

SECTION C
MINERALS AND WASTE DISPOSAL

Background Documents - the deposited documents, views and representations received as referred to in the reports and included in the development proposals dossier for each case and also as might be additionally indicated.

Item C1

Application for removal / variation of condition 12 of planning permission TM/06/762 at Blaise Farm Quarry Composting Facility, West Malling, Kent – TM/08/3350, TM/08/3351 & TM/08/3353

A report by Head of Planning Applications Unit to Planning Applications Committee on 22 January 2009.

Applications by New Earth Solutions Ltd for:

- (i) removal of condition 12 of planning permission TM/06/762 (*i.e. removal of all current restrictions on waste sources*) (TM/08/3350);
 - (ii) variation of condition 12 of planning permission TM/06/762 to allow waste to be sourced from the permitted 8 Kent Districts and the Medway Unitary Authority area without the constraints imposed by circumstances (i), (ii) and (iii) of the current condition; (TM/08/3351) and
 - (iii) variation of condition 12 of planning permission TM/06/762 to allow waste to be sourced from all 12 Kent Districts (*i.e. Canterbury, Thanet, Dover and Shepway added*) and the Medway Unitary Authority area without the constraints imposed by circumstances (i), (ii) and (iii) of the current condition (TM/08/3353)
- all at the New Earth Composting Plant, Blaise Farm Quarry, Kings Hill, West Malling, Kent.

Recommendation: Permission be granted for TM/08/3351 (*subject to further amendment to condition 12*) and refused for TM/08/3350 and TM/08/3353.

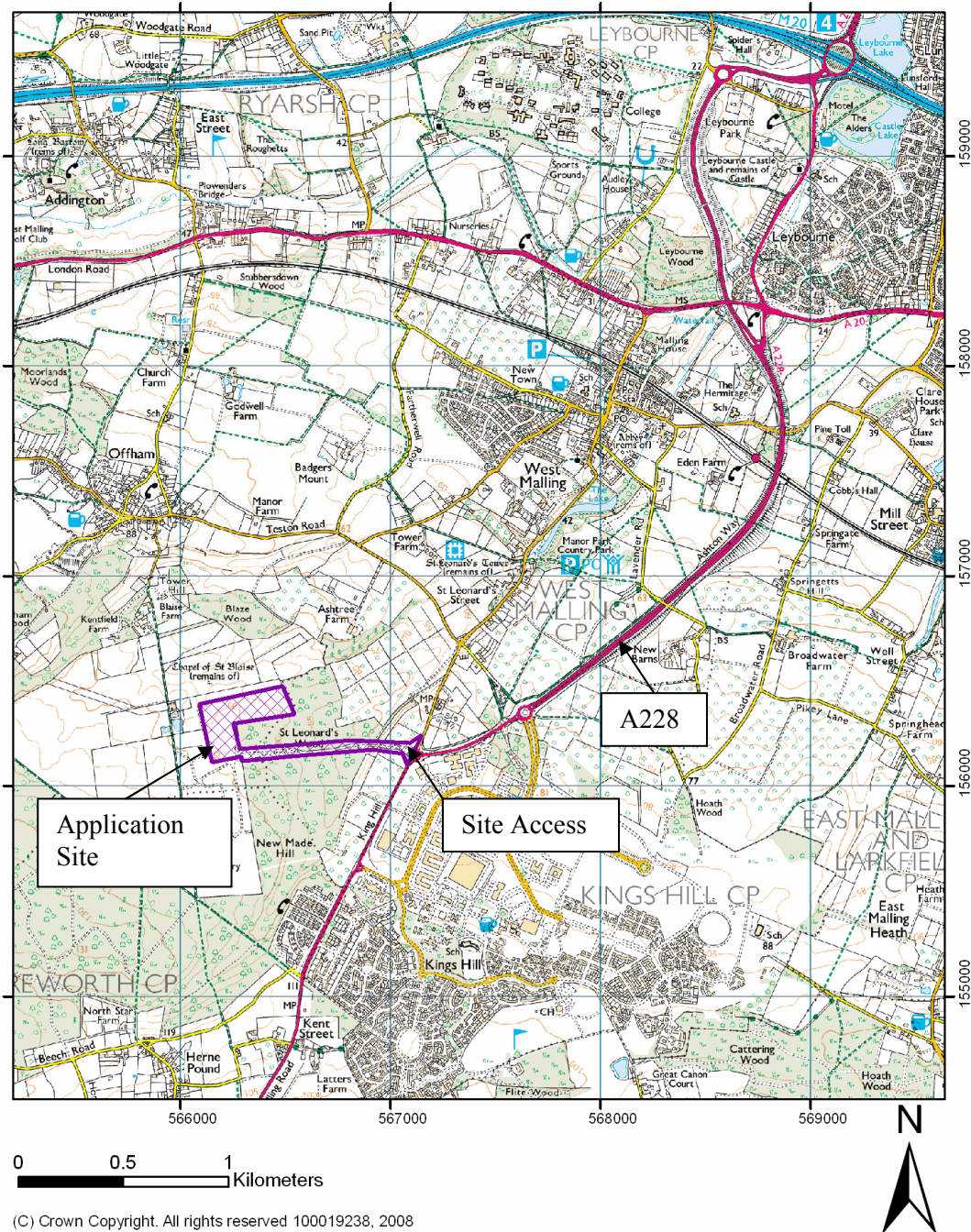
Local Members: Mrs S Hohler, Mrs T Dean and Mr R Long

Unrestricted

Site description and background

1. The New Earth Composting Plant is located within the excavated quarry void in the north eastern corner of Blaise Farm Quarry near Kings Hill, West Malling in the Parish of Offham. The composting facility is located about 15 to 20m lower than adjacent ground and is bounded to the east / part south by St Leonard's Wood, to the north by farmland and planting associated with the quarry and to the west / part south by those parts of the quarry that have yet to be started / fully excavated. The nearest residential property (Blaise Farm House) is about 500m to the north west. Access to the composting facility is via a purpose built access road from the existing quarry access road and the A228 West Malling roundabout near Kings Hill. The site lies in the Metropolitan Green Belt and St Leonards Wood is designated as both Ancient Woodland and a Local Wildlife Site (LWS). The remains of the Chapel of St Blaise (Scheduled Ancient Monument) lie about 100m to the north of the application site. The quarry has the benefit of a mineral permission (TM/88/1002) granted in 1994 which provides for the winning and working of ragstone over a 62-year period from the

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start of commercial mineral extraction (i.e. from March 2001).

