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26 November 2020

Our Ref: MB/2003/88101435/1

Dear Sir/Madam

APPLICATION REFERENCE: WP/20/00692/DCC
CONSTRUCTION OF AN ENERGY RECOVERY FACILITY WITH ANCILLARY BUILDINGS AND
WORKS INCLUDING ADMINISTRATIVE FACILITIES, GATEHOUSE AND WEIGHBRIDGE,
PARKING AND CIRCULATION AREAS, CABLE ROUTES TO SHIP BERTHS AND EXISTING
OFF-SITE ELECTRICAL SUB-STATION, WITH SITE ACCESS THROUGH PORTLAND PORT
FROM CASTLETOWN.
PORTLAND PORT CASTLETOWN, PORTLAND DT5 1PP

We write further to our letter dated 23 November 2020.

Please now find enclosed Freeths LLP's legal review of the submitted Shadow Habitats Regulations Assessment.

This is submitted on behalf of our client, the Portland Association.

Yours faithfully

Mark Bassett
Principal Manager

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LEGAL REVIEW
OF
PORTLAND ENERGY RECOVERY FACILITY
SHADOW HABITAT REGULATIONS ASSESSMENT
DATED
SEPTEMBER 2020

1. SUMMARY

2. Regulation 63 of the Conservation of Habitats and Species Regulations 2017 requires Dorset Council to conduct a Habitat Regulations Assessment (“HRA”) of the proposed Energy Recovery Facility (“ERF”) (application reference WP/20/00692/DCC). In doing so, Dorset Council must consult with Natural England (“NE”) (regulation 63(3)).
3. Under regulation 63, consent for the ERF may only be granted by Dorset Council where, following its Habitats Regulations Assessment, Dorset Council is able to conclude with certainty that there will be no adverse effect from the proposed ERF on the integrity of any European or Ramsar site, either alone or in combination with other plans or projects¹.
4. The HRA legal regime derives from the EU Habitats and Wild Birds Directives and is precautionary² and strict. The regime is governed by extensive domestic and Court of Justice of the European Union (“CJEU”) caselaw which must be adhered to by Dorset Council when undertaking its HRA.
5. The applicant, Powerful Portland Limited (“Powerfuel”), has provided a “shadow HRA”³ dated September 2020 in support of its planning application. To do so is commonplace, particularly in relation to a large application such as this.
6. On the basis of the Powerfuel shadow HRA, there is no scope for Dorset Council to be satisfied, as is legally required, that the proposed ERF will have “no adverse effect on the integrity of any European site either alone or in combination with any other plans or projects”. Dorset Council cannot rely on the Powerfuel shadow HRA as providing anything even approaching the robust assessment which the Council must undertake for this planning application in discharge of its HRA legal duty.
7. The following sets out a number of key and significant problems with Powerfuel’s shadow HRA. This is not an exhaustive list.
8. These are observations made by legally qualified professionals at law firm Freeths LLP based on the shadow HRA document alone.
9. It is quite likely that were the shadow HRA also to be considered / reviewed by air quality / ecological technical specialists, there would be a long list of further points to raise. Indeed we have noted the detailed comments contained in Stop Portland Waste Incinerator’s objection to the proposed ERF ie on the air quality aspects of Powerfuel’s shadow HRA and Environmental Statement submitted by Air Quality Consultants; and on ecological aspects of the Powerfuel’s

¹ The only exception to this would be where the HRA strict derogation tests apply (see regulations 64 and 68 of the Conservation of Habitats and Species Regulations 2017). It is not anticipated that the ERF could ever meet the strict requirements of the derogation tests.

² The HRA requirements under the Conservation of Habitats and Species Regulations 2017 must be applied consistently with the precautionary principle (see the judgment of Lord Carnwath in *R. (on the application of Champion) v North Norfolk District Council*, at paragraph 12).

³ This document has been labelled by Powerfuel as a “shadow Appropriate Assessment” but this is not correct because the document contains both elements which make up a shadow HRA ie the HRA screening assessment followed by the HRA appropriate assessment.

