on waste management, including decisions on suitable sites and installations for treatment and disposal, should be based on a local assessment of the Best Practicable Environmental Option.''

Under the heading ''Making Good Decisions'', para.4.4 says:

> ''The right way to treat particular waste streams cannot be determined simply. The objective is to choose the Best Practicable Environmental Option, (BPEO) in each case. BPEO varies from product to product, from area to area and from time to time. It requires waste managers to take decisions which minimise damage to the environment as a whole, at acceptable cost in both the long and short term. A more detailed description of how decision makers can identify the BPEO is at Chapter 3 section starting 3.3 in Part 2 of this strategy.''

83 The three ''key considerations'', namely the waste hierarchy, the proximity principle, and self-sufficiency are set out in para.4.5. Paragraph 4.13 is concerned with the obligations of waste planning authorities. It says:

> ''Waste Planning Authorities are responsible for identifying suitable sites for waste treatment or disposal installations. The Government and the National Assembly look to Waste Planning Authorities to:
> • take full account of the policies described in this strategy, in particular:
> • the importance of establishing the BPEO . . .''

Part 2 of the strategy complements Pt 1 and should be read in conjunction with it (see para.1.2).

84 Having referred to the fact that the strategy is a waste management plan for the purposes of the Framework Directive and s.44A of the 1990 Act, para.1.8 says:

> ''Furthermore, this waste strategy is an advisory document. The 1990 Town and Country Planning Act requires local planning authorities in England and Wales to have regard to national policies in drawing up their development plans, and therefore this document will be an important source of guidance. These development plans will then provide a framework for individual planning decisions . . .''

85 Chapter 3 describes the decision-making framework in considerable detail. I do not propose to extend this already lengthy judgment by extensive citations from the chapter. Suffice it to say that para.3.2 states in part:

> ''When taking waste management decisions on suitable treatment options, sites and installations, local authorities must follow the framework set out below. This framework should act as a guide for other decision makers, including business waste managers.''

The framework is set out under the heading ''Determining the Best Practicable Environmental Option''. Paragraph 3.4 states:

> ''The process that should be used for considering the relative merits of various waste management options in a particular situation is the Best Practicable Environmental Option (BPEO). This was defined in the 12th Royal Commission on Environmental Pollution as . . .''

The definition is then set out.

86 The proximity principle—which suggests that waste should generally be disposed of as near to its place of origin as possible—is then amplified. A step by step approach is suggested:

> ''Identifying the most sustainable mix of waste management options, environmentally, economically and socially, can be a daunting task. However, the process can be simplified by breaking it down into smaller, more manageable tasks:
>
> Step 1: set the overall goals for making the waste management decision, subsidiary objectives and the criteria against which the performance of different options will be measured.
> Step 2: identify all the viable options.
> Step 3: assess the performance of these options against the criteria.
> Step 4: value performance.
> Step 5: balance the different objectives or criteria against one another.
> Step 6: evaluate the rank the different options.
> Step 7: analyse how sensitive the results are to variations in the assumptions made or the data used.''

87 Annex A deals with ''Major Waste Facilities in England and Wales'' and includes the following advice in para.A3:

> ''Under the Town and Country Planning legislation, planning authorities must have regard to national and regional policies, including policies on waste management, in drawing up their waste development plans. This

> waste strategy will be a material consideration for planning authorities in drawing up their development plans and for determining individual planning applications.''

88 It is submitted on behalf of the claimant that while the report mentions BPEO on a number of occasions, and indeed sets out the Royal Commission on Environmental Pollutions definition, it does no more, in effect, than pay lip service to the principle when it comes to applying it to the particular circumstances of this application for planning permission. BPEO could not have been kept in mind by the Committee because there was nothing recommending a step-by-step analysis of the kind recommended in Waste Strategy 2000.

89 Having concluded that there was sufficient landfill space in the North-East Derbyshire Sub-Area and the plan area as a whole up to the end of the structure plan period in 2011, the Committee should have been invited to consider whether landfill at the application site was the best option to meet the objectives which this particular application was intending to meet.