2. Planning permission for the composting facility (TM/06/762) was granted on 19 September 2006 following the prior completion of a Section 106 (legal) agreement having previously been considered by the County Council's Planning Applications Committee on 20 June 2006. The permission provided for a fully enclosed composting facility (a series of buildings with a gross floor area of 24,153m³) to produce compost mainly from biodegradable materials comprising paper, card, food, vegetable and garden waste delivered by Waste Collection Authorities in Kent collected from household kerbside collection schemes and from Household Waste Recycling Centres (HWRCs), as well as from similar business wastes in Kent. The permission allowed up to 50,000 tonnes per annum (tpa) of waste to be imported to the facility. The facility was primarily designed to meet the requirements of a Kent County Council (KCC) waste management contract to process up to 25,000tpa of waste derived from Tonbridge and Malling and Tunbridge Wells over a 15 to 20 year period, as well as similar waste from Maidstone and Sevenoaks. The application was accompanied by a traffic impact report which concluded that the proposed location would meet the proximity principle for nine Districts (including Medway) in north, west and mid Kent and an alternative sites assessment report which concluded that of the four District areas considered (Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks), and in the absence of alternative sites in urban areas and non-Green Belt locations, only three locations (including Blaise Farm Quarry) offered practical opportunities for development of the facility based on the criteria used for assessment. The other two were the Wealden Granary Site in Mereworth Woods and Fishponds Farm to the north west of Tunbridge Wells, both of which were considered to be less favourable locations than Blaise Farm Quarry. The Wealden Granary Site is accessed off the B2016 (Seven Mile Lane) but development would have required clearance of an area of woodland which is also a Local Wildlife Site (LWS). The Fishponds Site requires access through a built-up area and would be visibly prominent.
3. The conditions attached to planning permission TM/06/762 of particular relevance to the current application are 2, 5, 12, and 15. Clause 5.3 of the Section 106 agreement is similarly important as this effectively repeats the terms of condition 12. Condition 2 requires all operations to cease within 20 years of the commencement of commercial composting operations, for all buildings, structures, plant, machinery, internal access roads and hardstandings to be removed within 12 months of cessation and for the site to be restored in accordance with an agreed restoration scheme within a further 12 months. Condition 5 requires that the development be carried out and completed in all respects strictly in accordance with the submitted / approved documents, plans and drawings. Condition 15 requires records to be maintained for 3 years detailing quantities and sources of waste imported to the site and for these records to be made available to the Waste Planning Authority on request to assist in monitoring compliance with other conditions (including condition 12). Condition 12 states:
 - "12. Waste imported to the composting facility shall only be sourced from within the Districts of Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks except in the following circumstances:
 - (i) those occasions where there is sufficient capacity to handle the additional

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- wastes at the Blaise Farm composting facility without diverting wastes from sources within Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks Districts; and
- (ii) where the additional wastes would otherwise be exported from the County or landfilled; and
 - (iii) where the additional sources of permitted waste are from within Swale, Ashford, Dartford and Gravesham Districts and the Medway Authority area.

Reason: As the principles of Best Practicable Environmental Option (BPEO), including the proximity principle, and very special circumstances necessary to justify the Green Belt location have been accepted on the basis that waste will primarily be derived from Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks and to accord with the principles of (amongst others) Waste Strategy 2000, PPG2, RPG9 Regional Waste Strategy (revised June 2006), Kent Structure Plan (1996) Policies S1 and MGB3, Kent & Medway Structure Plan (2006) Policy WM2 and Kent Waste Local Plan Policy W1, whilst acknowledging that a number of other waste sources are similarly proximate and could be used without undermining the reason for permitting a waste management facility in the Green Belt under certain circumstances.”

4. Condition 14 is also relevant. It originally required that no more than 50,000tpa of waste be imported to the site for composting in any calendar year but was subsequently varied (TM/07/4435) on 26 March 2008 in accordance with the resolution of the County Council's Planning Applications Committee on 18 March 2008. Application TM/07/4435 had initially sought the removal of condition 14 but the permission granted amended this instead to no more than 100,000 tonnes in any calendar year. The applicant had agreed to this as an alternative to removal of the condition. It should be noted that the variation of condition 14 was only granted as the County Council was satisfied that more than 100,000tpa of biodegradable waste could arise from within the four District areas referred to in condition 12 (i) such that this need not undermine the Green Belt case for the facility being located at Blaise Farm Quarry. This assessment was made following consideration of a report by Eunomia Research and Consulting Ltd which set out potential quantities of biodegradable waste from household (kerbside and household waste recycling centres), commercial and industrial sources for the eight Kent District areas and Medway referred to in condition 12 (i) and (iii).
5. It is also worth noting that as the planning permission has been implemented, an earlier permission (TM/03/1155) for a composting facility in the centre of Blaise Farm Quarry will not now be implemented.¹ It should further be noted that the dualling of the West Malling by-pass and by-passing of Leybourne Way (to the north of Blaise Farm Quarry) has now been completed and that the KCC waste management contract to process biodegradable waste from Tonbridge and Malling and Tunbridge Wells has now been let. The contract, which is for a duration of 15 years with an option for an extension, actually provides for between 25,000tpa and 30,000tpa of waste to be sent to the site for composting after an initial three year period during which phased

¹ This was secured by clause 7.1 of the Section 106 agreement.

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increases in waste quantities are proposed.

