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Our Ref: PM/LG/164.1

31 July 2009

**FRIENDS OF THE EARTH
RIGHTS & JUSTICE CENTRE**

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Dear Sirs

Determination of an Application for an Environmental Permit

Applicant: Veolia ES Recovery Nottinghamshire Limited

Address of Installation: Rufford Colliery Lane, Rainworth, Nottinghamshire, NG21 0ET

Permit number: BP3035MG

I. Introduction

This is a pre-action letter under the Judicial Review Pre-Action Protocol in support of an application for permission to apply for judicial review to quash the grant of a PPC Permit (immediately deemed to be an Environmental Permit under Reg 70(1)(a) of the Environmental Permitting (England and Wales) Regulations 2007) for the Rufford “Energy from Waste Facility”.

Our Client: We are instructed by a representative member of People Against Incineration (PAIN) in which regard we anticipate the possibility of making an application for legal aid very shortly.

The Decision in question:

Environmental Permit BP3035MG granted on 2 June 2009 for a proposed municipal waste incinerator at Rufford Colliery.

Orders Sought:

The following orders will be sought from the Court:

- (i) a quashing order quashing the grant of Environmental Permit BP3035MG;
- (ii) costs.

Factual Background:

On 21 December 2007 Veolia applied for a PPC permit for a municipal waste incinerator at the proposed Rufford Colliery “Energy from Waste Facility”. The permit was granted on 2 June

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2009. The Secretary of State has called in the planning application for the site, and the public inquiry is ongoing. Planning permission not being in place, construction of the facility has not yet begun nor can it.

The issues set out in this letter were also raised in letters of 30 April 2009 and 2 June 2009 from Public Interest Consultants, on behalf of PAIN, to the Environment Agency, and in PAIN's representations to the Agency during the consultation process on Veolia's application for the permit. The Agency's response to these representations demonstrate the legal errors which have been made.

II. Grounds of Claim:

- (i) In granting the PPC permit the Agency breached its duties under the Persistent Organic Pollutants Regulations 2007 (the "POPS Regulations"), failing to comply with Regulation 4(b) which requires the Agency to discharge the duty to give priority consideration to alternative processes, techniques or practices which avoid the formation and release of certain chemicals.

1. Article 6(3) of EC Regulation 850/2004 (the "EC Regulation") states:

"Members States shall, when considering proposals to construct new facilities or significantly to modify existing facilities using processes that release chemicals listed in Annex III, without prejudice to Council Directive 1996/61/EC, give priority consideration to alternative processes, techniques or practices that have similar usefulness but which avoid the formation and release of substances listed in Annex III."

2. This provision is one method of achieving the objectives of recital (13) which says, in part:

"releases of persistent organic pollutants which are unintentional by-products of industrial processes should be identified and reduced as soon as possible with the ultimate aim of elimination, where feasible"

3. The EC Regulation implements in European Law the provisions of the Stockholm Convention, an international convention aimed at eradicating a first list of POPs which are extremely damaging to human health. The Regulation also implements the 1998 Aarhus Protocol of the Geneva Convention on Long Range, Transboundary Air Pollution, also concerned with POPs.

4. Regulation 4 of the POPS Regulation states:

"All duties placed on the member State in Regulation (EC) No. 850/2004 must be executed by the Secretary of State, other than –

...

(b) Article 6(3), which must be complied with by any person considering an application for a permit or a significant modification to a permit under the Pollution Prevention and Control (England and Wales) Regulations 2004..."