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shadow HRA and ES submitted by Jonathan Cox Associates. We have also noted similar objection comments from the Ministry of Justice. These detailed technical comments/objections underpin yet further the deficiencies identified in this present legal review report.

10. General

11. In general the shadow HRA is a very broad-brushstroke, high level document lacking the necessary detail and without evidence or substantiation of its contents and conclusions. This means that no one, not least Dorset Council or the statutory consultee Natural England, can have any confidence that the information presented and conclusions drawn in the shadow HRA are correct / accurate.
12. It appears that there is, within other Powerful application documents, further information which purports to support the conclusions of the shadow HRA, such as the ES and its underlying reports. But this has not been explained in sufficient detail in the shadow HRA⁴, nor has there been any or any sufficient signposting in the shadow HRA of other relevant data / evidence / paragraph numbers of other documents / sources to assist anyone reading it to understand the basis for the conclusions drawn.
13. This is a fundamental problem with the shadow HRA document because the HRA regime is strict and precautionary and requires a very thorough and carefully evidenced approach to the analysis of potential impacts from the ERF on European and Ramsar sites.
14. For this reason and for many further reasons set out below, the Powerful shadow HRA fails to meet the legal requirements of the HRA regime and so cannot be relied upon by Dorset Council in discharge of its HRA duties when considering the ERF application. Any consent granted by Dorset Council to ERF on the basis of the Powerful shadow HRA would be unlawful.

15. The HRA Screening Test

16. Dorset Council will be aware that the first stage of the HRA process is the "HRA screening test". This is where the Council must ascertain whether the ERF "is likely to have a significant effect on any European or Ramsar site either alone or in combination with other plans or projects". This test is strict, as has been explained in domestic and CJEU caselaw. If the ERF will have a "likely significant effect" ("**LSE**") either alone or in combination with other plans or projects, then this first HRA stage is "failed" and the Council must conduct an "appropriate assessment".
17. Caselaw has shown what the "LSE" test means. The need for an "appropriate assessment" is triggered by a *risk* that the plan or project in question will have a significant effect on a European site. Such a risk will exist if, on the basis of objective information, the possibility of a significant effect cannot be excluded (see the judgment of the Grand Chamber of the European Court of Justice in case C-127/02 at paragraph 44, and the Opinion of Advocate General Sharpston in CJEU case C-258/11, at paragraphs 47 to 50). Paragraph 45 of the *Waddenzee* judgement put it this way: "*Any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.*"

⁴ The only cross reference given is at para 3.1 where there is reference made to further details of the project (ie at Chapter 2 of the Environmental Statement). There is also reference in the shadow HRA to "Fichtner" having undertaken air quality modelling work but the work is not enclosed with the shadow HRA and neither is there any cross referencing in the shadow HRA to any specific paragraphs of any Fichtner report.

