States of Jersey
States Assembly

États de Jersey
Assemblée des États

Environment Scrutiny Panel

ENERGY FROM WASTE PLANT AND RAMSAR: REVIEW OF PLANNING PROCESS

Presented to the States on 26th January 2010

S.R. 1/2010

Contents

Chairman's Foreword

This report was originally expected to be the first piece of work completed by the new Environment Scrutiny Panel. However, it soon became obvious that the volume and complexity of evidence to be reviewed would make that impossible. Ultimately it has taken around a year to finish, with one or two unexpected delays along the way.

As Chairman I was fortunate to have a team with a breadth of knowledge and experience; Vice Chairman Deputy Daniel Wimberley, Connétable John Refault, Connétable Peter Hanning (who joined the Panel on a co-opted basis for this review in March 2009) and latterly Deputy Paul Le Claire, who joined us in October 2009. The Panel's work was supported by Scrutiny officers Malcolm Orbell and Mike Haden.

The review would not have been possible without the outstanding work of its adviser Rob McInnes, of Bioscan (UK) Ltd., and his team, who have meticulously reviewed huge amounts of written and oral evidence, using their expertise in Environmental Impact Assessments and Ramsar matters to guide the Panel through the process. This report draws heavily on Bioscan's work in presenting comments and recommendations, but does not include all the technical background information. The adviser's full report will be provided to States Members and made available on the Scrutiny website, www.scrutiny.gov.je

It was always intended that if the Panel identified any deficiencies in the planning process for the Energy from Waste Plant at La Collette, this report should provide the opportunity to learn from them and put things right in respect of future projects. In the event, the Panel's adviser has identified a number of problems with the process.

One area of particular concern identified is the relationship between the Planning and Environment Department, in its role as Environmental Regulator, with the Transport and Technical Services Department, the Applicant in this case. On several occasions this was described to the Panel as 'comfortable'. While members would normally be pleased to see States Departments getting on well together, in the context of a planning application for such a major (and potentially contentious) development members did not find this reassuring. The Panel would have preferred to see much more evidence during its review of real challenge and rigour in the relationship between Regulator and Applicant.

To give just one example, members were very surprised that it was deemed acceptable by the Regulator for a pre-existing consent covering discharges of cooling water from the JEC's La Collette power station into the adjacent Ramsar site to be used to permit additional discharges which will arise from the new EfW Plant, without any requirement to supply updated baseline data, volumes or relevant thermal values in the Environmental Statement. The Panel is advised that this is highly questionable in terms of best practice for Environmental Impact Assessment.

The Panel's report highlights a number of issues where members believe the planning process did not apply sufficient rigour to ensure adequate protection of the environment. A number of recommendations are included where it is felt that action is needed to strengthen environmental protection.

Members have also discussed an over-arching issue in terms of the potential conflict between the Planning and Environment Department's dual roles, as both guardian of the natural environment and provider of planning and building services. If the States

want to ensure the highest level of protection for the environment it may be time to reassess whether a greater degree of separation between these two different functions is needed, so that the needs of the environment and planning requirements can be considered completely independently.

The adviser's report demonstrates that there were significant shortcomings in respect of the Environmental Impact Assessment and planning process for the EfW Plant; that in consequence Jersey may have failed to fulfil its obligations under the Ramsar Convention; and that the environmental protection of an area that should be a jewel in the Island's crown has potentially been compromised. As a small island where residents and visitors alike spend much of their leisure time enjoying Jersey's unique marine setting, any threat to this must be taken seriously.

During the review the Panel received submissions from a number of sources, including representatives of Jersey's important shellfish farming industry, a major stakeholder, who highlighted concerns about water quality and the Island's ability to protect its marine environment effectively. The Panel also recognises the hard work of Save Our Shoreline (SOS), who were largely responsible for bringing this matter to the attention of the public.

A letter sent to the Minister for Planning and Environment on 27th January 2009 indicated that the Panel's intended review of the Environmental Impact Assessment and planning process for the Energy from Waste Plant aimed to establish ***'whether the public can have full confidence in the planning and regulatory processes involved in both this and future large public projects'.*** On the basis of evidence received during its review the Panel concludes that there are many areas which need strengthening if that confidence is to be fully deserved.

Deputy P Rondel
Chairman, Environment Scrutiny Panel

1 Introduction

The new Environment Scrutiny Panel first met in December 2008. At its second formal meeting on 23rd January 2009 members decided that the Panel's first review should focus on issues arising from the decision to build a new Energy from Waste (EfW) Plant at La Collette, immediately adjacent to the Island's South East Coast Ramsar site. The Panel was aware of concerns expressed by Save Our Shoreline (SOS) and others over the proposed EfW Plant, following an article and a number of letters which appeared in the Jersey Evening Post during December 2008. While Outline Planning Permission for the plant had been granted in October 2007 and the Reserved Matters were approved by the Minister for Planning and Environment in October 2008, the Panel took the view that there was sufficient evidence of public interest in the matter for it to undertake a review.

Terms of reference were drafted reflecting the Panel's opinion that key issues related to the planning process, possible environmental concerns and Jersey's obligations under the Ramsar Convention. The idea was to review the planning process to see if there were any apparent shortcomings, and produce a report highlighting any areas where lessons might be learned. There was no Panel intention to review the States decision to approve the EfW Plant.

Perhaps naively, at the outset the Panel felt that it should be able to complete a report before the States summer recess. This soon encountered complications in the form of the Deputy of St Mary's private Member's proposition (P.8/2009) to rescind the States decision to approve the EfW Plant contract, which had been lodged on 20th January. Members had accepted the Deputy's assurances that he would be able to separate consideration of his private proposition from the Panel's work, and he agreed to abide by an embargo placed on any material obtained by the Panel for the purposes of its review.