6. Another application (TM/08/2893) seeking a temporary variation of condition 12 of planning permission TM/06/762 to allow up to 15,000 tonnes of waste to be imported from Essex for composting over the 18 month period from October 2008 to March 2010 was refused under officer delegated authority on 7 October 2008 following agreement to this approach by the Chairman of the Planning Applications Committee and Group Spokespersons. The reasons for refusal were:-
 - “1. The proposed importation of waste from Essex would be contrary to the principles of Best Practicable Environmental Option (BPEO) and contrary to paragraph 3.2 of PPG2 and Policies SS2 and WM2 of the Kent and Medway Structure Plan (2006). It would also undermine the County Council’s previous decision and lead to reduced capacity for waste arisings from within Kent or Medway (i.e. more proximate waste sources) resulting in such wastes either being transported further afield with resultant disbenefits or pressure for additional new facilities in the Kent Green Belt which could further undermine National Green Belt policy.
 2. The applicant has not demonstrated the very special circumstances necessary to overcome the presumption against inappropriate development in the Green Belt contrary to PPG2 and Policy SS2 of the Kent and Medway Structure Plan (2006).”

The Proposals

7. Application TM/08/3350 proposes the removal of condition 12 of planning permission TM/06/762 (*i.e. removal of all current restrictions on waste sources*) at the New Earth Composting Plant, Blaise Farm Quarry, Kings Hill, West Malling, Kent.
8. Application TM/08/3351 proposes the variation of condition 12 of planning permission TM/06/762 to allow waste to be sourced from the permitted 8 Kent Districts and the Medway Unitary Authority area without the constraints imposed by circumstances (i), (ii) and (iii) of the current condition at the New Earth Composting Plant, Blaise Farm Quarry, Kings Hill, West Malling, Kent.
9. Application TM/08/3353 proposes the variation of condition 12 of planning permission TM/06/762 to allow waste to be sourced from all 12 Kent Districts (i.e. Canterbury, Thanet, Dover and Shepway added) and the Medway Unitary Authority area without the constraints imposed by circumstances (i), (ii) and (iii) of the current condition at the New Earth Composting Plant, Blaise Farm Quarry, Kings Hill, West Malling, Kent.
10. In support of all three applications, the applicant states that it is intending to appeal against the refusal of planning application TM/08/2893 (i.e. the proposed temporary variation of condition 12 of planning permission TM/06/762 to allow up to 15,000 tonnes of waste to be imported from Essex for composting over the 18 month period from October 2008 to March 2010) and that in preparing for the appeal, it has scrutinised the wording of condition 12 and concluded that it does not meet the tests set out in Circular 11/95 and is *ultra vires*. Its reasons for this are that it considers the

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condition to be unenforceable. It states that the choice over how, where, what quantity and when waste is managed lies with producers and collectors (either municipal or commercial) and that it does not have control over them or have knowledge of their activities and future intentions. For these reasons it would be unable to demonstrate that circumstances (i) and (ii) has been met when contracting to receive waste from the areas listed in (iii). It further states that the County Council, as the enforcing authority, would be unable to detect a contravention as it would similarly be unable to establish that circumstances (i) and (ii) had not been met.

Planning Policy Context

11. **National Planning Policies** – the most relevant National Planning Policies are set out in PPG2 (Green Belts), PPS10 (Planning for Sustainable Waste Management), PPS23 (Planning and Pollution Control) and Waste Strategy for England 2007.
12. **Regional Planning Policies** – These include Policies E1 (areas of cultural importance), E2 (biodiversity), E3 (Green Belts), W4 (sub-regional self-sufficiency), W5 (targets for diversion from landfill), W6 (recycling and composting targets), W7 (capacity requirements) and W17 (location of waste management facilities) of the adopted Regional Spatial Strategy (RPG9) and Policies BE7 (management of the historic environment), NRM4 (conservation and improvement of biodiversity), NRM5 (woodlands), CC10a (Green Belts), W4 (sub-regional self-sufficiency), W5 (targets for diversion from landfill), W6 (recycling and composting targets), W7 (capacity requirements) and W17 (location of waste management facilities) of the emerging South East (SE) Plan.
13. **Kent Structure Plan (2006)** - These include Policies SP1 (conserving and enhancing Kent's environment and ensuring a sustainable pattern of development), SS2 (extent of the metropolitan Green Belt), EN1 (protecting Kent's countryside), EN3 (protecting and enhancing countryside character), EN7 (county and local wildlife designations), EN8 (protection, conservation and enhancement of biodiversity), EN9 (trees, woodland and hedgerows), NR5 (pollution impacts), NR8 (water quality), TP12 (development and access to the primary / secondary road network), TP15 (development traffic & HGVs), TP17 (traffic and management of minor roads), WM1 (integrated waste management), WM2 (assessment criteria for waste proposals), WM4 (planning for waste management capacity) and WM6 (assessment of strategic waste management facilities).
14. **Kent Waste Local Plan (1998)** – These include Policies W6 (consideration of need / harm), W10 (criteria for composting proposals), W18 (noise, dust and odour), W19 (ground and surface water), W20 (land drainage and flood control), W21 (nature conservation), W22 (road traffic and access), W31 (landscaping) and W32 (aftercare).
15. **Tonbridge and Malling Borough Local Plan (December 1998)** - Identifies that the application site lies in the Green Belt.
16. **Tonbridge and Malling Borough Council Local Development Framework Core Strategy (September 2007)** – Policies CP1 (sustainable development), CP3 (Metropolitan Green Belt).

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17. **Kent Joint Municipal Waste Management Strategy (April 2007)** – The most relevant Policies are 8 (which states that the Kent Waste Partnership will achieve a minimum level of 40% recycling and composting of household waste by 2012/13 and will seek to exceed this target) and 12 (which states that the Kent Waste Partnership will work to secure composting capacity including in-vessel in the County to enable the authorities in the east of Kent to provide an efficient and cost-effective service for management compostable wastes).