5. All of the substances listed in Annex III are produced by the incineration of waste. In the Stockholm Convention *Guidelines on Best Available Techniques and Provisional Guidance on Best Environmental Practices* (adopted by COP 3), it is stated in Part V at page 2 that “Waste incinerators are identified in the Stockholm Convention as having the potential for comparatively high formation and release to the environment of chemicals listed in Annex C of the Convention.”
6. Guidance on the application of Article 6(3) can be found in the same document. At Section II.C it clearly sets out an approach to priority consideration of alternatives, including the following steps:
 - a. Review proposed facility in the context of sustainable development
 - b. Identify possible and available alternatives
 - c. Undertake a comparative evaluation of both the proposed and identified possible and available alternatives (this stage includes various criteria, including Information on Socio-Economic Considerations)
 - d. Priority Consideration – explained as follows:

“A proposed alternative should be given priority consideration over other options, including the originally proposed facility, if, based on the comparative evaluation described in subsection 3 above, and using relevant considerations and criteria from Convention Annex F and Annex C, an identified, available alternative is determined to:

- *Avoid the formation and release of chemicals listed in Annex C;*
- *Have similar usefulness;*
- *Fit comparatively well within a country’s sustainable development plans, taking into account effective integration of social, economic, environmental, health and safety factors.”*

7. Section V of the guidance deals specifically with waste incineration. At page 2 of Section V the guidance states:

“When considering proposals to construct new waste disposal facilities, the Stockholm Convention advises Parties to give priority consideration to:

- *Alternatives such as activities to minimize the generation of municipal waste, including resource recovery, reuse, recycling, waste separation and promoting products that generate less waste, when considering proposals to construct new waste disposal facilities (Stockholm Convention, Annex C, Part V, section A, subparagraph (f)), and to;*
- *Approaches that will prevent the formation and release of chemicals listed in Annex C.”*

8. And at Section V page 11:

“In addition to urging Parties to give priority to approaches that promote recycling and recovery of waste and minimize waste generation, the Stockholm Convention stresses the importance of considering alternative disposal and treatment options that may avoid the formation and release of chemicals listed in Annex C. Examples of such alternatives, including emerging technologies, are listed below.

For municipal waste, possible alternatives to incineration are:

- *Zero waste management strategies, which aim to eliminate the generation of waste through the application of a variety of measures, including legislative and economic instruments;*
- *Waste minimization, source separation and recycling to reduce the waste volume requiring final disposal;*
- *Composting, which reduces waste volume by biological decomposition;*
- *Mechanical biological treatment, which reduces waste volume by mechanical and biological means and generates residues requiring further management;*
- *High-temperature melting, which uses thermal means to reduce waste volume and encapsulates residues requiring further management.*
- *Specially engineered landfill, which contains and isolates wastes (including effective capturing and burning of formed methane with energy recovery or at least flaring if the latter technique is not applicable);”*

9. Thus a clear process for priority consideration of alternative facilities/waste disposal solutions is envisaged. In addition, at Annex C of the Convention itself, Part V general guidance relating to BAT and BEP puts the priority consideration of alternatives as a first step in the process.

10. It is clear from the decision document that the Agency have failed entirely to carry out this priority consideration process as required under Article 6(3). Instead, the Agency only considered the narrow question of different techniques within the incineration process (see for example C7.2.2 at page 28 of the decision doc) and did not do so with reference to avoiding the production of POPs within Annex III. In failing to consider in the assessment the available alternative processes which would avoid the formation and release of Annex III pollutants entirely, the Agency breached its obligation under Regulation 4(b) of the POPS Regulations.

11. At pages 180-181 of the decision document (and in a letter to Public Interest Consultants of 28 May 2009) the Agency gives an explanation for why it does not agree that consideration of alternative processes, not just alternative techniques within the proposed incinerator technology, is required under Article 6(3). At page 180 the document states: *“The Stockholm Convention distinguishes between intentionally- and unintentionally-produced POPs. Intentionally-produced POPs are those used (mainly in the past) in agriculture...and industry. Those are not relevant where waste incineration is concerned, but it is these that we understand Article 6(3) addresses.”*

12. As set out above, it is clear from the Convention, Regulation and guidance that Article 6(3) covers both intentionally- and unintentionally-produced POPs. Article 6(3) is concerned with new or significantly modified facilities ‘using processes that release chemicals listed in Annex III’. Whether that release is intentional or unintentional does not matter. It is simply a question of whether the proposed processes release those chemicals. If they do, then alternatives have to be given priority consideration. Confining Article 6(3) to intentional releases is contrary to its own language and to the objective of recital (13). The Agency’s position constitutes a clear error of law.