However, following initial background enquiries it became clear that the Minister for Planning and Environment had some concerns about possible overlap between the two issues, particularly in the case of information requests to his department. The Panel considered the matter and agreed to postpone further work on its review until the rescindment proposition had been debated; the debate was postponed, but eventually ended on 25th February 2009.

After making contact with the Department for Environment, Food and Rural Affairs (Defra) in March the Panel also contacted the Ramsar Secretariat in Switzerland to notify them that a review was in preparation and to seek their views on possible expert advisers. Suggestions received from both bodies were followed up, as well as alternatives drawn from independent research. The Panel finally accepted a tender submitted by Bioscan UK Ltd. to act as expert consultants to the review. Contracts were exchanged on 8th May 2009, and Mr Rob McInnes of Bioscan made his first visit to the Island on 14th May, visiting the EfW Plant construction site and the Jersey Electricity Company's power station at La Collette, followed by a tour of parts of the Ramsar site and shellfish beds with representatives of the Jersey Aquaculture Association. A further visit and meeting with the Panel took place the next day.

Subsequently Bioscan has provided a comprehensive service of advice and assistance to the Panel, carrying out an in-depth study of all documents received, advising on preparation for and attending public hearings and meetings with non-governmental organisations (NGOs) and States departments, commenting on best

practice, and finally submitting an independent report which takes into account the large volumes of evidence received during the course of the review.

The Bioscan report is considered to be an exceptionally thorough and detailed piece of work, and the Panel is grateful to Rob McInnes and his team for their diligence over many months of evidence gathering, analysis and explanation. The Panel intends to forward copies of the Bioscan report to both Defra and the Ramsar Secretariat for their comments, which will be published separately in due course.

The Panel is conscious that some people may not have the time or inclination to read two reports. Rather than duplicate the adviser's work, the Scrutiny report aims to summarise and present all key findings, together with the Panel's recommendations and additional comments. Inevitably this means that some relevant information and particularly detailed references to evidence sources do not always appear in the Scrutiny report. To review all background information, specific references to sources of evidence and detailed technical commentary this report should be read in conjunction with the Bioscan report, which will be provided to States Members and can also be accessed on the Environment Panel pages of the Scrutiny website, www.scrutiny.gov.je Transcripts of public hearings and copies of submissions to the review are also available on the website.

2 Terms of Reference

(Revised 31st March 2009.)

Energy from Waste Plant and Ramsar: Review of Planning Process

- To consider the scope of the Environmental Impact Assessment for the new Energy from Waste (EfW) Plant at La Collette and whether this and the related Environmental Impact Statement were appropriate and fully compliant with relevant standards
- To establish whether there are genuine environmental concerns which still need to be addressed regarding the possible impact of the EfW Plant on the Ramsar Wetland site and adjacent land areas
- To examine the consultation with stakeholders included in the planning process
- To consider whether Jersey has fulfilled its international obligations under the Ramsar Convention
- Any other pertinent matters that may arise during the course of the review.

The Panel will report its findings and recommendations to the States.

3 Panel Membership

Deputy Phil Rondel – Chairman (Member for St John)

Deputy Daniel Wimberley – Vice Chairman (Member for St Mary)

Connétable John Refault (St Peter)

Connétable Peter Hanning (St Saviour) (co-opted member for Ramsar review w.e.f. 3rd March 2009)

Deputy Paul Le Claire (St Helier) (joined current Panel 1st October 2009)

Officer support: Malcolm Orbell, Mike Haden

Adviser

Bioscan UK Ltd.
The Old Parlour
Little Baldon Farm
Little Baldon
Oxford OX44 9PU

(Full details of the Bioscan team and other contributors are available in the adviser's report.)

Note on Report Structure

For convenience the Scrutiny report presents a summary of key findings and recommendations first, followed by more detailed comments on individual terms of reference.

List of Abbreviations

Abbreviations used frequently in the report, in alphabetical order:

CEMP	**Construction Environmental Management Plan**
CLG	**Community Liaison Group**
COP10	**10th meeting of the Conference of the Contracting Parties to the Ramsar Convention**
DEFRA	**(UK) Department of Environment, Food and Rural Affairs**
EC, EEC	**European (Economic) Community**
EfW	**Energy from Waste**
EIA	**Environmental Impact Assessment**
EMS	**Environmental Management System**
ES, EIS	**Environmental (Impact) Statement**
EU	**European Union**
HIA	**Health Impact Assessment**
HSE	**Health and Safety Executive**
IEMA	**Institute of Environmental Management and Assessment**
JEC	**Jersey Electricity Company**
JEP	**Jersey Evening Post**
NGO	**Non-Governmental Organisation**
P&E	**Planning and Environment**
RAMS	**Remedial Action (or Risk Assessment) Management System**
SBC Ltd	**Joint venture between French company Spie Batignolles and local construction firm Camerons**
SOS	**Save Our Shoreline**
TTS, T&TS	**Transport and Technical Services Department**

Summary of Key Findings

1. **The scoping process for the Environmental Impact Assessment (EIA) for the Energy from Waste (EfW) Plant failed to comply with relevant standards.**

2. **There is no evidence of participation by any non-governmental organisations (NGOs), or of broader public engagement during the scoping process.**

3. **The Environmental Statement (ES) failed to provide sufficient information in several key areas.**

4. **Planning and Environment (P&E) identified shortcomings in the Environmental Statement, but failed to ensure that their own concerns were addressed fully.**

5. **The decision to grant permission placed a disproportionate reliance on post determination mitigation and pollution control measures in order to protect the marine environment.**

6. **Contemporaneous guidance should have been published when the Planning & Building (Environmental Impact) Jersey Order 2006 became law.**

7. **The Construction Environmental Management Plan (CEMP) is lacking in detail, based on generic rather than site specific solutions, has not generated a wider dialogue and fails to demonstrably address concerns raised by P&E.**