90 The objectives were not identified in any systematic way, but once it was acknowledged that there was sufficient capacity in the county as a whole and in the north-east of the county, they clearly included the objective of meeting an imminent shortage of landfill space in the south-east of the county. Whether landfill was the best option for such a waste stream, having regard to the waste hierarchy, and if it was whether landfill in the north-east of the county would be in accordance with the proximity principle, were not examined. The defendant was obliged to adopt *the*, not *a, BPEO. There is considerable force in these criticisms of the way in which the report and the joint report dealt with BPEO.*

91 I turn to consider the status of Waste Strategy 2000 post the Government's implementation of the Landfill Directive.

92 The background to the making of the Directive is set out in the recitals. Recital 18 explains:

> ''Whereas, because of the particular features of the landfill method of waste disposal, it is necessary to introduce a specific permit procedure for all classes of landfill in accordance with the general licensing requirements already set down in Directive 75/442/EEC and the general requirements of Directive 96/61/EC . . .''

Article 8 provides, so far as material:

> ''Member states shall take measures in order that:
> (a) the competent authority does not issue a landfill permit unless it is satisfied that . . .
> (b) the landfill project is in line with the relevant waste management plan or plans referred to in Article 7 of Directive 75/442/EEC.''

Article 7 of the Waste Framework Directive required the competent authorities to draw up as soon as possible one or more waste management plans. Waste Strategy 2000 is that plan for England and Wales. Who is to ensure that a landfill permit is not issued unless it is ''in line with'' the Strategy? As mentioned

above, the Landfill Directive was implemented by the Landfill (England and Wales) Regulations 2002, under which the Environment Agency is responsible for issuing landfill permits.

93 DEFRA has published a note explaining how the main requirements of the Landfill Directive have been transposed in the 2002 Regulations. Under the heading ''Conditions of the permit'' the note explains that the requirement in Art.8B of the Landfill Directive ''has already been transposed in the PPC Regulations 2000 through the duty placed on the Environment Agency not to issue a permit to any waste management activity unless it has already obtained planning permission''. Thus, it is clearly intended, at least by DEFRA, that local planning authorities will not grant planning permission for a landfill project unless they are satisfied that it is ''in line'' with Waste Strategy 2000.

94 On behalf of the defendant, Mr Evans, whose submissions were adopted by Mr Barrett on behalf of the interested party, submitted that the combined effect of the Landfill Directive and Waste Strategy 2000 did not alter the approach to BPEO that was required to be taken by the local planning authority. It had to keep BPEO in mind as an objective. Both Mr Evans and Mr Barrett submitted that the strategy was merely advisory, no more than a material consideration to which the defendant was required to have regard as members were advised in the joint report. It was for the local planning authority to decide what weight to give to the Strategy, both in general and insofar as it gave advice in relation to BPEO in particular.

95 So far as Art.8 of the Landfill Directive is concerned, Mr Evans submitted that the duties relating to issuing landfill permits were imposed by the 2002 Regulations upon the Environment Agency, not the local planning authority. Thus, the local planning authority was not under any duty to ensure that a planning permission was ''in line'' with the Strategy.

96 He fairly accepted that this approach had two consequences. Firstly, if the local planning authority was not under any obligation to ensure that a grant of planning permission was in line with the Strategy, it might well be too late to recover the position when the Environment Agency came to consider the issue of a permit under the 2002 Regulations. That might cause the United Kingdom to be in breach of the Landfill Directive. Secondly, whatever may be the respective roles of the local planning authority and the Environment Agency, the practical effect of the submissions of the defendant and the interested party is that no greater weight need be placed by the decision taker upon the relevant waste management plan that has been drawn up pursuant to Art.7 of the Waste Framework Directive as implemented by s.44A.

97 I am unable to accept Mr Evans' and Mr Barrett's submissions in this respect. In 1975 the Waste Framework Directive addressed all forms of waste management, including reduction, re-use, recycling, energy recovery and disposal (see Arts 3 and 4). Since it required member states to prepare waste management plans it could reasonably be expected that, once those plans had been prepared, arrangements would be made for them to be given additional weight in the decision-making processes of member states.

98 The 1999 Landfill Directive is concerned with a particular method of waste disposal, landfill, which is at the bottom of the waste hierarchy (that is to say,

all other things being equal, it is the least preferred option). The purposes of the Landfill Directive included encouraging the prevention, recycling and recovery of waste and obviating the wasteful use of land (Recital 3), and ensuring that, in future, only safe and controlled landfill operations should be carried out (Recital 2). In short, it sought to discourage the unnecessary use of landfill as a method of waste disposal.