13. The decision document continues at page 181: *“This would be logical [that Article 6(3) addresses only intentionally-produced POPs], not least because high-temperature incineration is one of the prescribed methods for destroying POPs. The UK’s national implementation plan for the Stockholm Convention...makes explicit that the relevant controls for unintentionally-produced POPs are delivered through IPPC and WID requirements. That would, as required by the IPPC Directive, include an examination of BAT, including potential alternative techniques, with a view to preventing or minimising harmful emissions. These have been applied as explained in the draft decision document, which addresses alternative techniques and BAT for the minimisation of emissions of dioxins explicitly.”*

14. Again, this constitutes a clear error of law. In fact, the UK National Implementation Plan does not specifically mention the Article 6(3) obligation at all. The discussion of BAT is directed to Article 5 of the Regulation, which contains other provisions on unintentionally-produced POPs.

15. The remainder of the response on the POPs issue tries to justify the production of low levels of POPs. It completely fails to carry out the exercise required by Article 6(3) which is to give priority consideration to alternatives. The Agency’s analysis therefore proceeds on the incorrect basis that incineration proposals which would generate POPs are not subject to Article 6(3).

16. At various points in the decision document the Agency explicitly rejects consideration of different waste treatment options, stating it is a matter for the planning authority. There is no policy identifying this site for waste operations (and in particular for an EfW) and the planning application is not determined. Even if a planning decision had been taken, responsibility for ensuring that priority consideration takes place clearly lies with the Agency under Regulation 4(b). The Agency did not address the options in terms of POPs at all, let alone in terms of any ‘priority consideration’.

- (ii) The second ground of claim is that the Environment Agency failed to consider the information obtained under Article 6 of the EIA Directive and conclusion reached.

17. Paragraph 13 of Schedule 4 to the PPC regulations provides:

“In the case of an application for a permit to operate a Part A installation, any relevant information obtained or conclusion arrived at pursuant to Articles 5, 6 and 7 of Council Directive 85/337/EEC on the assessment of the effects of certain public and private

projects on the environment in relation to the installation shall be taken into consideration by the regulator in determining the application.”

18. The Agency’s duty to give reasons under the PPC Regulations includes enabling a reader of the decision to understand that this duty has been complied with. The Decision Document says at para D.10:

“D.10 PPC Regulations - Schedule 4, Part 2. para 13 (EIA Directive information)

No information concerning any Environmental Impact Assessment for the installation was supplied by the Applicant in response to Question B5.1 in the PPC Application Form. However, during the determination period, the Environment Agency was provided with a copy of the planning application and environmental impact assessment by Nottinghamshire County Council. The Environment Agency reviewed the relevant aspects of the planning application and made comments as a statutory consultee to the planning application. The Agency has had regard to the relevant information obtained and considers that no additional or different conditions are necessary in light of the EIA. We have seen the Planning Committee Report and had regard to the council’s conclusions. The County Council resolved to grant planning permission subject to a legal agreement and referral to the Government Office for the East Midlands. The planning application has been called in by the Secretary of State.”