8. **The monitoring and reporting protocols associated with managing environmental effects during construction appear to be weak, with poor lines of communication and a lack of co-ordination.**

9. **Potential environmental risks associated with the ingress of tidal water and the potential for the site to hold contaminated material were predicted for the construction phase of the project. However, it took more than three months from the date that water ingress was first encountered within the excavation to the production of a detailed method statement to deal with this issue. This is considered unacceptable.**

10. **The drainage schedule submitted in order to discharge a condition of planning holds limited information with no specific quantification of design values regarding chemical, thermal or volumetric issues.**

11. **The consultation process demonstrated several shortcomings and there appears to be an atmosphere of resignation and mistrust surrounding the EfW Plant which pervades the various non-governmental organisations and the public.**

12. **Consultation undertaken as part of the EIA process failed to provide an empowering and participative environment.**

13. **NGOs should have engaged more actively in raising concerns regarding the submitted ES. By failing to submit formal comments they effectively compromised their right to formally influence the determination process.**

14. **There is a lack of confidence amongst stakeholders in the ability or willingness of the Regulator and relevant States departments to protect the marine environment.**

15. **Article 3.2 of the Ramsar Convention relates to the reporting of change or likely change to the ecological character of listed Ramsar sites. Article 3.2 is unqualified as to the magnitude or significance of change. At no point has P&E acknowledged the potential for change to the ecological character of the area, nor have alleged environmental incidents known to be under investigation by the Environment Regulator been notified to Ramsar. This is considered to represent a breach of Jersey's obligations under the Convention.**

16. **All Ramsar sites should have a management plan. The South East Coast of Jersey Ramsar Site did not possess a management plan at the time of the EIA, although the Panel is aware that P&E are addressing this issue.**

17. **The resources required to enable proper implementation of the obligations under the Ramsar Convention have not been forthcoming and shortfalls in both the one-off and recurrent costs remain today.**

18. **Recent studies have indicated that there has been a reduction in environmental quality over the last decade in the portion of the Ramsar site closest to La Collette. This alone (without the EfW Plant development) should have resulted in an Article 3.2 report being submitted via the UK Department of Environment, Food and Rural Affairs (Defra) to the Ramsar Secretariat, but this has not happened.**

19. **The ES was predicated on avoiding impacts to the Ramsar site. However, the findings of this review consider the Environmental Statement to be potentially unsound and missing essential information; consequently the mitigation measures are inappropriate and poorly considered and the implementation of the CEMP lacking in rigour. This has exposed the marine environment to an unnecessary pollution risk.**

20. **Additional studies are required to assess the current status of the Ramsar site and to implement the site management plan.**

21. **There is a need for a greater understanding of issues relating to heavy metal accumulation and bacterial pollution to enable effective protection of Jersey's sea fisheries and the marine environment.**

Recommendations

1. **Detailed guidance should be published on the EIA process in Jersey. The Panel understands that this is in preparation by the Planning and Environment Department. In the light of the findings of this report, the Panel believes that the draft guidance should be reviewed in consultation with local stakeholders and subjected to external peer review to ensure that it fully reflects best practice.**

2. **A more systematic and transparent process should be implemented in respect of scoping for future Environmental Impact Assessments. This should record how and why decisions have been made and what organisations/individuals have been consulted; where appropriate these records should be included in the published Environmental Statement.**

3. **The scoping process should be more participative and involve key stakeholders as well as representatives of relevant States departments. An assessment of potential stakeholders should be undertaken as part of the scoping exercise and lead to formal invitations to participate in the scoping process; this matter needs to be considered adequately in the ongoing development of guidance.**

4. **Every new project should be independently assessed on its own merits. Analogies drawn from prior local experience may be used to provide comparative information but must not be considered as a substitute for comprehensive, site-specific studies and evaluations.**

5. **An urgent review should be carried out by Transport and Technical Services (TTS) and P&E of all procedures for implementing environmental mitigation and protection measures relevant to the remainder of the construction phase of the EfW Plant, including method statements, monitoring and reporting.**

6. **P&E should adopt a more robust approach to consenting discharges. All discharge consents should include quantifiable values wherever possible. Values should be set at a level designed to maximise environmental protection, not based on any design constraints or plans notified by the applicant.**

7. **Future CEMPs should be more robust and closely monitored for compliance. P&E should adopt the best practice guidance published by the Institute of Environmental Management and Assessment as a minimum standard.**

8. **A robust baseline data set for the Ramsar site and other coastal waters should be developed as part of a strategy to protect the marine environment from further unnecessary risks. This should include a thorough investigation of sediments, appropriate biota and water quality, with particular attention to areas considered likely to be affected by pollution. The results of these studies should be made public and updated on a regular basis.**

9. **There should be a clear separation between the roles and responsibilities of government departments regarding future planning**

applications. P&E as the Regulator and responsible planning authority should treat States departments as they would any other applicant, adopting a rigorous and challenging approach to maximise protection of the natural environment.

10. **Future EIAs need to be conducted in a culture which ensures that all applicants, including States departments, and all stakeholders provide full details of environmental information relevant to each application.**

11. **The provision of relevant environmental information should ensure that the Minister, in determining any application, takes all material considerations into account.**

12. **A culture of inclusivity, participation and empowerment needs to be developed in order to rebuild trust between NGOs, the Regulator and the wider public regarding the EIA process. This could be assisted by inviting consultation during the preparation of guidance on the EIA process as recommended above.**

13. **The "Environmental Who's Who" should be maintained, updated and used as a matter of course in guiding public participation and consultation.**

14. **Public consultation should follow best practice guidance, use a variety of fora and be as participative and inclusive as possible.**

15. **Steps should be taken to encourage both NGOs and the public to maintain active involvement in the consultation process, especially where this may be prolonged as a result of change or delay to the application.**

