

## **Interim Findings**

### *Introduction*

1. Quite recently adopted Core Strategy and Generic Development Control Policies Development Plan Documents, already form part of the minerals and waste development plan for Cumbria. These set out respectively the spatial vision, strategic objectives and strategic policies and the detailed policies against which waste and minerals proposals will be assessed. The role of the Resubmitted Site Allocations Policies and Proposals Map DPD (RSAP) is, therefore, limited to the identification of the specific sites required to deliver the spatial strategy and strategic objectives.
2. The hearing sessions of the RSAP Examination took place between 24 and 26 April 2012. During the final session, I indicated those matters on which I had reservations regarding the soundness of the RSAP and invited the Council to consider the main modifications that it would request me to recommend in accordance with s20(7C) of the 2004 Act as amended by the Localism Act of 2011. The Council indicated that it did not consider any changes to be necessary to make the submitted RSAP sound.
3. It did, however, indicate a willingness to introduce a policy to reflect the presumption in favour of sustainable development, which lies at the heart of the National Planning Policy Framework (the Framework) and to guide how the presumption will be applied locally (see paragraph 15 of the Framework).
4. It is for the Council, therefore, to decide whether it introduces this policy as a main modification of the RSAP or by way of an additional modification. The former can only be recommended by me in response to a request from the Council under s20(7C) of the 2004 Act. The latter can be undertaken by the Council without any such recommendation. I can only recommend modifications of the RSAP that would make it sound if asked to do so. If I am not asked to do so, and I consider the RSAP to be unsound, I can only recommend non-adoption of it (s20(7B) of the 2004 Act). Conversely, if I am asked to do so, I must recommend the modifications that I consider necessary whether the Council agrees with them or not.
5. The purpose of this 'interim findings' paper is to set out the three Issues about which I have reservations regarding soundness, to help the Council to decide how it now wishes to proceed.

*Whether the Habitats Regulation Assessment (HRA) has been carried out in accordance with the relevant regulations and guidance.*

6. Although raised by Barrow Borough Council specifically in respect of the Roosecote area of search put forward in RSAP policy 7 (site M12), it became apparent during the hearing session discussion that this representation actually raised a wider matter of principle.
7. HRA is a multi stage process the first two of which are screening and, where the plan or project (either alone or in combination with other plans and projects) is likely to have a significant effect on a European site, appropriate assessment. Document RSAP3 sets out the HRA that has been undertaken for

the RSAP. The Council refers to Regulation 61 of the Conservation of Habitats and Species Regulations 2010<sup>1</sup>, but I believe that Regulation 102, which applies particularly to land use plans, is also very relevant. Under this regulation the context for the assessment is the plan as a whole.

8. The concern of Barrow Borough Council is that site M12 was not subject to HRA at all. The Council agrees and indeed explains that none of the areas of search or mineral safeguarding areas (MSA) put forward in the RSAP policies and proposals maps have been assessed through the HRA<sup>2</sup>. In summary, the reasons are that areas of search are fairly broad areas where knowledge about the mineral resource is not certain, while MSAs are only an indication of mineral presence, not future mineral working.
9. The Council argues that this approach was agreed with and endorsed by Natural England during the early stages of Plan preparation. However, it accepted that there is no documentary evidence of that agreement which was given during meetings between the Council and Natural England. The documentary evidence that does exist is in the form of Natural England's consultation responses to the previous version of the Site Allocations Policies and Proposals Map DPD (SAP) on 5 February 2010<sup>3</sup> and that dated 29 November 2011 on the RSAP now at examination<sup>4</sup>.
10. Turning first to the February 2010 representation, in my view the context means it is very unlikely that Natural England would have made those comments without a full understanding of the contents of the HRA report<sup>5</sup>. This is mainly because the letter welcomes the fact that Natural England's suggestions have been made to the report and notes that further work has been carried out on both cumulative effects and necessary mitigation as part of the appropriate assessment stage that leads to the conclusions drawn. The conclusion within Natural England's letter that 'we are now able to agree with your conclusion that the Site Allocations Policies and Proposals Map are not likely to adversely affect the integrity of European Sites' must be read in that context. In my view it is clear that the contents of the final report were fully appreciated by Natural England.
11. Paragraph 1.8 of that report is not materially different from the same paragraph in RSAP3. The November 2011 letter refers to the comments made previously and Natural England 'understand that we do not need to repeat them'. It then goes on to 'note' what is said in the RSAP, correctly quoting what is said in the document, but citing the wrong paragraph numbers.
12. Unfortunately, as the Council acknowledges, what is said in RSAP1 at paragraph 5.62 is wrong. The HRA<sup>6</sup> cannot (and indeed does not) conclude that '...this site is unlikely to have impacts on the Morecombe Bay SAC, SPA and Ramsar' because, being a proposed area of search, that assessment was not carried out. There is therefore a risk, which cannot be quantified, that Natural England's comments in respect of site M12 have been made on an erroneous assumption.