Consultations

18. **Tonbridge and Malling Borough Council** – No objection to applications TM/08/3351 and TM/08/3353 subject to the remaining conditions attached to planning permission TM/06/762 being placed on any new permissions. *Comments are awaited on application TM/08/3350 and Members will be updated as necessary at Committee.*
19. **Offham Parish Council** – Objects to all three applications. Its comments are as follows:-

“Having carefully considered the information submitted and that relating to previous planning applications we confirm that we strongly object to these three applications for the following reasons:

- We were very disappointed to receive these three applications and to learn of NES's intention to appeal against the refusal to grant planning permission for the variation of Condition 12 to permit waste from Essex to be processed for a temporary period.
- Following Mr. Bleszynski's (NES) attendance at our last meeting on the 7th October where we discussed the original application for the variation of Condition 12 (TM/08/TEMP/0058) and a subsequent telephone discussion with Cllr Innes, we had taken at face value NES's justification for seeking the variation of Condition 12 on the basis that this was only to be a one off application and for a temporary period of 18 months to help Essex to achieve their recycling targets whilst developing their own facilities.
- Whilst we had no objections to the application for a temporary permission to import waste from outside the specific areas given NES's explanation of the reasons for the temporary surplus capacity in the plant and acceptance of the fact that importing waste from outside the approved areas would have no direct impact on Offham or our neighbouring parishes in terms of no additional traffic movements, we did concur with KCC on the problems the application created in terms of planning policy, given the location of the site within the MGB and the original justification for granting planning permission. Hence, whilst on the one hand we could not see any great harm from a local perspective in “helping out” another county on a temporary basis, on the other hand we recognised that there were perhaps bigger issues to be considered in terms of planning policy and precedents. Therefore, on balance, we concluded that we supported the decision of KCC.
- As we had been led to believe that the application was only for a temporary term of 18 months and was to “help out” another county we were very surprised to learn

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first of all of the intention to appeal against the refusal on the basis that by the time the appeal had been considered and a decision issued a substantive part of the proposed 18 months could well have passed and the “need” potentially have been eliminated by either Essex progressing the development of their own facilities or by them making alternative arrangements.

- We were even more perplexed by the subsequent arrival of these three applications in that they question the actual intention of the previous application.
- OPC originally objected to the original proposal to erect a composting plant in 2004/05 on the basis that the original planning permission for the quarry in 1988 contained a condition stating that the land had to be restored, phase by phase, to agricultural and at similar levels and contours to those that existed before any work took place. We were not opposed to the principle of a composting plant but were opposed to the principle that one of the original planning conditions, and a very significant one in our eyes, was not being fulfilled. Furthermore at the time of granting the original planning permission for the quarry, many reassurances were given that the site would not be used for waste management activities.
- This is the second site within our neighbourhood where a large quarry had been excavated and the resultant void has not been filled as originally envisaged. Offham Quarry became, as we are sure everyone is aware, a landfill site and the final contours are significantly different to the landscape that existed before quarrying took place.
- Bearing in mind that once permission had been granted for a 50,000 tonne capacity plant and the principle of building the facility granted on the grounds of “very special circumstances” we did not object to the doubling in capacity on the basis that this increase in capacity was a consequence of a more even flow of waste deliveries over the year, the original plant having been designed to accommodate seasonal peaks. Additionally, it did not involve an increase in floor area, and, most importantly, the applicant had confirmed that the increase in capacity would have no impact on noise, odour emissions or the level of HGV movements restricted to 82 HGV movements (41 in and 41 out) in any one day and 42 on a Saturday (21 in and 21 out).
- In the original application the need for the composting plant in this location was justified on the grounds of BPEO. We have heard mention that the BPEO test is no longer required – is this the case? If not, then where is the justification for varying the condition in each of the applications, and if so there must still be a requirement for some sort of cost benefit analysis in terms of benefits from importing waste from a wider area against the costs of transporting the waste to the plant – both financial and environmental.
- Once again, we seem to be faced with the situation of a continually evolving project. It is at great cost to the Village that this was the case with the Landfill site within the Village. In the case of Blaise Farm Quarry, permission was granted to extract stone on the basis that the quarry void would be backfilled and the land fully restored. Next, along came the application for the composting plant to be built in the quarry void. Permission was granted but a subsequent operator of the facility increased this to 100,000 tonne capacity plant. Now permission is being sought to vary the condition restricting the sources of the waste enabling it to serve a wider regional and indeed national area
- As far as we can determine the purpose behind Condition 12 was quite simply to ensure that the composting facility served and benefited the local area, rather than

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meeting a regional or indeed national need. Furthermore it must be remembered that “very special circumstances” were necessary to justify the release of the land from the MGB, proximity to waste source being one of them and the applicant demonstrating that there were no suitable alternative sites. Neither of these justifications could possibly apply to an extended area either regionally or nationally.

- The applicant states that Condition 12 cannot be complied with because of problems of forecasting waste supplies. However, we cannot believe that the statistical information would not be available for the calculations to be made to ensure that all parts of Condition 12 were being complied with. The only complication might be if NES were seeking to take on a contract from outside the priority districts for a different period of time when forecasting might be more difficult. This could easily be overcome by ensuring that all contracts were on the same time scale. If there was spare capacity, this would be easily identifiable at the time of accepting a contract from outside the priority districts.
- The applicant states that they cannot control the availability of waste but surely this is a normal business risk of supply and demand. NES have built a commercial plant for processing waste based on their business analysis and forecasting of a demand for composting facilities. Their ability to win contracts for the supply of waste for their plant depends surely on their business acumen and not simply the whim of suppliers. If permission is granted for either a regional or national expansion of the source area then this could result in the local districts having to compete with other areas. At the end of the day, NES are going to make a business decision and if one authority is willing to pay more than another to send their waste to this composting facility then NES are obviously going to select the most lucrative contracts. Without any restrictions, such as those imposed by condition 12, in an extreme example the composting plant could be importing waste from outside of the local area and the waste from that local area could be forced to go elsewhere.
- NES took on this site with a planning permission for a plant of 50,000 tonne capacity. This facility has been constructed and has been in operation since September 2008. We understand from a recent visit to the site that they are currently receiving approximately 30,000 tonnes of waste and should be up to 50,000 tonnes by early next year. Construction has not started on Phase 2 which would double the size of the plant to 100,000 tonnes. If, as they have suggested, the original designated areas cannot provide sufficient waste to fill this increased size, then a simple solution to this problem would be to not start construction of Phase 2.
- By seeking a variation to condition 12 they are seeking to change the nature of the plant in terms of the geographical area it is seeking to serve. To widen this area to provide a regional or national facility then NES should be making a new application, rather than seeking a variation of a condition and then all the issues could be fully debated. Even if the need for proving BPEO no longer exists, as mentioned above there must be some tests/guidelines in terms of costs and benefits of providing such facilities and the distance travelled for both their imports and exports.
- We note the comments made on the Section 106 Agreement relating to this development and the restrictions placed on variation until 2011.