16. **TTS should re-establish the Community Liaison Group to provide a forum for consultation on ongoing developments at La Collette. However, there is a legitimate concern that this may prove counterproductive.**

17. **P&E should be awarded sufficient funding to enable adequate implementation of the Island's obligations under the Ramsar Convention.**

18. **P&E should complete and implement a management plan for the South East Coast of Jersey Ramsar site as a matter of urgency and the remaining States Ramsar sites as soon as possible.**

19. **Development of the management plan should give careful consideration to monitoring and assessment protocols. Physico-chemical sampling and biotic monitoring should be appropriate, stratified and fit for purpose in order to evaluate ecological character. The evaluation of ecological character needs to take into account wider ecosystem services provided by the Ramsar site. The development of the management plan should also be inclusive and involve local stakeholders.**

20. **An Article 3.2 report should be produced and submitted to the Ramsar Secretariat regarding the likely change in ecological character within the**

South East Coast of Jersey Ramsar site as a result of potential water vectored contamination. This report should also highlight the activities proposed to assess and understand this situation and to ensure appropriate protection and, if necessary, remediation is established.

21. **Further investigations should be carried out to evaluate ongoing and potential impacts on the marine environment, to include consideration of further developments on the waterfront, and discharges from the Bellozanne outfall and other sources. These studies should be used as a basis for proposals to prevent further degradation of the marine environment.**

22. **Testing for cumulative impacts of heavy metals and other potential pollutants on marine biota should be extended to a wider range of sites and biota and carried out on a more frequent basis to enable the compilation of relevant and reliable baseline data. Key local stakeholders should be involved in this process.**

23. **A review of environmental protection mechanisms relevant to the marine environment should be carried out between Planning and Environment and other relevant departments in consultation with key stakeholders to identify areas of concern and establish a way forward.**

24. **Ministers and Chief Officers should meet with the Scrutiny Panel to discuss difficulties over access to potentially sensitive information and to establish how such problems can be avoided and requests expedited in future.**

Key Findings in Detail

1. Term of Reference:

‘To consider the scope of the Environmental Impact Assessment for the new Energy from Waste (EfW) Plant at La Collette and whether this and the related Environmental Impact Statement were appropriate and fully compliant with relevant standards’.

This section refers to work undertaken within the Environmental Impact Assessment (EIA) process.

Adviser comment - Assessment of compliance
‘Environmental impact assessment (EIA) should be a systematic process to identify, predict and evaluate the environmental effects of proposed actions and projects. There are several stages in the process: screening, scoping and EIA compilation / Environmental Statement (ES) production. There are also subsequent planning stages beyond the EIA process per se which include review, determination, and reserved matters. Each stage in the EIA and planning process for the EfW Plant is considered.’

1.1 Screening

The screening process determines whether the development proposal requires an EIA. Under Article 2 of the Planning & Building (Environmental Impact) Jersey Order 2006 it was clear that the proposed EfW Plant required an EIA. This was accepted by all parties concerned.
No issues were identified during this review regarding the screening process.

1.2 Scoping

Scoping is the process for determining the range of information that is likely to be required in an EIA. It also ensures that an EIA focuses on the important issues and avoids those that are considered to be insignificant. However, there is no legal requirement for the Regulator to request that scoping is undertaken, or for the applicant to undertake it.

1.2.1 Environmental Effects

The scoping exercise should identify which environmental effects are likely to be significant and eliminate those which are considered insignificant. The Environmental Statement should further consider the degree of significance of possible effects. The scoping process should assess environmental receptors[1] for which there would be no likelihood of a significant effect, which need not be subject to further evaluation.
Significance should take into account criteria including the value of the receptor, the magnitude and duration of the effect, the reversibility of the effect and the sensitivity of the receptor. Scoping should be transparent and systematic, with a reasoned justification as to why certain issues may be excluded from the ES. The process is often based on a combination of baseline data and expert judgement. However, evidence provided to this review suggests that the adequacy of available baseline

[1] A component of the natural, created or built environment that can be affected by an impact

information was highly questionable (see section 1.3.3) and that judgements were therefore potentially compromised by a lack of reliable information.
Best practice recommends that the scoping process should be participative. This view is supported by the Environmental Impact Assessment – Environmental Policy Advice Note 1 produced by the former States of Jersey Planning & Environment Committee. This approach is meant to build confidence among concerned organisations and the public that environmental issues are being dealt with in a fair and thorough manner.

Evidence reviewed by the Panel suggests that the scoping process for the EfW failed to comply with relevant standards. The following issues have been identified:

1. P&E is very clear that a 'pre-scoping' exercise took place, but that TTS did not request a full scoping opinion. If correct, this means that the formal scope of the ES was not agreed by P&E. However, TTS clearly believe that the scope was agreed (ES, para. 3.2.1). This statement does not appear to have been challenged by P&E at the time the ES was submitted, or during the subsequent determination process.

2. As noted above, an agreed formal scope is not a statutory requirement. In this case, the pre-scoping process did identify a range of environmental issues for TTS to consider; and P&E was entitled to request further information at later stages of the process. However, for a development of this scale and importance, the Panel believes it is a matter of concern that confusion apparently remained regarding whether the scope of the ES had been formally agreed or not.

3. Further misunderstanding has been highlighted in respect of the pre-scoping consultations between the two Departments. The terms 'scope out' and 'scoped out' appear at various points in records of this process. During interviews and hearings for this review it became clear that the interpretation of these terms was not transparent between Departments. TTS took them to mean that the issue was not to be addressed in the ES; P&E on the other hand have stated that they could have meant the issue was intended to be fully scoped subsequently. The Panel finds it astonishing that the assessment of possible impacts on the marine environment could potentially have been compromised by a simple misunderstanding of terminology; such errors should not be possible in a properly conducted process.