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<sup>1</sup> RSAP3 paragraph 1.3

<sup>2</sup> RSAP3 paragraph 1.8

<sup>3</sup> Representation 73 within SAP7

<sup>4</sup> Representation 20 within RSAP7

<sup>5</sup> SAP4

<sup>6</sup> RSAP3

13. Furthermore, notwithstanding the apparent endorsement by Natural England of the approach taken, there may be some doubt about the extent to which it is compliant in any event with the requirement of Regulation 102 to assess the Plan as a whole.
14. The arguments put by the Council for not including the areas of search and, particularly, the MSAs in the HRA have some force. Nevertheless, the Council will wish to assess the risk of a legal challenge to the RSAP on this point if it is adopted without any modification.
15. This is a matter that, in general terms, was reviewed in a recent judgement<sup>7</sup> (*Feeney*) that I drew to the attention of the Council and other participants. The Council will wish to consider both the extent to which *Feeney* is relevant to the circumstances of the RSAP and what action it should now take in the light of the above comments. There would appear to be a number of options:
  - (a) Do nothing;
  - (b) Revise the HRA so that it includes all areas of search;
  - (c) Revise the HRA for site M12 only;
  - (d) Introduce into RSAP1 policy wording that would ensure that no planning permission would be approved without confirming that there would be no adverse effect on the integrity of a European site. This may satisfy Regulation 102(4). A similar situation has arisen in the examination of the Gloucestershire Waste Core Strategy and, on counsel's advice, Gloucestershire County Council is proposing the following wording for inclusion in a relevant policy by way of a main modification:

*Proposals are supported by sufficient information for the purposes of an appropriate assessment of the implications of the proposal, alone or in-combination with other plans and projects, for any Special Area of Conservation (SAC), Special Protection Area (SPA) and Ramsar site. The conclusions of the assessment, in accordance with Council Directive 92/42 EEC and the Conservation of Habitats and Species Regulations 2010, must show that a proposal can be delivered without adverse effect on the integrity of any SAC, SPA or Ramsar site.*
16. In considering option (d), it is relevant for the Council to review the extent to which the other development plan policies<sup>8</sup> provide sufficient assurance that development which may adversely affect the integrity of a European site would not be permitted. The Council argued that these policies could not and did not repeat national policy although it also observed that this policy, as expressed in Planning Policy Statement 9, *Biodiversity and Geological Conservation* was now cancelled by the Framework. Nevertheless, the associated Companion Guide and Circular 6/2005, *Biodiversity and geological conservation - statutory obligations and their impact within the planning system* remain current and the Framework itself sets out policy in this area in chapter 11 and more particularly in paragraphs 118 and 119.
17. To conclude on this Issue, I consider matters to be finely balanced. I believe this to be a 'justified' soundness test matter and one where the degree to which the evidence base is proportionate to be at issue. However, there is

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<sup>7</sup> HD40

<sup>8</sup> CSD14 policy CS4 and CSD15 policy DC10

also the matter of whether the HRA has been carried out in accordance with the regulations. If the s20(7C) request is made, and I consider that the RSAP would be unsound on this Issue, the only modification that I could recommend would be (d) from the above list, since it would not be possible for me to undertake any revisions to the HRA. Following what is set out in paragraph 4 above, 'do nothing' (option (a)) would not be an option in these circumstances.