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18. The "likely significant effect" test therefore operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site (Advocate General Eleanor Sharpston in CJEU case C-258/11, paragraph 49).
19. There are a number of serious deficiencies in the approach to the LSE test in the Powerfuel shadow HRA as follows.
20. *There is no explanation as to the basis for the author's decision to consider European / Ramsar sites only within 10km of the ERF*
21. Paragraph 1.2 of the shadow HRA makes clear that the shadow HRA considers European sites *within 10km of the proposed stack*.
22. But this 10km search area has not been explained or justified. Why have the authors not considered European sites further afield (given that stack emissions / traffic emissions / water pollution impacts may well be felt further away than 10km from the proposed stack).
23. Justification and explanation is needed. The justification must be linked to and evidenced by the potential pathways of impact that are relevant, including stack emissions, others sources of emissions from the proposed ERF and traffic emissions. In the case of traffic emissions, this means that there must be consideration of likely routes of traffic to / from the ERF and then a search for European / Ramsar sites along those routes which might be affected (and hence the area of impact may well be more than 10km from the ERF facility).
24. *Omission of any assessment of impacts on the Studland to Portland SAC European marine site*
25. The shadow HRA gives no consideration of impacts on the Studland to Portland SAC European marine site. This is the case even though it is mentioned on Figure 1 as being within the 10km search area selected in the shadow HRA and even though marine pollution is a clear pathway of impact from the ERF and there is discussion of potential marine pollution impacts eg in section 5 (5.88) and section 6 (6.6, 6.9).
26. *Failure of the shadow HRA to consider impacts on each of the qualifying features of each European site*
27. A HRA must be undertaken "in view of the conservation objectives" of the relevant European sites (see regulation 63(1)) and also must consider each and every qualifying feature of each of the relevant European sites (see the case of C-461/17 *Holohan v An Bord Pleanála*⁵).
28. This shadow HRA fails to consider all the qualifying features even of the European sites that the author *has* selected to consider.
29. For example, paragraph 4.9 lists the qualifying features of Chesil and the Fleet SAC but it omits two qualifying habitats: (i) Coastal vegetation outside reach of waves; and (ii) Mediterranean saltmarsh scrub.
30. This means that there can be no confidence that all qualifying features of the other relevant European sites have been included. A full check must be carried out by Dorset Council to

⁵ Paragraph 40: "In the light of the foregoing, the answer to the first three questions is that Article 6(3) of the Habitats Directive must be interpreted as meaning that an 'appropriate assessment' must, on the one hand, catalogue the entirety of habitat types and species for which a site is protected..."

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ensure that its own HRA covers / addresses all relevant qualifying species of all relevant European sites.

31. The authors have (in section 4 of the shadow HRA, 4.25-4.31) listed NE's conservation objectives for the European sites that they have chosen to cover but have failed in doing that to include the NE list of *qualifying features* (these area set out by NE *under* the NE conservation objectives in the published conservation objective documents online). NE's lists of *qualifying features* should be included so as to ensure that everyone is absolutely clear which of the species and habitats described in the shadow HRA are / are not the *qualifying features*.
32. Failure to consider / address adequately all relevant impact pathways in relation to all the relevant qualifying features
33. At paragraph 5.13 of the shadow HRA, the only impact pathways listed as considered in the shadow HRA are the following, as they affect land *within* the European / Ramsar sites: (i) Stack emissions; (ii) Traffic / ship emissions; (iii) Pollution run off; and (iv) Dust.
34. The shadow HRA (wrongly) omits any consideration of impacts from the ERF on land / water outside the boundary of any European / Ramsar sites which might be "functionally linked" to any European or Ramsar site. The issue of functionally linked land has not been addressed at all and is a key issue here, particularly since (i) *mobile* species (eg birds; great crested newts) are relevant to the European / Ramsar sites considered in this shadow HRA and these species will use habitat *outside* the boundary of their European / Ramsar site as well as habitat within the European / Ramsar site; and (ii) the ERF is very close to the boundary of at least two European sites (see Figure 1 of the shadow HRA).
35. The shadow HRA also omits any or any detailed consideration of further impact pathways such as: noise impacts, odour impacts, visual impacts and impacts of the proposed stack obstructing bird flight access to the SPA / Ramsar sites.
36. Paragraphs 5.14 / 5.15 of the shadow HRA dismiss in a few lines the possibility of other possible impacts on the basis that "there is no realistic potential for LSE". There is brief mention in paragraph 5.15 of the reasons for this, being due to "distance" / "distribution of habitats" / there being "no potential impact pathway" / "inert nature of material". But there is no further explanation given, nor any data or basis provided, in support of the conclusions drawn.
37. We also note that at paragraph 5.15 of the shadow HRA Powerfuel screens out "operational activities, such as the removal of residual incinerator bottom ash material (post-combustion) from the site via ship" due to "the inert nature of the material leaving site". Given the risks associated with untreated IBA⁶ and the possibility of marine pollution resulting from any possible leakages/ explosions from the untreated IBA, the explanation given at 5.15 is inadequate to screen out "operational activities, such as the removal of residual incinerator bottom ash material (post-combustion)". A further detailed explanation must be given and it is most likely appropriate assessment will be required.
38. As can be seen from the above, the caselaw requires that Dorset Council may only conclude "no LSE" in relation to a pathway of impact to any European site where, based on objective information, there is no risk (with the exception only of hypothetical risks) to the European site. There are European / Ramsar sites in extremely close proximity to the proposed ERF in this case. Indeed based on the shadow HRA's Figure 1, the ERF redline actually abuts / adjoins the boundary of at least two European sites.