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In conversations with NES, we have been informed that as all operations are contained within an enclosed building there is no need for plants to be located in isolated locations but they can be just as easily located on industrial zoned land. Blaise Farm Quarry is a convenient site in that it is an existing “hole in the ground” albeit that it should, in the fullness of time be restored to agricultural land, and we would suggest, is very attractive financially in that its land value will be a fraction of zoned industrial sites. At the time of granting permission for the 50,000 tonne capacity plant, NES stated that there were no suitable alternative sites within the locality. Bearing in mind the current state of the market and as soon as one expands the area of search there must be other viable sites that surely ought to be considered as possible alternative locations.”

20. **West Malling Parish Council** – Objects to all three applications.

TM/08/3350: Strongly objects to this application as it feels that this would defeat the whole purpose of the introduction of condition 12 and would thus not be ecologically sound. It also expressed particular concern about the extra volume of traffic which would be generated.

TM/08/3351: Objects strongly to this application as it objects to any relaxation of condition 12. However, if KCC is minded to permit the variation of the condition it urges that a full independent environmental impact assessment should be carried out.

TM/08/3353: Objects to application as it objects to any relaxation of condition 12. However, it urges that if KCC is minded to permit either variation of condition a full independent environmental impact assessment should be carried out.

21. **Kings Hill Parish Council** – Objects strongly to all three applications for the following reasons:-

- If the applications are allowed the applicant would be able to move waste from other areas of Kent and would then want to bring waste from other counties in England and Wales;
- There would be an increase in noise and CO2 emissions and the level of HGV movements would inevitably increase from the current restrictions of 82 (Monday to Friday) and 42 on a Saturday.

22. **Mereworth Parish Council** – Objects to all three applications (*no reasons given*).

23. **SEERA** – No representations to make as the application does not fall within its normal criteria for regionally significant waste applications set out in its advice note.

24. **SEEDA** – No comments to make on any of the applications.

25. **Environment Agency** – No objection to the removal or variations of condition 12.

Representations

26. The application has been publicised both by site notice and newspaper advertisement

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and 12 local residential / business properties were notified. At the time of writing no responses have been received.

Local Members

27. County Council Members Mrs S Hohler, Mrs T Dean and Mr R Long were notified in October 2008.

Discussion

28. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that planning applications are determined in accordance with the development plan unless material considerations indicate otherwise. In the context of this application, the policies outlined in paragraphs 11 to 17 are of greatest relevance. Also of particular relevance is Circular 11/95: The Use of Conditions in Planning Permissions (1995) which sets out the general criteria for the validity of planning conditions and the “six tests” that all conditions should meet.
29. Prior to the publication of PPS10, Government advice required planning authorities to consider whether waste planning applications constituted the Best Practicable Environmental Option (BPEO). Case law established that consideration of BPEO to individual applications should be afforded substantial weight in the decision making process. PPS10 moved the consideration of BPEO principles to the Plan making stage where it is to be considered as part of the Sustainability Appraisal (SA) / Strategic Environmental Assessment (SEA) process applied to the Plan. However, where planning authorities’ current waste policies have not been subject to the SA / SEA process (as is the case with the Kent Waste Local Plan) it is still appropriate to consider planning applications against the principles of BPEO. Until such time as the Kent Waste Development Framework (WDF) reaches a more advanced stage, applications will be considered against Policy WM2 of the Kent & Medway Structure Plan to ensure that they deliver facilities that are “*of the right type, in the right place and at the right time*” in accordance with paragraph 2 of PPS10. This approach is also consistent with the underlying principles of the adopted and emerging Regional Spatial Strategy for the South East (i.e. RPG9 and the draft SE Plan).
30. Each of the planning applications has been submitted under Section 73 of the Town and Country Planning Act 1990. Although such applications are normally described as being to remove, amend or vary a planning condition(s), Section 73 actually provides for the development of land without compliance with a condition(s) attached to an earlier permission. Any planning permission granted pursuant to Section 73 represents a wholly new planning permission and the applicant would then have the option as to which planning permission it wished to rely upon. Section 73 enables the planning authority to decide that planning permission should be granted subject to conditions different from those existing, the same as those existing (in which case permission should be refused) or unconditionally. In principle, the scope of the planning authority’s jurisdiction when considering a Section 73 application is more limited than when considering a full application and it does not empower the planning authority to rewrite the permission altogether. However, the planning authority is not constrained in its consideration of the full planning merits. Although the applicant has

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submitted three separate applications, it could have sought any or all of the proposed changes to condition 12 as part of the same application.

31. The key issues for each application are:-

- whether condition 12 of planning permission TM/06/762 is *ultra vires* and whether it meets the “six tests” in Circular 11/95;
- what are the implications of the proposed change (removal or amendment) and would this be acceptable in planning terms; and
- whether any other change to the wording of condition 12 would be desirable for any reason.

Is condition 12 ultra vires and does it meet the six tests in Circular 11/95?