*Whether the sites identified in Policy 6 for the management of low level radioactive waste (LLW) are justified, effective and consistent with national and Core Strategy policy*

18. The adopted Core Strategy<sup>9</sup> deals with radioactive wastes in Chapter 8. There are three policies dealing with high and intermediate level radioactive wastes storage (CS policy 10), high and intermediate level radioactive waste geological storage (CS policy 11) and LLW (CS policy 12). Following changes made to the SAP as a result of the previous examination<sup>10</sup>, the RSAP now deals only with LLW and not its subset, Very Low Level Waste (VLLW). There are two matters for consideration of this Issue. First, whether the allocation of proposed site CO36 (Land within Sellafield) is consistent with the Core Strategy. A further consideration under this matter is whether the explanatory text in RSAP1 paragraphs 3.13 to 3.18 to justify policy 6 reflects or seeks to revise the Core Strategy. Second, is whether site CO36 is in any event deliverable. I deal with these in turn.
19. RSAP policy 6 flows from CS policy 12 and, having regard to what is said in paragraph 1 above, can do no more than identify the site or sites required to deliver the spatial strategy and strategic objectives inherent in that policy.
20. CS policy 12 itself is in three parts. The first sentence sets out the spatial strategy to be followed and refers only to the continuing role of the Low Level Waste Repository (LLWR) near Drigg. The remaining two sentences of the first paragraph set out criteria against which proposals for the purposes stated will be assessed. There is, therefore, a development management function within the policy and in both sentences there is reference to 'the site'. In context, this can only mean the LLWR. The final paragraph of the policy qualifies the Council's acceptance of the national role for 'the Repository' and sets out how this qualifier will be monitored. During the hearing session the Council argued that this final part of the policy permitted the identification of sites other than the LLWR for the management of LLW. I do not believe the paragraph to be capable of bearing that interpretation.
21. This matter was first debated at length during the examination of the submitted Core Strategy. At my request during my previous examination of the SAP, the Council published relevant parts of the Core Strategy Inspectors' report<sup>11</sup>. The main purpose was to assist the discussion around what was then submitted policy 5 and whether it could include sites for VLLW as well as LLW. However, those same parts have clear messages about the limited scope of CS policy 12.

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<sup>9</sup> CSD14

<sup>10</sup> See HD36, RC-S8 & RC-S9

<sup>11</sup> ED56d Appendix 4

22. There are several paragraphs where what is recorded clearly suggests that CS policy 12 relates to the LLWR alone<sup>12</sup>. Indeed, in two passages the views of the Council are stated as accepting that ‘...the CS needs to state clearly that CS policy 12 addresses only the LLWR near Drigg, and does not address either VLLW or LLW elsewhere in Cumbria’ (paragraph 8.71) and that ‘...CS policy 12...only applies to the LLWR near Drigg’ (paragraph 8.107).
23. Only in paragraph 8.106 is there a caveat where it says that ‘...the CS does not rule out additional provision for Cumbria’s wastes, for example, on or near the Sellafield complex for the decommissioning wastes that are likely to arise there.’ However, I take that to mean that any applications coming forward at sites other than the LLWR would be assessed against the development plan policies. I do not believe it to mean that the RSAP can and should identify sites for the disposal of LLW beyond the LLWR.
24. I appreciate that in several respects matters have moved on since the Core Strategy examination and the Council alludes to some of these in its Topic Paper<sup>13</sup>. However, the national strategy for the management of solid LLW has not changed in any material way since my previous examination of the SAP. What I understand to be current strategy<sup>14</sup> was published in August 2010 and is referred to in my previous report<sup>15</sup>. The strategy sets out the four alternative disposal options for this waste stream, which would help to optimise the capacity available at the LLWR<sup>16</sup>. It does though state that ‘This strategy recognises the opportunity provided by the use of alternative sites for disposal of LLW’. However, it does not set out to prescribe which of the above is preferred or where these activities should take place, because of the inherently local issues that accompany such decisions.<sup>17</sup> At the last examination, the Nuclear Decommissioning Authority (NDA) confirmed that no preference is expressed in the strategy for any one disposal option over another<sup>18</sup>. There is no evidence of any change to this position.
25. The ‘inherently local issues’ referred to are properly debated through the preparation of a local plan or the review of an existing development plan document, in accordance with the advice now set out in the Framework. For a subject with a national dimension, such as radioactive waste management, the requirements to plan strategically across local boundaries set out in paragraphs 178 to 181 of the Framework are particularly pertinent.
26. The need for such a review has long been recognised by the Council. It was first referred to by the Core Strategy Inspectors in their report<sup>19</sup>. This was then incorporated into the Core Strategy itself with the policies themselves no longer being consistent with national policy being identified as a trigger for such a review<sup>20</sup>. Finally, paragraph 3.18 of the RSAP itself refers to the need for an urgent review of the spatial strategy now that the national policy position has been confirmed.