⁶ See for example <https://www.gov.uk/maib-reports/gas-explosions-on-general-cargo-ship-nortrader-with-1-person-injured>

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39. Based on objective information then, there is clearly a *risk* of impacts through matters such as noise impacts, odour impacts, visual impacts, impacts of the proposed stack obstructing bird flight access to the SPA / Ramsar sites. When applying the legal test, as is required, it would appear obvious that these matters cannot be screened out as having “no LSE” and that instead further analysis is required in an appropriate assessment.
40. Paragraph 5.15 also states that “*impacts on certain Annex 1 habitats have been screened out where background levels of relevant critical levels and loads are not exceeded and the process contribution is insignificant*”. But:
- 40.1. no clarity at all has been provided on *which specific habitats* the impacts have been screened out for; and
- 40.2. no clarity has been provided *on the basis* by which this conclusion is reached.
41. Again this is inadequate. On “objective information” (the correct legal test) there will be emissions from ERF’s stack and other on-site sources and ship / traffic emissions from the ERF and a risk to European sites from air quality impacts, particularly given the proximity of European sites to the redline of the ERF. On “objective information” this risk cannot be excluded. So once again it is obvious that the risk of air quality impacts to the qualifying habitats of all relevant European sites must be taken to appropriate assessment.
42. Paragraph 5.16 makes a bald assertion that there will be no impacts on the Crookhill Brick Pit SAC but:
- 42.1. This is an empty statement as there is no reference to any analysis or data to support the conclusion. In particular the statement rules out stack emission and traffic emission impacts on this SAC without any further explanation and yet a quick google search shows that there is a road that runs right beside the SAC (approximately 55-60m away). This is directly contrary to Natural England’s July 2018 guidance “Natural England’s approach to advising competent authorities on the assessment of road traffic emissions under the Habitats Regulations”⁷. This guidance sets out a clear and required approach to screening in relation to air quality impacts deriving from traffic. This guidance has not apparently been followed; and
- 42.2. The point made above with regard to functionally linked land is also highly relevant to this SAC and this is a further omission.
43. *Failure to provide any clarity as to exactly which pathways of impact for which European sites are being screened out as having “no LSE”; and which are being taken forward to the stage 2 appropriate assessment stage of HRA*
44. There is no clarity in the shadow HRA as to which pathways of impact for which European sites are being screened out as having “no LSE”; and which pathways of impact for which European sites are being taken forward to the stage 2 appropriate assessment stage of HRA. The shadow HRA is completely confused on this point.
45. Section 7.1 states “*The assessment of the application concluded that, in the absence of avoidance and mitigation measures, the project was likely to result in a significant effect on the Isle of Portland to Studland Cliffs SAC and Chesil and the Fleet SAC*”. This is therefore demonstrating that the author regards, as screened out in their entirety, all pathways of impact

⁷ <http://publications.naturalengland.org.uk/publication/4720542048845824>

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for all the other 3 European / Ramsar sites which are considered in this shadow HRA ie Chesil Beach and the Fleet SPA; Chesil Beach and the Fleet Ramsar; and Crookhill Brick Pit SAC.