99 To this end, Art.8 of the Landfill Directive is more prescriptive than the Framework Directive as implemented by paras 2 and 4(1)(b) of the 1994 Regulations. In ordinary language an obligation to be satisfied that a proposed development is ''in line with'' a waste management plan, is more stringent than an obligation to keep the objective of implementing the plan, so far as material, in mind. The difference in wording between the two directives, requiring greater weight to be placed upon the waste management plan, is deliberate, having regard to the purposes of the later directive. The words ''in line with'' admit of some flexibility. They are perhaps less prescriptive than ''in accordance with''. Moreover, given the complexity of the subject matter and the many factors that may have to be taken into account when taking individual waste disposal decisions, the waste management plan itself may well allow for a further degree of flexibility. Mr Evans submitted that, in this respect, the Strategy was no different from earlier policy guidance, which also referred to BPEO such as that contained in PPG10. He referred to para.1.8 in Pt 2 (above) and to the advice in para.A3 in Annex A to the Strategy.

100 This is to take these paragraphs out of context. Both Pts 1 and 2 of the Strategy must be read as a whole. It is true that it is an important source of guidance which must be taken into account by local planning authorities. But on its face it professes to be more than that: it ''implements . . . the requirement within the Waste Framework Directive . . . as incorporated into law by section 44A of the Environmental Protection Act 1990'' (see paras 1.4 and 1.5).

101 Fairly read, as a whole, the policies relating to BPEO in Waste 2000 are, and are intended to be, more prescriptive than earlier policy guidance. To give but a few examples from the extracts cited above: ''Decisions on waste management, including decisions on suitable sites . . . for disposal should be based on a local assessment of the BPEO''; ''The right way to treat particular waste streams cannot be determined simply. The objective is to choose the BPEO in each case''; ''The Government . . . look(s) to Waste Planning Authorities to take full account of the policies described in this Strategy, in particular . . . the importance of establishing the BPEO''; ''When taking waste management decisions on suitable . . . sites . . . local authorities must follow the framework set out below''. As mentioned above, the framework describes how to determine the BPEO: ''The process that should be used for considering the relative merits of the various waste management options in a particular situation is the BPEO''.

102 On a fair reading, the Strategy does not simply maintain the status quo in policy terms, leaving local planning authorities free to give such weight as they choose to BPEO. One of the main objectives of the Strategy is to ''deliver change'' by placing greater emphasis on the need to choose the BPEO when making waste management decisions.

103 It is true that Ch.3 in Pt 2 of the Strategy applies to waste management decisions by local authorities generally, but contrary to the advice given to members in the joint report (above) it applies with no less force to waste planning authorities when they are taking decisions on planning applications for waste disposal. Under the 2002 Regulations the Environment Agency is concerned at the landfill permit stage with the detailed regulation of landfilling operations that will already have been granted planning permission. It is for waste planning authorities when deciding whether or not to grant planning permission for landfill proposals to ensure that they are ''in line'' with Pts 1 and 2 of the Strategy.

104 Mr Evans submitted that such an obligation might conflict with the waste planning authority's duty under s.54A: to determine an application for planning permission in accordance with the development plan unless material considerations indicate otherwise. Policies in the development plan might conflict with those in the Strategy. Since the Strategy will be a material consideration for local planning authorities when reviewing their development plans, the scope for conflict should reduce as policies in development plans ''catch up'' with those in the Strategy. Any conflicts in the short term should not present a practical difficulty because the policies in the Strategy will, at the very least, be material considerations for the purposes of s.54A which may indicate that an application for planning permission should be determined otherwise than in accordance with the (conflicting) policies in the development plan.

105 Mr Barrett conceded that the Government might well have wished local planning authorities to give greater weight to the policies in the Strategy including BPEO, but he submitted that its intention was that this should be achieved through the incorporation of those policies into statutory development plans, thus giving them the added force of s.54A. He relied upon para.A3 of Annex A to the Strategy, but his submission ignores the concluding words of the para.A3 which make it clear that the Strategy is to be taken into account in both plan making and development control.