4. Evidence of this lack of transparency appears in the notes of the scoping exercise which P&E provided to TTS, supposedly confirming 'the scope of the Environmental Impact Assessment'. They describe the effects of the development on coastal waters and groundwaters as not significant, adding the comments 'scope out' or 'scoped out'. Similarly, flora and fauna are described as 'scoped out'. A range of assessments and evaluations are recommended for various issues, but under 'Biodiversity' the only consideration given to the Ramsar Site is 'cooling water plume statement'. No detailed evaluation or reporting is provided to justify the scoping decisions in respect of these receptors.

5. In respect of best practice and Planning's own Policy Advice Note that the scoping process should be participative, the Panel finds it significant that while a number of meetings were held with statutory consultees and members of P&E, there is no evidence of participation by any non-

governmental organisations (NGOs), or of broader public engagement during the scoping process.

1.3 Environmental Statement

This section refers to the Environmental Statement (ES) submitted to Planning and Environment and on which determination was based.

Adviser Comment:
'The purpose of an Environmental Statement (ES) is to identify, describe and evaluate the likely significant effects of the proposed development or project on the environment. Schedule 2, Article 1 of the Planning & Building (Environmental Impact) Jersey Order 2006 states very clearly what an ES should contain. The adequacy of an ES is for the competent authority, in this case P&E, to determine. Should they feel that an ES fails to comply with the Planning & Building (Environmental Impact) Jersey Order 2006, and thus in principle with the approach described in the EC Directive 85/337/EEC (as amended), it should be returned to the applicant.'

1.3.1 What should be included

Environmental receptors which have been identified as not likely to be significantly affected by the development at the scoping stage do not have to be considered within an ES. Normal requirements of an ES include: baseline information, project description, prediction of impacts, details of mitigation and a non-technical summary of the components.

From the adviser's comment above it is seen that the Regulator (P&E) bears the responsibility for determining whether the ES provides sufficient information on which to determine the outcome of an application. The regulating authority has the power to require additional information from the applicant to remedy any shortcomings, prior to determination. In the normal course of events it is not considered unusual for an applicant to provide the minimum information required in order to satisfy the regulating authority. From interviews with TTS it is clear that they adopted this approach, which could be described as prudent fiscal management on behalf of a government department employing public funds. However, in this case the Panel believes that there may have been unintended consequences, as explained below.

1.3.2 Assessment of Impacts and the Content of the ES:

The approach adopted for the evaluation of likely significant effects on the marine environment and the Ramsar site, during both construction and operation of the EfW Plant, was to try to demonstrate that there would be no impact because suitable mitigation measures would be employed to negate any significant effects before they could occur. However, for this philosophy to succeed required both:

a) Sufficient information on the nature and significance of potential impact sources for the Regulator, statutory consultees and members of the public to consider what those effects might be, assuming there was no mitigation; and

b) Total confidence in the design, implementation and management of suitable mitigation measures.

In the opinion of the Panel, neither of these conditions was met.

1.3.3 Baseline Information On The Ramsar Site

Reference to baseline surveys of the Ramsar site is provided in a list of reports and data sources in the ES. However, there is no presentation or discussion of any of the information contained in these sources in any assessment of significant effects. No information is provided regarding their quality or relevance to the prevailing baseline, despite the fact that the documents listed pre-date submission by between five and eighteen years. **The Panel therefore considers that baseline information provided in the ES in relation to the Ramsar site was inadequate.**

TTS representatives suggested in a public hearing that the Regulator had sufficient knowledge of the Ramsar site to facilitate a proper evaluation of significant effects. They maintained that it was reasonable for an applicant to rely on the Regulator to use their knowledge if it was considered adequate to assess any potential effects, or to require further information from the applicant if it was not. **In either case the requirement for appropriate baseline information to be presented within an ES so that all interested parties can consider the possible outcomes was not met.**

1.3.4 Treatment of Potential Impacts

The following potential impacts on the Ramsar site are identified in the ES:

- water pollution risk from the construction and operation of the new facility
- discharge from cooling waters
- the possibility that potentially harmful substances may be present in the made ground together with the direct connectivity with the marine environment
- the potential for run-off from hard-standing to generate contamination.

The following potential impacts on the Ramsar site are also recorded in environmental impact summary tables:

- impact of flue gas emissions
- impact of thermal heated discharge from the proposed EfW facility to coastal waters
- potential spillage risk during construction
- release of contaminants from made ground
- leachate generation during waste handling
- contaminated drainage reaching ground and coastal waters
- spillage risk from site chemicals.

However, despite all of the above, the Biodiversity chapter of the ES states that *'the only potential impact on the Ramsar site would be water pollution risk from the construction and operation of the new facility'*. There is no detailed assessment of the significance of any of the potential impacts, and the Ramsar site's unique and internationally significant characteristics, flora and fauna are not given individual consideration, as would have been expected. Instead it is treated as a homogeneous body.

The failure to assess potential impacts on the Ramsar site in detail supports the Panel's wider conclusion that at various key points the EIA process appears to have followed a minimalist approach resulting in a demonstrable lack of rigour. Little evidence has been seen of any effort to go beyond the minimum requirements of due process. In this instance, potential impacts were identified in the ES but not followed up in sufficient detail to provide meaningful information or offer adequate protection to the environment.

1.3.5 Sources, Pathways and Receptors

The Panel's adviser has confirmed that a source-pathway-receptor analysis provided in the ES for water-vectored sources of pollution during construction is an appropriate forecasting approach for assessing risk. The potential source is contamination within the made ground; the pathways are infiltration and tidal movements; the primary receptor is the Ramsar site. A likely significant effect is therefore identified in the ES. However, post-determination monitoring is heavily relied upon to inform consent and pollution control measures; there is a lack of detail and clarity in the ES on the nature of possible contamination and the rates and magnitude of pathways. Summary tables of environmental impact define the actual impact and proposed mitigation as *'anticipated to be low risk due to inert nature of fill'*, despite the fact that in their response to post-submission consultation, P&E specifically raised the issue of buried incinerator ash and other non-inert waste streams on the site.