46. Yet (i) there is no explanation of this at the LSE section of the shadow HRA in relation to the Chesil Beach and the Fleet SPA or the Chesil Beach and the Fleet Ramsar (and in any event the explanation in relation to the Crookhill Brick Pit SAC is wholly inadequate); and (ii) indeed the Stage 2 appropriate assessment *does* then go onto consider the Chesil Beach and the Fleet SPA and Ramsar site, which therefore directly contradicts the statement at section 7.1.
47. *Failure to apply NE's air quality (traffic) guidance dated July 2018⁸*
48. One of the pathways of impact acknowledged by the authors is air quality impacts from traffic. On this basis NE's air quality guidance on the LSE screening test must be followed. The shadow HRA's screening assessment makes no mention of this guidance and there is no evidence that the screening assessment has followed it.
49. *Failure to consider in combination effects at the LSE stage*
50. There has been no attempt to address the issue of "in combination effects" at the LSE stage.
51. This is essential, in particular, for the pathways of impact / qualifying features for which the authors are seeking to conclude that there is "no LSE". This is because the legal requirement is to consider LSE both (i) from the project alone; and (ii) in combination with other plans or projects.
52. For example the authors seek to argue that there is no LSE from the project on the Crookhill Brick Pit SAC. Quite apart from the fact that no / no adequate reasoning has been provided, the explanation fails completely to address in combination effects.
53. This is a particular concern with regard to emissions from the proposed ERF. The authors of the shadow HRA refer to a number of air quality guidance documents in the screening section of the shadow HRA ie paragraphs 5.4 to 5.12. However, having discussed the guidance, the screening section of the shadow HRA does not explain how the proposed stack meets the requirements of the guidance and in any event fails to address impacts of the stack emissions "in combination with other plans and projects".
54. This is highly relevant because paragraphs 5.14-5.16 make clear that emissions from the stack have been screened out as having "no LSE" for some qualifying features of some European sites (though as noted above the details of which features and which European sites are simply not clear). If that is the case then there must first be a clear assessment of the emission impacts of the stack and other ERF sources alone and then in combination with other plans and projects and only then may a conclusion of "No LSE" be drawn.
55. The requirement for an "in combination" air quality assessment at the HRA screening stage is well known, ever since the High Court decision in *Wealden District Council v Secretary of State for Communities and Local Government, Lewes District Council and South Downs National Park Authority* [2017] EWHC 351). In this case it was held that any "screening out" of air quality impact pathways from an appropriate assessment of a plan or project must be undertaken both on the basis of the plan or project "alone" and "in combination with other plans or projects". This is confirmed in the IAQM guidance (A guide to the assessment of air quality impacts on designated nature conservation sites, June 2019). More recently the CJEU's "*Dutch nitrogen*

⁸ <http://publications.naturalengland.org.uk/publication/4720542048845824>

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cases”⁹ have also made clear, consistent with *Wealden*, that that any attempt to apply a “screening-out threshold limit” must be fully explained and evidenced given the risk of “in combination effects” that could arise.

56. The screening assessment in this shadow HRA fails to comply with these requirements. This is a major error.
57. *Failure to comply with the CJEU decision in “People Over Wind”*
58. The well known CJEU case of *People Over Wind*¹⁰ confirms that mitigation measures (measures which avoid or reduce impacts on European sites) may not be relied upon at the HRA LSE screening stage. Instead mitigation measures may only be considered and relied upon at the appropriate assessment stage.
59. Paragraph 5.12 of the shadow HRA confirms that the shadow HRA author regards the proposed stack height as a mitigation measure. Yet at 5.15 and 5.16 the author screens out air quality impacts in relation to certain (unspecified) qualifying habitats and The Crookhill Brick Pit SAC. No explanation has been given. However in any event this appears to have been concluded in the light of the stack size, which the author has stated must be regarded as mitigation. On that basis the conclusion contravenes *People over Wind*.
60. *What is required for the LSE stage*
61. What is required for the LSE assessment is actually completely standard in shadow HRAs produced by developers; and it is a real concern that this shadow HRA has not provided what is standard. Once there has been presented a clear, evidenced and justified approach to selecting the European / Ramsar sites which must be considered then what is needed, for each European / Ramsar site, is a table showing:
 - 61.1. Along the top, all the qualifying features of each European / Ramsar site considered relevant;
 - 61.2. Down the side, all possible impact pathways including all those mentioned above;
 - 61.3. For each combination of qualifying feature and impact pathway in the table, an explanation of whether there is or is not likely to be a significant effect for that European site from the ERF *alone*;
 - 61.4. Where it is concluded, for a particular combination of qualifying feature and impact pathway, that there is *no* likely significant effect from the ERF *alone* then there must be presented (i) a clear explanation of the “objective information” relied on as leading to that conclusion; and (ii) a further explanation as to whether there is or is not, based on objective information, a LSE from the pathway / qualifying feature *in combination with other plans or projects*.
 - 61.5. Unless it can be concluded, based on objective information, that there is no risk of a significant effect from the ERF alone or in combination then the combination of qualifying feature and impact pathway must be taken to appropriate assessment.