32. If condition 12 was *ultra vires* it would be unlawful. Its legality can only be tested by way of a claim for judicial review, which should have been made promptly / within three months of the grounds for the claim having arisen. In this case, any claim for judicial review would need to have been made by 19 December 2006 (i.e. three months from the date of planning permission TM/06/762). In respect of the legal requirement for a condition, case law² has also held that conditions should:-

- a. Fulfil a planning purpose;
- b. Fairly and reasonably relate to the permitted development; and
- c. Not be manifestly unreasonable.

33. The “six tests” in Circular 11/95 are that conditions should be:-

1. Necessary;
2. Relevant to planning;
3. Relevant to the development permitted;
4. Enforceable;
5. Precise; and
6. Reasonable in all other respects.

34. Planning permission TM/06/762 was granted at Blaise Farm Quarry following careful consideration of various issues including those of the “very special circumstances” necessary to justify the Green Belt location and the proximity of waste sources to the site. It was felt that the limitations contained in condition 12 were essential to justify the location and overcome the usual Green Belt objections to the proposals and that the condition would go some way to ensuring that waste handled by the site arose in the four District areas referred to in the first part of the condition (i.e. those areas which the facility was primarily designed to serve, which are covered by significant areas of Green Belt and within which the applicant had demonstrated that there were no suitable alternative sites). It was also intended to provide some flexibility to the operator by allowing waste to be imported from the other five areas which would be similarly proximate and are, in some cases, also covered by significant areas of Green Belt without prejudicing the ability of the facility to compost waste from the four main

² Newbury District Council v Secretary of State for the Environment [1965]

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District areas.

35. For the above reasons, I consider condition 12 to fulfil a planning purpose and be fairly and reasonably related to the permitted development such that it meets the requirements of legal tests (a) and (b) above and to be necessary, relevant to planning and the development permitted such that it meets 1, 2 and 3 of the “six tests” in Circular 11/95.
36. In assessing whether condition 12 is enforceable, it is necessary to consider how the operator could demonstrate compliance and how the County Council could monitor this. Part (i) of condition 12 could be addressed by the operator commissioning regular waste generation figures or forecasts for the four main District areas, having regard to the likely generation of putrescible waste within those District areas and the facilities in them which could treat or dispose of that waste, and comparing the results against any spare capacity at the facility (which could in turn be established from the information required by condition 15 and any existing or future contracts which would be known to the operator). In providing the report by Eunomia Research and Consulting Ltd in support of planning application TM/07/4435 the applicant has already demonstrated that this approach is possible. The County Council could undertake its own assessment on a similar basis and also rely on information obtained via condition 15. Part (ii) of condition 12 could be addressed by the operator making proper inquiries during discussions on prospective waste contracts with producers, collectors or delivery companies (as appropriate) and the Waste Planning Authority as to what alternative treatment or disposal options exist and ensuring that it only accepted waste that met the requirements of the condition. Given the requirements of condition 15, and its knowledge of alternative waste facilities, the County Council would be able to assess whether imported waste was compliant with this part of condition 12. Part (iii) of condition 12 could simply be assessed from information obtained pursuant to condition 15 as this requires the operator to maintain records of the quantities and sources of waste imported to the facility for three years and to make this information available to the Waste Planning Authority on request. The collection of similar information is also a requirement of the Environmental Permit and related waste legislation.
37. Having concluded that condition 12 fulfils a planning purpose, is fairly and reasonably related to the permitted development, is necessary, relevant to planning, relevant to the development permitted and enforceable, it must follow that the condition is sufficiently precise and reasonable in other respects. I therefore consider that condition 12 meets the three “case law” tests such that it is not *ultra vires* and that it also meets the “six tests” in Circular 11/95.

What are the implications of the proposed changes (removal or amendments) to condition 12 of planning permission TM/06/762 and would the proposed removal or amendments be acceptable in planning terms?

38. Although none of the applications has been submitted on the basis that there is no planning justification for condition 12 and that it does not therefore fulfil a valid planning purpose, it is appropriate to address this point at this stage as such considerations are certain to become an issue in the event of any appeal.

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39. Tonbridge and Malling Borough Council has raised no objection to applications TM/08/3351 and TM/08/3353 subject to the remaining conditions attached to planning permission TM/06/762 being placed on any new permissions. *At the time of writing this report its comments are awaited on application TM/08/3350.* All four local parish councils have objected to the applications. Their reasons (where given) are set out in paragraphs 19 to 22. No other representations have been received in response to any application.
40. If condition 12 were to be amended to remove circumstances (i), (ii) and (iii) to simply allow waste from the eight Kent District areas and Medway (*application TM/08/3351*) this would widen the normal geographical waste catchment area and reduce the likelihood of the facility taking waste from the four main District areas that the facility was designed and permitted to serve and within which the alternative sites assessment report referred to in paragraphs 2 and 34 above had demonstrated there to be no suitable alternative sites (i.e. no sites in urban areas or non-Green Belt locations). Although Dartford, Gravesham and Medway also contain areas of Green Belt (53%, 78% and 22% of the local authority areas respectively), these areas have not been subject to any form of alternative sites assessment and it is not possible to say whether more suitable sites exist in them. If they do contain more suitable sites, any waste management facilities designed to serve these areas should be developed on those sites. As Ashford and Swale are entirely outside the Green Belt, they are not subject to the same Green Belt policy considerations and it is considered that waste from these areas should only exceptionally be dealt with at waste management facilities in the Green Belt.
41. In the case of Ashford and Swale, the proposed amendment would also be likely to result in waste being transported over greater distances and take longer to travel than if it were to come from within any of the four Districts (as exemplified by the applicant's own traffic impact report referred to at paragraph 2 above). The proposed amendment is also likely to give rise to pressure to allow additional waste management facilities in the Green Belt in the four principal District areas which contain the following percentages of Green Belt cover: Tonbridge and Malling (71%); Tunbridge Wells (22%); Sevenoaks (93%); and Maidstone (1%). The proposal may also lead to pressure for new waste management facilities in the other areas with Green Belt designations referred to in paragraph 40 above. It may additionally result in waste from within the Green Belt being transported greater distances to any new facilities that may be permitted elsewhere.
42. In the worst case, all the remaining currently uncontracted capacity at the New Earth Composting Facility (i.e. between 70,000tpa and 75,000tpa) could come from outside the four main District areas and outside the Green Belt for the remaining life of the facility with resultant disbenefits (including those relating to travel distance or time). Decisions on waste sources are also likely to be based entirely on commercial considerations. Given the above, the proposed amendment would conflict with Green Belt policy and any associated reasons for the imposition of condition 12 (including those relating to proximity) and undermine the original reasons for granting planning permission.