106 For these reasons, I conclude that the defendant's approach to the status of the policies relating to BPEO in Waste Strategy 2000 was erroneous in principle because the joint report effectively relegated BPEO to a material consideration to be taken into account but to be given such weight as the defendant thought fit. Such an approach did not accord with Pill L.J.'s pre- Landfill Directive and Waste Strategy 2000 *dicta* in *Murray*. There was no recognition of the defendant's duty, post the publication of the Strategy and the implementation of the Landfill Directive, not to grant planning permission unless the proposed development was ''in line with'' the policies relating to BPEO in Waste Management 2000.

107 But the defendant's consideration of BPEO was seriously flawed, regardless of the weight that should have been attributed to the policies in the Strategy. Mr Evans and Mr Barrett pointed to the number of places in the report where BPEO was mentioned. I accept that there are frequent references to BPEO in the report, but merely repeating the acronym, however frequently, and whether or not accompanied by the Royal Commission's definition, is not an adequate consideration of the issues raised by BPEO. If a material consideration is to be

taken into account it must first be properly understood. What matters is not the letters BPEO, but the analysis of the issues raised by the concept: the application of the three key elements—the waste hierarchy, the proximity principle and self-sufficiency to the particular waste stream(s) which the development is intended to serve. So long as there was both a local (in the North-East Derbyshire Sub-Area) and county-wide shortage of capacity, it was relatively easy to see how the proximity principle might be met. It would appear that this must have been the assumption underlying the environmental statement, since it contained no discussion of BPEO whatsoever. However, once it had been concluded that there was capacity both locally and county-wide up to 2011, the question whether this particular application site would be the BPEO for meeting a shortage of landfill space in the south-east of the county had to be addressed in terms of the three key considerations, including the proximity principle. Beyond referring to the application site's good road connections, and stating that the Director was ''mindful of the imminent shortage of landfill space'' in the south-east of the county, the report did not address this issue at all. It may well be that this is why the Director did not feel able to conclude that the site was the BPEO in accordance with criterion 1 in Waste Management Policy 1 in the structure plan, merely that it was ''a BPEO for the disposal of waste''.

108 I accept that officers' reports should not be read in a legalistic or pedantic manner. If there had been a reasonable attempt to grapple with the issues raised by BPEO in the light of local spare landfill capacity and capacity county-wide for the structure plan period, the use of the indefinite rather than the definite article might well have been of little consequence, and reference to it dismissed as mere pedantry. Its use in this report is, in my judgment, a reflection of the defendant's muddled approach to the BPEO issue. Unfortunately, the muddle was compounded, rather than clarified, by the advice given to members in the joint report as to the weight that they ought to give to BPEO. Given the importance attached to choosing the BPEO for a particular waste stream in Waste Strategy 2000, this was a significant flaw in the decision-making process.

109 The defendant's failure to deal adequately with BPEO, whether it is regarded as a breach of its obligation to ensure that the grant of planning permission was in line with Waste Strategy 2000, or whether it is viewed more simply as a failure to have regard to a material consideration, does not mean that the planning permission must be quashed. The court has a discretion and I have anxiously considered whether it would be right in all the circumstances to exercise that discretion, given the two-fold justification for the development in the environmental statement: to reclaim a despoiled site and to facilitate the disposal of wastes arising in the area. It is clear from the report and from the minutes of meeting on March 11, 2002 that the Director placed considerable weight upon the first justification: ''there was no realistic likelihood of an appropriate restoration being achieved without the importation of waste in the manner proposed''. However, it was for members to determine the application. The minutes record that they ''generally considered that there were not any substantial planning grounds for refusal of the application. It was felt that the site was in need of improvement but that it would be unlikely to regenerate in a satisfactory manner on its own.''

110 Given the manner in which BPEO was addressed in the report and joint report it is not surprising that members concluded that there were no substantial planning grounds for refusing planning permission. Since there had been no proper BPEO analysis it is not possible to say whether there would or would not have been a substantial planning objection on this ground, for example because of failure to comply with the proximity principle. Thus it is simply not possible to tell what members' attitudes might have been if there had been a proper analysis of the BPEO issue, including both the weight to be given to, and the content of, the policies relating to BPEO in Waste Strategy 2000. In particular, Waste Management Policy 2 in the structure plan gives preference to waste disposal proposals that assist in the reclamation of derelict or despoiled land, ''where waste disposal activities are justified'' (see above). In deciding whether waste disposal activities are justified a BPEO assessment is, for the reasons set out above, a most material consideration.

111 For these reasons, the application succeeds on ground 3 and the planning permission dated December 23, 2002 must be quashed.