⁹ In Joined Cases C-293/17 and C-294/17 *Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van gedeputeerde staten van Limburg and Stichting Werkgroep Behoud de Peel v College van gedeputeerde staten van Noord-Brabant* [2018] ECLI:EU:C:2018:882

¹⁰ C-323/17 *People Over Wind and Sweetman* [2018] ECLI:EU:C:2018:244

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62. The HRA Stage 2 Appropriate Assessment and the test of “No adverse effect on the integrity of any European site either alone or in combination with other plans and projects”
63. Under HRA rules, where it is concluded that there is a LSE from the ERF on any European / Ramsar site qualifying feature through any impact pathway then Dorset Council must conduct an appropriate assessment.
64. Dorset Council must then decide if it can be certain that “there will be no adverse effect from the ERF on the integrity of any European site either alone or in combination with other plans or projects”.
65. As a matter of law, consent for the ERF may not be granted unless Dorset Council can be certain that that “there will be no adverse effect from the ERF on the integrity of any European site either alone or in combination with other plans or projects”. This is a legal requirement. It is not a matter of planning discretion.
66. Dorset Council will no doubt be aware of the caselaw relating to the strict standard of assessment required for an appropriate assessment and the subsequent “adverse effect on integrity test”.
67. For example:
 - 67.1. In an appropriate assessment, all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect the conservation objectives of the European sites must be identified in the light of the best scientific knowledge in the field (CJEU case C-127/02, paragraph 54).
 - 67.2. An appropriate assessment may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned (CJEU case C-164/17¹¹, paragraph 39).
 - 67.3. The competent national authorities, taking account of the appropriate assessment of the implications of [the plan or project] for the site concerned in the light of the site’s conservation objectives, are to authorise [it] only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (CJEU case C-127/02, paragraph 61).
 - 67.4. The plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned (CJEU case C-127/02, paragraph 56).
68. Powerfuel’s shadow HRA (appropriate assessment) fails to meet these strict requirements.
69. Failure of the shadow HRA’s appropriate assessment to consider impacts on all qualifying features of the relevant European sites and any other species which are “necessary to the conservation of the qualifying features”
70. The CJEU decision in *Holohan*¹² requires an appropriate assessment to consider *all* qualifying species of each relevant European site and also any other species which are “necessary to the conservation of the qualifying features”.

¹¹ C-164/17 *Grace and Sweetman v An Bord Pleanála* [2018]

¹² C-461/17 *Holohan v An Bord Pleanála*, paragraph 39 “As regards other habitat types or species, which are present on the site, but for which that site has not been listed, and with respect to habitat types and species located outside that site,