19. It appears therefore that the Agency had regard to the Environmental Statement submitted pursuant to Article 5 of the EIA Directive but not to the representations made by statutory consultees and the public on the Environmental Statement pursuant to Article 6. The Agency is asked to confirm that it did not consider those representations.
20. Article 5 contains the requirement to submit an Environmental Statement, whilst Article 6 provides for the consultation of public bodies and the public at large. Article 7 is concerned with transboundary consultation. Consequently paragraph 13 requires the Environment Agency to consider information obtained in the EIA consultation process as well as the Environmental Statement.
21. The essence of the Environmental Impact Assessment process is the publication of material by the developer, comments on it by the public and statutory bodies and finally the consideration of the developer’s material *and* the public and other consultees’ comments by the decision maker. EIA is not a process merely of the developer providing information and the decision maker taking it into account. Public participation and the consideration of the output of that participation is an essential part of the process (see *Berkeley v Secretary of State for the Environment* [2001] 2 A.C. 603 per Lord Hoffmann). The requirement on the PPC regulator to consider the information obtained from the public and other statutory bodies fits the purpose of EIA.
22. If the Agency considered only the developer’s environmental statement this would be completely contrary to the purpose of EIA. It is to see only half of the picture. There has been no conclusion reached in the EIA process – as the application is now being determined by the Secretary of State, but in any event the obligation extends to consider the information submitted even if a conclusion has been reached. The reason is that the Agency’s consideration of the information is in the context of the PPC Directive whereas the planning authority’s conclusion is in a planning context where the resolution of certain matters would be left to the PPC regulator. The planning authority’s consideration of the material in a planning context is no substitute under the regulations for consideration by the PPC regulator of the representations in a PPC context. This is a situation where ‘or’ means ‘and’.
23. The Agency will be aware that Mr Justice Ouseley found the EIA ground in *R(Day) v*

Environment Agency, which was similar to this ground, to be arguable.

II. The quashing of the permit

On the basis of the failure to comply with the POPS Regulations the permit was unlawfully issued. It follows that the permit should be quashed by the High Court. That is the standard response to an unlawful decision. Indeed, the Court is obliged to take this step under Article 10 of the EU Treaty (see *Berkeley*). A prompt agreement to revoke the permit, or submission to judgment in this case would avoid the considerable costs (including to the public purse) and delay which would be caused by the Agency's defence of their unlawful decision in judicial review proceedings.

What the Defendant is asked to do:

Revoke the Environmental Permit, alternatively to agree to the quashing of the permit on the bringing of judicial review proceedings. If you do not agree to either course of action, please explain why not.

Within three months of the issue of the Environmental Permit, the revocation notice must be issued and the operator announce that it will not appeal against the revocation to avoid judicial review proceedings. The Agency will recall that judicial review proceedings had to be brought against the Hull incinerator PPC permit because the revocation had not been made or accepted within the judicial review period.

We are currently taking urgent instructions with a view to the possibility of making an application for legal aid. In the event that is not possible we anticipate that our client will require costs protection in order to bring this claim. In a case such as this costs protection is required under the terms of both the Aarhus Convention and the EIA Directive (as amended) so as to ensure that access to justice is "*not prohibitively expensive*." Please would you confirm that, should it be necessary for our client to make an application for judicial review, the Agency will agree not to seek its costs from our client or to limit any such application to an amount such as is necessary to ensure that access to justice is not prohibitively expensive; any such amount would need to be agreed in advance or would be the subject of an application for a protective costs order.

If the Agency is not minded to agree to such costs protection we should be grateful for an early indication of the basis for its disagreement. Even without the European law requirements referred to above, this is a situation where a protective costs order would be justified on domestic common law grounds. In any event this is a case where no order for costs against the claimant might be justified on public interest grounds (see *R(Davey) v Aylesbury Vale District Council* [2007] EWHC Civ 1166).

As interested party costs are exceptional in any event, and public interest factors apply, the interested party is invited to agree that if it does take part in the proceedings, it will not seek an order for costs against the claimant in the High Court.

Interested Parties:

The interested party is:

1. Veolia ES Recovery Nottinghamshire Limited
Veolia House
154 Pentonville Rd
London
N1 9PE

V. Final matters

Legal Advisers dealing with this claim:

Laura Gyte of Friends of the Earth Rights & Justice Centre
Richard Harwood, barrister, of 39 Essex Street, London WC2R 3AT

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Period for reply

Please reply within 14 days of the date of this letter i.e., **by not later than close of business on Friday 14 August 2009.**

Yours faithfully,

Friends of the Earth Rights & Justice Centre

Cc: Interested Party