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<sup>12</sup> ED56d Appendix 4 paragraphs 8.65, 8.71, 8.78, 8.106 and 8.107

<sup>13</sup> ED88

<sup>14</sup> LD191

<sup>15</sup> RSAP10 paragraph 88

<sup>16</sup> LD191 page 26

<sup>17</sup> LD191 page 26

<sup>18</sup> RSAP10 paragraph 85

<sup>19</sup> ED56d paragraph 8.61

<sup>20</sup> CSD14 paragraph 8.5

27. That review has not yet taken place. Nevertheless, paragraph 3.14 of RSAP1 refers to the policy of both the Council and Copeland Borough Council, that decommissioning wastes should be managed on the site where they arise as justification for the identification of land within Sellafield (site CO36) in policy 6. The Council suggested at the hearing session that this would be a common sense solution and I note that it would also be one of the options identified in the national strategy.
28. At the hearing session, the Council confirmed that the policy referred to in RSAP1 paragraph 3.14 was formulated at a Cabinet meeting in August 2009<sup>21</sup>. The purpose of the report to that meeting was, in fact, to allow Cabinet to consider and agree a response to the consultation on the UK strategy for management of LLW. From the minute<sup>22</sup> it is clear that the Cabinet approved as its response the answers to the consultation questions set out in Appendix 1 to the officer's report<sup>23</sup>. The answer given to question 6 is not, in my view, as unequivocal as the 'policy' set out in RSAP1 paragraph 3.14.
29. The Council also referred to Structure Plan policy ST4<sup>24</sup> and Copeland Local Plan policy DEV9<sup>25</sup>. The structure plan was adopted in 2006 and paragraph 2.13 predates and acknowledges that there will be later developments in national LLW strategy. The local plan was also adopted in 2006 and the policy refers back to the structure plan policy ST4. Both seem to set out criteria which would need to be assessed in the event of a proposal coming forward or a subsequent plan being prepared. Neither in my view directly supports the statement in RSAP1 paragraph 3.14, although what is said could be the outcome of the assessment process that they set out.
30. To conclude on the first matter under this Issue, while there are clear grounds for a review of the Core Strategy in regard to LLW (and indeed VLLW), it has yet to take place. The identification of a site other than the LLWR for the management of LLW is not consistent with the Core Strategy. The language used to justify site CO36 in paragraphs 3.14 to 3.17 and 5.106 has not emerged through any spatial planning process by which the other options identified in the national strategy have been tested and rejected. While it may well be consistent with national strategy for LLW management, there is no evidence that the proper planning process to show that it has been followed.
31. I can deal with the second matter very briefly. The Council confirmed in its Topic Paper<sup>26</sup> that the detailed assessment of the Sellafield complex is programmed but has yet to start. It seems to me that the conclusion drawn about the deliverability of this site in my previous report<sup>27</sup> remains valid.
32. In conclusion on this Issue, and for the reasons set out, I consider that the RSAP would be inconsistent with the Core Strategy if site CO36, Land within Sellafield, is included in the document. It would not meet the 'justified' test of soundness, in that the site is to give effect to a policy that amounts to a

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<sup>21</sup> HD37 and HD38

<sup>22</sup> HD38

<sup>23</sup> HD37

<sup>24</sup> LD16

<sup>25</sup> LD20

<sup>26</sup> ED88 paragraph 19

<sup>27</sup> RSAP10 paragraph 93

revision of the Core Strategy that has not emerged from any consideration against reasonable alternatives. As there is little evidence of the deliverability of the site over the Plan period, there are doubts as to whether it meets the 'effective' test either. It may also be that the inconsistency with the Core Strategy means that the RSAP would not be compliant with regulation 8(4) of the Town and Country Planning (Local Planning) (England) Regulations 2012 and thus would not satisfy s20(5)(a) of the 2004 Act.