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71. The shadow appropriate assessment in this shadow HRA does not meet either requirement.
72. Failure to consider / address all relevant European sites and all impact pathways
73. The failures in relation to these points noted above are carried through into the shadow appropriate assessment which is also therefore deficient.
74. Failure to consider impacts on functionally linked habitat outside the European / Ramsar sites
75. As is the case in the screening assessment, this is also omitted from the shadow appropriate assessment.
76. No reference to any bird survey data collected to support the shadow appropriate assessment in relation to the Chesil Beach and the Fleet SPA/ Ramsar
77. It is standard that development applications such as this would be supported by bird survey data to assist in assessing impacts of the ERF on the qualifying species of the SPA / Ramsar both when in the SPA / Ramsar and when using other land / sea outside the SPA / Ramsar site. Claims are made by Powerfuel in the shadow appropriate assessment about the behaviour of certain qualifying bird species but this is without any supporting evidence / data (eg 5.82 and 5.83). This is not adequate.
78. Failure to undertake correctly an “in combination” shadow appropriate assessment of the ERF project with other plans and projects
79. The shadow appropriate assessment must consider the impacts of the ERF project both alone and in combination with other plans and projects.
80. Section 6 of the shadow appropriate assessment purports to undertake an “in combination” assessment. But it is incorrect and / or inadequate.
81. An in combination assessment under HRA requires the assessor to identify a zone of influence *around each of the European / Ramsar sites of concern* to reflect the maximum distance from which each impact pathway of concern might affect that European site. The zones will differ depending on the pathway of impact. It is therefore not correct to identify a zone of influence around *the proposed project location* ie here around ERF. This is because the law is requiring an assessment of the impacts *on the European site* that the subject project is having together with any similar impacts on that same European site from other plans or projects.
82. In this case the author has not explained at all how the in combination projects listed in 6.2 have been identified. Table 3 is described as looking at “*other projects in the area*” which is unclear. It does not seem however that the author has identified the zone of influence of each relevant pathway of impact, as is required, nor does it seem that the author has considered zones of influence by reference to the locations of the European / Ramsar sites.
83. Table 3 makes no mention of any agricultural plans or projects which may well give rise to air quality impacts which should be considered in combination with the ERF project.

it must be recalled that the Habitats Directive, as follows from the wording of Article 6(3) of that directive, subjects ‘[a]ny plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon’ to the environmental protection mechanism of that provision. In that regard, as stated by the Advocate General in points 43 and 48 of her Opinion, the conservation objective pursued by the Habitats Directive, recalled in paragraph 35 of the present judgment, entails that typical habitats or species must be included in the appropriate assessment, if they are necessary to the conservation of the habitat types and species listed for the protected area”.

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84. Table 3 and paragraph 6.3 rely on “distance” as the apparent basis for why there is no “in combination” effect between the ERF and certain other projects. But no distance figures or reasoning has been provided. This is wholly inadequate. An appropriate assessment “*may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned*”.
85. The ERF’s air quality impacts are a very significant issue for this project and the approach to “in combination” air quality effects is of paramount importance. Yet paragraph 5.20 of the appropriate assessment states that where a particular “PC” threshold is not met then Powerfuel concludes “no adverse effect on integrity of the site”. This is inadequate and fails to comply with the legal requirements because no in combination assessment of other plans or projects (as required by *Wealden* and the *Dutch nitrogen* cases) has been mentioned or undertaken. Paragraph 5.20 states that the approach taken is in accordance with national guidance, but fails to inform the reader to which guidance it is referring.
86. The shadow HRA discusses critical levels and critical loads in the shadow appropriate assessment at paragraphs 5.22 – 5.87. Again there is no mention / explanation of how “in combination” effects have been taken into account.
87. *The discussion of critical levels and critical loads in the shadow appropriate assessment is incomplete / not sufficiently evidenced*
88. The shadow appropriate assessment presents information (with some omissions) for four European / Ramsar sites on (i) “critical levels” in relation to NO_x, SO₂ and Ammonia; and (ii) critical loads in relation to Nitrogen deposition and acid deposition. However:
- 88.1. there is no presentation of the underlying modelling data or any isopleth information to show how the conclusions have been drawn. There is merely a reference in the text to the “Fichtner” modelling. There is no Fichtner report listed in the References at the back of the shadow HRA;
- 88.2. there is no explanation as to how in combination effects have been taken into account;
- 88.3. the analysis fails to address each qualifying feature of each European / Ramsar site;
- 88.4. the analysis fails to address other species necessary for the conservation of the qualifying features;
- 88.5. the shadow appropriate assessment relies on supposed emission levels expressed as PC or PEC in relation to critical levels and critical loads but in most cases does not then go on to consider *ecological impacts* in relation to the qualifying features. This is contrary to the High Court judgment in *Compton Parish Council*¹³ where the judge stated (paragraph 207) “*It is perfectly clear, in my judgment, that Guildford BC, whose task it was to undertake the HRA, did consider whether significant adverse effects were likely from the development proposed in the Local Plan; it then undertook an appropriate assessment to see whether there would be no adverse effect on the SPA. That could not be answered, one way or the other, by simply considering whether there were exceedances of critical loads or levels, albeit rather lower than currently. What was required was an assessment of the significance of the exceedances for the SPA birds and their habitats*”;