Adviser comment:
'There is precedent in UK planning law to consider a permission unsound if there is insufficient information for all parties, including the public, to consider the environmental effects. Given the significance of the receptor (an internationally protected site) and the potential variability of the identified contamination source this review has concluded that further information should have been provided in the ES in the source-pathway-receptor model to facilitate better determination of the likely significant effect, and hence the design of mitigation measures.'

The Panel notes that P&E have objected to the above reference to UK case law being included in this report without further explanation. They commented that:

'There is also precedent in U.K. Planning Law that a permission remains valid on its face unless it is challenged and that challenges relating to the robustness of a decision have failed. As such, the comment relating to U.K. Planning Law is mischievous.'

However, the Panel's adviser disputes this:

'The intention is not to be 'mischievous' but to present a comparable standard for assessment. The absence of planning precedent in Jersey has necessitated using the next closest relevant example for assessing likely significant effects. This provides a relevant standard for comparison as per the terms of reference (for this review).'

The use of UK planning case law is discussed in more detail in the adviser's report.

1.3.6 Reliance on Mitigation: Conflict with EC Directive

An over-reliance on the use of mitigation measures, such as pollution control procedures, which are themselves dependent on further ground investigations, may not be compatible with the principles held within the EC Directive 85/337/EEC (as amended) and therefore in the Planning & Building (Environmental Impact) Jersey Order 2006. Deferring the requirement to describe likely significant effects until after the decision to grant permission to the development also has potential consequences for the design and implementation of the necessary mitigation measures. This is seen to be in conflict with the Directive's objective of enabling members of the public

and other consultative bodies to both fully understand and contribute to the environmental information.

1.3.7 Assessment of Air Quality Implications for Ramsar

There is no assessment in the Environmental Statement of either construction or operational impacts on air quality for the Ramsar site. While the Panel accepts that the assessment of air quality regarding impacts on Island residents is adequate, likely significant effects on the marine environment are ignored. Although the overall assessment of operational air quality for the proposed EfW Plant at La Collette shows a positive impact, the Panel notes that the effects of different forms of pollution vary significantly for different organisms. Something that may not be of particular concern to human health could potentially have more serious consequences to marine life, and vice versa. There are also potential concerns in terms of cumulative effects, such as bio-accumulation within the food chain. In this respect the ES clearly fails to provide adequate consideration of potential impacts on the Ramsar site; the need to consider airborne emissions is identified under 'Biodiversity' in the notes supporting the agreed scope of the ES, yet again the necessary evidence is not presented. This contrasts with an ES produced by Babtie Fichtner for a similar EfW Plant in Nottinghamshire, in which it was deemed necessary to include an assessment of the potential effects of emissions on protected nature conservation sites.

1.3.8 Cooling Water 'Consent'

One clear potential impact on the Ramsar site is identified from the discharge of cooling water. This was referred to in early submissions to the Panel from SOS and others. Repeated references are made in the ES to the 'existing outfall consent', which in fact applies to the arrangements for discharge of cooling water from operation of the neighbouring JEC power station. However, no details of the consent (in terms of values or parameters) are presented in the ES. Therefore the appropriateness of the consent values for protecting the environment cannot be interrogated in order to assess likely significant effects. Consequently the Panel considers that the repeated use of this consent without supporting details is misleading.

1.3.9 Cooling Water Culvert

The culvert which conducts cooling water from the JEC plant to the sea is set in material of higher hydraulic conductivity than the surrounding made ground, making this a preferential flow path for water. However, the culvert has not been considered as a potential pathway for water transfer between the construction site and the marine environment in the ES. Changes in ground conditions in the vicinity of the culvert should have been assessed as part of the evaluation of potential impacts on the marine environment.

1.3.10 'Local Knowledge'

It has been stated that TTS felt it was appropriate for the Regulator to use data held on construction activities from previous civil engineering projects as a baseline for the EIA. At a public hearing the former chief officer of the department maintained that there was a wealth of knowledge of other construction projects on the south-east coast adjacent to the Ramsar site, which could be applied in order to evaluate the likely significant environmental effects associated with the construction of the EfW facility. However, this premise is considered unsound, for two reasons:

- In terms of process, an ES can draw upon local knowledge as part of the baseline, but it cannot rely on knowledge of similar developments in the

locality as an important determinant. Local analogies must be supported by a proper evaluation of site-specific baseline data. The evidence from similar local sites should then be assessed in relation to the development site; however, no evidence of local comparators is provided in the ES.

- In this particular case, to argue that experience of other sites on the south-east coast could be used as a meaningful indicator in respect of development on the 'made ground' of the La Collette reclamation site is considered untenable. This would ignore both the artificial structure and the nature of the 'fill' at the reclamation site.

It is assumed that the approach proposed by TTS was followed by P&E at the scoping stage, which led them to conclude that further evaluation of likely significant effects during construction was not required. However, the Panel is concerned that the Regulator was fully aware of the likely presence of pockets of contamination in the 'made ground' comprising the La Collette site; yet these were dismissed in evidence as being of 'de minimis' levels, without any requirement for on-site, detailed tests to establish the scale of any potential problems[2].

Members believe that insufficient attention was given to these possible sources of pollution which inevitably risked being disturbed during the process of excavation and construction, with consequent potential to impact directly on the adjacent marine environment. The Panel believes that responsibility for this must to some extent be shared between the Regulator and TTS, whose knowledge of the site was clearly greater than that of P&E.

1.3.11 Cumulative Effects

The Panel notes that the conclusion within the ES that no likely significant effects on the marine environment were predicted, during either construction or operation, has the 'knock-on' effect of removing any requirement to consider cumulative effects on the Ramsar site. Thus potential inadequacies in one area of the ES are compounded.