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43. If condition 12 were to be amended to remove circumstances (i), (ii) and (iii) to allow waste from all Kent District areas and Medway (*application TM/08/3353*) the same Green Belt and proximity arguments would apply. However, it would additionally be likely to lead to waste from even less proximate sources (i.e. Canterbury, Shepway, Thanet and Dover) being imported to the facility at the expense of more proximate waste sources or waste being exported elsewhere from within the Green Belt over longer distances and be contrary to the objectives of sustainable waste management.
44. If condition 12 were removed (*application TM/08/3350*) there would be no restriction whatsoever on where waste imported to the site can be sourced from. This could result in waste being imported to the facility from anywhere. This would wholly undermine both the Green Belt and proximity cases for the development at Blaise Farm.
45. In my view, all of the above implications would be unacceptable when considered against relevant planning policies and the proposed changes should be resisted.

Would it be desirable to change the wording of condition 12 for any reason?

46. Notwithstanding the above, it is desirable to consider whether condition 12 could be reworded in some way to make the process of compliance and enforcement more straightforward whilst still securing its objectives. It may also enable consideration of any exceptions to the normal waste source areas to be undertaken in a more transparent way. Consideration as to whether condition 12 might be better reworded in some way is provided for under the terms of Section 73 of the Town and Country Planning Act 1990.
47. Condition 12 could be re-worded as follows:-
 12. Unless otherwise approved beforehand in writing by the Waste Planning Authority, waste shall only be imported to the composting facility from the Districts of Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks. With the prior consent in writing of the Waste Planning Authority obtained upon application pursuant to this condition made in advance waste may be accepted from sources in Swale, Ashford, Dartford and/or Gravesham Districts and/or from the Medway Authority area if the following requirements are met:-
 - (i) the application for consent is supported by a report demonstrating that the acceptance of waste from the additional area(s) would not lead to waste already being imported to the composting facility from within the Districts of Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks being diverted elsewhere or be likely to prejudice the ability of the composting facility to take further waste from these four principal Districts during the remaining life of the facility. The report should include a clear statement setting out the proposed amount of waste to be imported (expressed in tonnes per year), information on likely peaks and troughs during the year and the duration of the proposed contract, together with an assessment of the available capacity at the composting facility based on existing and committed contractual arrangements; and

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- (ii) the application is supported by information as to what the alternative means of disposal of the additional waste sought to be accepted would be which demonstrates that it would otherwise be exported from the County or landfilled.

Any waste imported from Swale, Ashford, Dartford and/or Gravesham Districts and/or from the Medway Authority area shall be imported in accordance with the terms and conditions of any consent given by the Waste Planning Authority and only for the duration of that consent.

Reason: As the principles of Best Practicable Environmental Option (BPEO), including the proximity principle, and very special circumstances necessary to justify the Green Belt location have been accepted on the basis that waste will primarily be derived from Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks and to accord with the principles of (amongst others) Waste Strategy for England (2007), PPG2, RPG9 Regional Waste Strategy (revised June 2006), emerging South East Plan and Kent & Medway Structure Plan (2006) Policy WM2, whilst acknowledging that a number of other waste sources are similarly proximate and could be used without undermining the reason for permitting a waste management facility in the Green Belt under certain circumstances.

With the following additional informative:-

Informative

1. You are advised that in considering applications for additional waste sources pursuant to condition 12 the Waste Planning Authority will consider limiting any approval(s) given by restricting the quantities of waste which may be imported or the duration of any approval period where not to do so would be likely to prejudice the ability of the composting facility to take further waste from the four principal Districts of Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks during its remaining permitted life. You are further advised that where a non-landfill alternative exists outside the Green Belt in Kent or Medway you will need to provide specific reasons as to why this facility cannot take the additional waste.

48. This re-wording to condition 12 would secure the objectives behind the imposition of the current condition, provide a more practical mechanism for seeking approval of additional waste sources and enable the consideration of any additional waste sources to be subject to public scrutiny without reducing the controls afforded by the condition. As outlined in paragraph 30 above, the County Council could determine that one or more of the applications be granted permission subject to this replacement condition. However, to avoid the possibility of an even greater number of planning permissions existing than would otherwise be the case, it would be preferable to grant planning permission for only one of the applications on this basis and refuse the other two. Although it is largely academic (*given the way Section 73 of the of the Town and Country Planning Act 1990 functions*) it would seem logical to refuse the two applications which seek the greatest change to condition 12.

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Other matters

49. Although all three proposals would be likely to result in an increase in the number of HGVs currently using or contracted to use the site, which could lead to additional associated impacts on the road network near the site (e.g. the A228) when compared to the situations under these scenarios, they would not result in any increase in the number already permitted. The impacts associated with permitted HGV movements have already been fully considered when the previous applications were determined and the existing permissions already contain conditions designed to keep related impacts to an acceptable level (e.g. maximum daily HGV movements). The Section 106 Agreement also restricts the use of local roads through Offham, West Malling and Mereworth to vehicles collecting waste from these areas and the permissions contain other conditions designed to ensure that potential impacts on the local environment from operations at the site are minimised. No changes are proposed to these restrictions and the site would continue to be controlled by an Environmental Permit. Any new permission(s) would need to replicate the conditions imposed on planning permission TM/06/762 as amended by planning permission TM/07/4435.
50. If condition 12 were to be amended as above, it would be desirable for clause 5.3 of the Section 106 Agreement to be modified to reflect this change.