¹³ [2019] EWHC 3242 (Admin)

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- 88.6. the shadow appropriate assessment lacks required detail / data eg one sees time and time again “*given the distance of the European site from the ERF....*”, but without any presentation of what the distance actually is.
89. *The shadow appropriate assessment in relation to traffic / ship emissions impacts is unclear*
90. The shadow appropriate assessment contains discussion of traffic / ship emission impacts at paragraphs 5.94-5.97. Whilst concerns are raised regarding potential impacts, no data or evidence is presented to support the conclusions and the conclusions themselves are not clear.
91. For example it is stated at 5.95 “at all points along the modelled transects that cover the European sites, emissions from traffic alone ...are below 1% of the critical level or load *for the most sensitive habitats within those sites*”. Which are the most sensitive habitats?
92. For example it is stated at 5.96 “...there is some exceedance of the relevant critical levels and loads...the highest levels of exceedances are found closest to the roads” and at 5.97 “road traffic emissions, and those generated by ships have been factored into the modelling work...have been assessed above”. Yet there is no visibility at all as to what the exceedances described are / how they have been assessed “above”.
93. *Omission of consideration of acid deposition impacts on Chesil Beach and the Fleet SPA / Ramsar sites*
94. This is omitted.
95. *Omission of consideration of impacts of water pollution on Isle of Portland to Studland Cliffs SAC / Studland to Portland SAC*
96. This is omitted (it is acknowledged that there may not be marine impacts on the Isle of Portland SAC but, if not, then this should be explained and if the screening assessment had been conducted as required then this would have been made clear).
97. *Omission of consideration of impacts of dust pollution on Chesil and the Fleet SAC even though its boundary appears on Figure 1 to abut the redline of the ERF*
98. This is omitted.
- 99. WHERE DOES THIS LEAVE DORSET COUNCIL?**
100. Based on the information presented by Powerfuel in its shadow HRA, Dorset Council would have to refuse permission for the ERF because Dorset Council cannot be satisfied, on the basis of Powerfuel’s deficient shadow HRA, that there will be no adverse effect on the integrity of any European site or Ramsar site from the ERF alone or in combination with other plans or projects.
101. Were Dorset Council to grant consent to the ERF on the basis of Powerfuel’s shadow HRA, the decision would be unlawful and the permission would be quashed by the Court upon application for judicial review.
102. Dorset Council should exercise its own legal powers under regulation 63(2) of the Conservation of Habitats and Species Regulations 2017 to require Powerfuel to provide a shadow HRA which is fit for purpose and which rectifies the numerous errors in Powerfuel’s present

FREETHS

document as identified above and in other objectors reviews. Note that regulation 63(2) states: *“A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment [ie the appropriate assessment] or to enable it to determine whether an appropriate assessment is required”*.

103. Either way the public and NE must be consulted, see in particular regulations 63(3) and (4) of the Conservation of Habitats and Species Regulations 2017.

Freeths LLP
26 November 2020