1.3.12 Ash Pit Issues

The presence of ash pits within the boundaries of the application site is considered in the ES, which states that the ash mounds contain contaminated material and the area should be avoided. The ash mounds are therefore identified as a source of potential risk in a source-pathway-receptor model, but are not considered in any assessment of environmental effects. This is acceptable if the approach proposed is one of avoidance, implying no change in environmental conditions. However, if construction activities were proposed within the immediate area of the ash pits then the likely significant environmental effects of this should have been assessed and submitted to the Regulator in advance. This does not seem to have happened in respect of work leading up to damage to the ash pit liner in March 2009 (see section 2.1.5).

1.3.13 Pollution Control

P&E identified some shortcomings in information provided in the ES regarding pollution control in their compilation of consultation responses for the checklist for environmental impact assessment. The ES relies heavily on pollution control measures and guidance, to be regulated by P&E. However, without any robust baseline information it is hard to design and implement suitable pollution control and mitigation measures, and their effectiveness cannot be evaluated.

[2] Public Hearing with P&E 8th July 2009

1.4 Determination and Reserved Matters

Adviser comment:
'EIA is an iterative process. In the case of the EfW Plant there is a record that the regulator (P&E) and the applicant (T&TS) operated in a flexible and co-operative manner. The approach advocated by P&E in May 2006, which proposed that the scope of the EIA could evolve as the process develops, is considered appropriate and sound. One of the key stages in the overall process is post submission of the application and the accompanying ES.

Following an internal review, if P&E felt that the ES failed to assess significant environmental effects or was in any way deficient it could be returned to the applicant with a request for further information. This indeed happened via the post-submission consultation responses sent by P&E to T&TS in May 2007 and the subsequent response back to P&E in September 2007. The additional information received by the regulator enabled the application to be determined subject to compliance with conditions and approved plans. The assumption therefore is that the responses provided by T&TS were considered sufficient to satisfy the requirements of the Planning & Building (Environmental Impact) Jersey Order 2006.

The granting of permission was subject to 'Reserved Matters'. The Reserved Matters were approved by P&E in October 2008.'

1.4.1 Inadequate responses

The internal P&E department process seems to have been robust and thorough in seeking information on key issues, significant effects and areas of concern. A number of issues highlighted by this review were also identified by the department during the post-submission consultation process.

However, many of the responses received from members of P&E staff, especially those pertaining to waste regulation and water pollution are considered inadequate to address the concerns raised. As an example, the presence of buried incinerator ash and other inert waste streams on the site was highlighted, but no further assessment of likely significant environmental effects was suggested. Likewise, risk to the marine environment from surface waters during construction and operation was identified but there was no further investigation of the effect; instead, mitigation was recommended.

The Panel is concerned that some TTS responses to P&E were evidently considered sufficient to enable determination, despite containing little or no additional information. The response to the fact that the site was known to include non-inert waste was as follows:

> *'Noted. We recognise that the La Collette reclamation site does contain buried incinerator ash and other non-inert waste including some occasional asbestos.'*

This provides no additional information about possible effects or suitable mitigation; further information should have been requested by P&E to ensure that the environment would be protected.

Replying to a request for more detail on dewatering methods, the following was provided by TTS:

> *'Construction Industry Research and Information Association (CIRIA) publication 'Groundwater Control, Design and Practice' CIRIA Report No. C515.'*

This simply repeats information already in the ES, without providing any new site-specific details. As a formal request for more information the approach taken by P&E thus signally failed to address their own concerns.

Adviser comment:
'The lack of information provided in the ES inherently compromises the efficacy of any pollution control or mitigation measure unless P&E apply a stringent precautionary principle in regulating the site. This was not done. The lack of rigour demonstrated by P&E in ensuring that appropriate and feasible dewatering methodologies were determined prior to the commencement of construction is considered by this review as a significant failure of the EIA process.'

1.4.2 Political Pressure

During the determination of Reserved Matters, a letter dated 24th September 2008 from the Minister for Transport and Technical Services to the Minister for Planning and Environment referred to the Reserved Matters having been submitted to Planning and Environment the previous day. It also indicated that the timetable for the process would see the Reserved Matters submission publicly advertised on 30th September, with any representations to be received by 21st October. It went on to state:

> *'It is therefore imperative for the success of the Energy from Waste Project that the Reserved Matters be determined at your public meeting proposed for Friday 24th October.'*

The justification for this was given in terms of additional indexed charges of approximately £0.8 million which would be payable in respect of the EfW contract on a monthly basis if there were any delay beyond the end of the fixed tender period, which was due to expire on 31st October. The letter further stated:

> *'I hope you will understand why I felt it necessary to explain these issues. The political opponents of the Energy from Waste facility do not appear to take these matters into consideration when they seek delays to the project. However, as a Council of Ministers we have to have regards to the wider interest of the Island, and I hope that you will be able to confirm that the Reserved Matters will indeed be considered by you on 24th October 2008, and that unnecessary delays to the implementation of this key strategic facility are not incurred.'*

While recognising the scale of the potential economic consequences of delay, the Panel notes that the representation from the Minister for Transport and Technical Services could be interpreted as putting considerable political pressure on the final stage of the determination process. One of the principal objectives of EC Directive 85/337/EEC is the protection of both the environment and the quality of life of individuals, which is also in the wider interest of the Island. Members are concerned that this evidence suggests that in the worst case, only three days were available for late representations from the public or other interested parties to be considered before a decision was made regarding the approval of Reserved Matters for the most expensive civil engineering project ever undertaken by the States of Jersey.