33. I do recognise that this conclusion could be considered inconsistent with that drawn following my examination of the SAP in 2010<sup>28</sup>. On reflection, that conclusion may have been incorrect. However, it was heavily influenced by and contingent upon an urgent and early review of the Core Strategy which, in the event, has not taken place.
34. I also acknowledge that the Council wishes to be in a position to deal with planning applications coming forward and that the nature of those applications has changed as both national LLW strategy and environmental permitting regulations have evolved. However, this was the situation when both the Core Strategy and the SAP were examined<sup>29</sup>.
35. The Council will need to consider if it wishes to change policy 6. I believe that site CO36 should be deleted with consequential amendments throughout RSAP1. These would include the deletion of paragraphs, 3.14, 3.16, 3.17 and 5.105 to 5.109 inclusive. There is no evidence before me to support the second sentence of paragraph 5.28, which could be interpreted as prejudging any planning application for such wastes to be managed at Lillyhall.
36. These changes would leave policy 6 identifying only site CO35, the LLWR. In reporting on the previous examination of the SAP, I noted that the policy adds very little to the Core Strategy in this respect<sup>30</sup>. The Council may wish to consider whether this policy should remain in the RSAP at all and will have noted the comments of Waste Recycling Group on this during the Hearing session.

*Whether the RSAP would be consistent with the Core Strategy without a Mineral Safeguarding Area identified for slate*

37. CS policy 14 states that mineral resources will be safeguarded from unnecessary sterilisation by other developments by the identification of, among other things, MSAs for resources of local building stones (my emphasis). At the examination of the SAP, the same representor argued that a preferred area should be identified in association with the Kirkby Slate quarry. However, this was found not to be consistent with the Core Strategy<sup>31</sup>, although a change to the text of the document, reflected in RSAP1 paragraph 3.25, was made by the Council<sup>32</sup>.
38. Previously, the representor was concerned that preferred area status would give greater confidence that planning permission would be secured for the

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<sup>28</sup> RSAP10 paragraph 93

<sup>29</sup> RSAP10 paragraph 78

<sup>30</sup> RSAP10 paragraph 91

<sup>31</sup> RSAP10 paragraph 117

<sup>32</sup> RSAP10 paragraph 115

necessary extension of the quarry. However, that is not my understanding of the concern now expressed, which is more related to the potential sterilisation of the resource. Indeed, as policy DC6<sup>33</sup> treats all proposals outside preferred areas in the same manner irrespective of their designation as areas of search, MSA, or no designation at all, this is correct.

39. Core Strategy policy 14 does not qualify the resources of local building stones for which MSAs should be identified in any way. It seems to me that where, as in this case, an identified area is put forward for inclusion as an MSA, by what the Council acknowledges is an operator of importance to the economy<sup>34</sup>, it would be inconsistent with the Core Strategy not to do so. The Council, in effect, acknowledges this too<sup>35</sup>.
40. As an alternative, the Council proposed some additional wording which was discussed during the hearing session<sup>36</sup>. This would commit to addressing the matter in the forthcoming review of the Core Strategy. However this, in my view, is not necessary since the Core Strategy already gives sufficient guidance. What is required is the identification of the area required by CS policy 14. I do not agree either that the wording of that policy implies that all resources of local building stones must be safeguarded.
41. I also consider that there is a distinction to be drawn with what is said regarding the gypsum MSA<sup>37</sup>. An MSA is identified but it is said to be an interim one. While the Council was concerned that it may be argued by others that the RSAP provided an opportunity to deal with this matter, no such case has been made. There is, therefore, no soundness issue for me to consider in this regard.
42. To conclude on this Issue, I consider that the RSAP would be unsound without the identification of the MSA sought. Whilst not quite clear which of the soundness tests in paragraph 182 of the Framework an inconsistency with the Core Strategy falls under, it would not be compliant with regulation 8(4) of the Town and Country Planning (Local Planning) (England) Regulations 2012. It would not therefore satisfy s20(5)(a) of the 2004 Act.

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<sup>33</sup> GDC15

<sup>34</sup> ED89 paragraph 32

<sup>35</sup> ED89 paragraph 36

<sup>36</sup> ED89 paragraph 38

<sup>37</sup> RSAP1 paragraph 3.30