Conclusion

51. For the reasons set out above, I consider that condition 12 is not *ultra vires* and that it meets the “six tests” for conditions in Circular 11/95.
52. I would not support the proposed removal or amendments to condition 12 on the grounds that these would be contrary to the principles of the policies set out in the reason for condition 12, would be specifically contrary to paragraph 3.2 of PPG2, the 6th bullet of paragraph 3 of PPS10 and Policies SS2 and WM2 of the Kent and Medway Structure Plan (2006) and would undermine the County Council’s previous decision and make it difficult to maintain the intent behind condition 12 for the remaining life of the facility (i.e. about 20 years). In this way it could also lead to waste either being transported greater distances with resultant disbenefits or pressure for additional new waste management facilities in the Green Belt which could further undermine National Green Belt policy. In the case of application TM/08/3350 it could also lead to a reduction in capacity for waste arisings from more proximate waste sources within Kent or Medway.
53. Notwithstanding the above, I believe that it would be desirable for condition 12 to be reworded as suggested in paragraph 47 in order to make the process of compliance and enforcement more straightforward and transparent. I therefore recommend accordingly.

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Recommendation

54. I RECOMMEND that:-

- (i) PERMISSION BE GRANTED in respect of planning application TM/08/3351 subject to the conditions imposed on planning permission TM/06/762 dated 19 September 2006 as amended by planning permission TM/07/4435 dated 26 March 2007 being repeated and condition 12 being reworded as follows:-

12. Unless otherwise approved beforehand in writing by the Waste Planning Authority, waste shall only be imported to the composting facility from the Districts of Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks. With the prior consent in writing of the Waste Planning Authority obtained upon application pursuant to this condition made in advance waste may be accepted from sources in Swale, Ashford, Dartford and/or Gravesham Districts and/or from the Medway Authority area if the following requirements are met:-

- (i) the application for consent is supported by a report demonstrating that the acceptance of waste from the additional area(s) would not lead to waste already being imported to the composting facility from within the Districts of Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks being diverted elsewhere or be likely to prejudice the ability of the composting facility to take further waste from these four principal Districts during the remaining life of the facility. The report should include a clear statement setting out the proposed amount of waste to be imported (expressed in tonnes per year), information on likely peaks and troughs during the year and the duration of the proposed contract, together with an assessment of the available capacity at the composting facility based on existing and committed contractual arrangements; and
- (ii) the application is supported by information as to what the alternative means of disposal of the additional waste sought to be accepted would be which demonstrates that it would otherwise be exported from the County or landfilled.

Any waste imported from Swale, Ashford, Dartford and/or Gravesham Districts and/or from the Medway Authority area shall be imported in accordance with the terms and conditions of any consent given by the Waste Planning Authority and only for the duration of that consent.

Reason: As the principles of Best Practicable Environmental Option (BPEO), including the proximity principle, and very special circumstances necessary to justify the Green Belt location have been accepted on the basis that waste will primarily be derived from Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks and to accord with the principles of (amongst others) Waste Strategy for England (2007), PPG2, RPG9 Regional Waste Strategy (revised June 2006), emerging South East Plan and Kent & Medway Structure Plan (2006) Policy WM2, whilst

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acknowledging that a number of other waste sources are similarly proximate and could be used without undermining the reason for permitting a waste management facility in the Green Belt under certain circumstances.

Informative

1. You are advised that in considering applications for additional waste sources pursuant to condition 12 the Waste Planning Authority will consider limiting any approval(s) given by restricting the quantities of waste which may be imported or the duration of any approval period where not to do so would be likely to prejudice the ability of the composting facility to take further waste from the four principal Districts of Tonbridge and Malling, Tunbridge Wells, Maidstone and Sevenoaks during its remaining permitted life. You are further advised that where a non-landfill alternative exists outside the Green Belt in Kent or Medway you will need to provide specific reasons as to why this facility cannot take the additional waste.
- (ii) PERMISSION BE REFUSED in respect of planning application TM/08/3350 for the following reasons:-
1. The importation of waste from other sources would be contrary to the principles of Best Practicable Environmental Option (BPEO) and contrary to paragraph 3.2 of PPG2 and Policies SS2 and WM2 of the Kent and Medway Structure Plan (2006). It would also undermine the County Council's previous decision and lead to reduced capacity for waste arisings from within Kent or Medway (i.e. more proximate waste sources) resulting in such wastes either being transported greater distances with resultant disbenefits or pressure for additional new facilities in the Green Belt which could further undermine National Green Belt policy.
 2. The applicant has not demonstrated the very special circumstances necessary to overcome the presumption against inappropriate development in the Green Belt contrary to PPG2 and Policy SS2 of the Kent and Medway Structure Plan (2006).
- (iii) PERMISSION BE REFUSED in respect of planning application TM/08/3353 for the following reasons:-
1. The importation of waste from other sources would be contrary to the principles of Best Practicable Environmental Option (BPEO) and contrary to paragraph 3.2 of PPG2 and Policies SS2 and WM2 of the Kent and Medway Structure Plan (2006). It would also undermine the County Council's previous decision and lead to reduced capacity for waste arisings from more proximate waste sources within Kent or Medway resulting in such wastes either being transported greater distances with resultant disbenefits or pressure for additional new facilities in the Green Belt which could further undermine National Green Belt policy.

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2. The applicant has not demonstrated the very special circumstances necessary to overcome the presumption against inappropriate development in the Green Belt contrary to PPG2 and Policy SS2 of the Kent and Medway Structure Plan (2006).
- (iv) The applicant be requested to modify clause 5.3 of the Section 106 Agreement to reflect the change to condition 12 set out in (i) above.

Case Officer: Jim Wooldridge

Tel. no. 01622 221060

Background Documents: see section heading.
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