1.5 Conclusion

The methodology adopted in the ES involves regulation and mitigation after determination, rather than properly evaluating likely significant effects in advance. This approach appears to be inconsistent with required standards in Jersey; it also shifts the burden of responsibility from the applicant to the Regulator. P&E evidently considered the ES to be fully compliant with relevant standards and not deficient in any way, despite the fact that some of their own specific requests for additional information were not responded to adequately or addressed in the final ES.

It is acknowledged that the ES does include much information and certain issues, for example aerial deposition and associated human health impacts, are dealt with adequately. **However, the Panel concludes that in a number of key areas there are significant grounds to consider that the ES contained insufficient information and did not comply with relevant standards.**

1.6 Key Findings

1. The screening process was competent and adequate.

2. The scoping process failed to comply with relevant standards.

3. TTS should have formally requested a scoping opinion from the Minister.

4. P&E should have been clearer in their recommendations regarding the required scope of assessments and evaluations. Record keeping of these recommendations should have been more robust.

5. P&E and TTS should have ensured that decisions made during the scoping phase were systematic, transparent, unambiguous and formally recorded.

6. Decisions made at the scoping stage have undermined the assessment of likely significant environmental effects during the subsequent EIA process.

7. Scoping should have been more participative in respect of NGOs and the wider public.

8. TTS based the EIA on the premise that there should not be an impact on the Ramsar site and that they would ensure that this was the case. The ES failed to provide sufficient information in several key areas, particularly in relation to the Ramsar site, for this position to be guaranteed or for the Regulator, statutory consultees and the general public to consider potential effects from an informed standpoint. P&E should have applied considerably more rigour during the determination process.

9. The internal post-submission review process within P&E was adequate to obtain a collective view of the ES. However, both the technical review of the ES, especially the evaluation of significant effects, and the reaction to subsequent responses provided by TTS lacked considerable rigour and exposed several shortcomings within the department.

10. The decision to grant permission placed a disproportionate reliance on post-determination mitigation and pollution control measures in order to protect the marine environment and specifically the Ramsar site. The lack of information provided in the ES inherently compromised an understanding of the effectiveness of such measures unless P&E applied a stringent precautionary principle in regulating the site.

11. The lack of rigour applied within both the drafting of the ES and the subsequent approach of the Regulator to information shortcomings and lack of knowledge has exposed the environment to unnecessary risks.

12. The term 'comfortable' has been used on a number of occasions to describe the relationship between P&E and TTS. While this may have some benefits, it can also undermine the procedural process of EIA and potentially result in complacency. There is evidence to suggest that this occurred during this process, especially with regard to understanding the likelihood of significant environmental effects from potential contamination within the made ground.

13. Contemporaneous guidance should have been published when the Planning & Building (Environmental Impact) Jersey Order 2006 became law. In the absence of guidance a precautionary approach should have been adopted by the Regulator. The failure to adopt a precautionary approach and to apply sufficient rigour to the regulation of development must not be allowed to set a legal precedent for future developments requiring an EIA in the States of Jersey.

1.7 Recommendations – Environmental Impact Assessment

1. **Detailed guidance should be published on the EIA process in Jersey. The Panel understands that this is in preparation by the Planning and Environment Department. In the light of the findings of this report, the Panel believes that the draft guidance should be reviewed in consultation with local stakeholders and subjected to external peer review to ensure that it fully reflects best practice.**

2. **A more systematic and transparent process should be implemented in respect of scoping for future Environmental Impact Assessments. This should record how and why decisions have been made and what**

organisations/individuals have been consulted; these records should be included in the published Environmental Statement.

3. **The scoping process should be more participative and involve key stakeholders as well as representatives of relevant States departments. An assessment of potential stakeholders should be undertaken as part of the scoping exercise and lead to formal invitations to participate in the scoping process; this matter needs to be considered adequately in the ongoing development of guidance.**

4. **Every new project should be independently assessed on its own merits. Analogies drawn from prior local experience may be used to provide comparative information but must not be considered as a substitute for comprehensive, site-specific studies and evaluations.**

2. Term of Reference:

‘To establish whether there are genuine environmental concerns which still need to be addressed regarding the possible impact of the EfW Plant on the Ramsar Wetland site and adjacent land areas’.

Potential environmental concerns have been considered under separate headings, relating to the two key stages in the life of the EfW Plant: construction and operation.

2.1 Environmental Concerns during Construction

One of the Panel’s primary concerns surrounding the EfW construction process relates to the adequacy of the CEMP. As noted above, the philosophy adopted by TTS towards protection of the environment during this process relied heavily on post-determination mitigation and pollution control measures. This in turn puts considerable emphasis on the production and implementation of a suitably robust CEMP.

The CEMP was signed off by P&E on 29th October 2008. As no conditions were attached to it, it is assumed that it was considered acceptable and fit for purpose by the Regulator.

Adviser Comment:
‘A good CEMP should detail all the project specific mitigation measures required to ensure the environmental impact of a project is minimised. For a CEMP to be successful it is important that the ES contains the essential information on potential impacts and proposed mitigation. The core of the CEMP should detail site specific environmental actions to be adhered to / implemented pre-construction, during construction and post-construction. Best practice guidance* on the preparation of CEMPs states that it is important that individual actions are clearly defined in terms of:

- What should be done;
- How it should be done;
- Why should it be done;
- Who should do it; and
- A section to allow verification that the action was completed.

It is also recommended that to be successful the CEMP should involve a number of parties during its implementation. Typically this will involve the project proponent (the applicant, in this case T&TS), the principal consultants (in this case Babtie Fichtner), an appointed environmental co-ordinator or manager, a site clerk of works, construction operators (in this case SBC Ltd and all their sub-contractors), the regulator (P&E) and wider stakeholders.’

* IEMA 2008. Environmental Management Plans. Best Practice Series, Vol. 12. IEMA, Lincoln, UK

2.1.1 Key Issues – Construction Environmental Management Plan

The following key issues have been identified with regard to the CEMP provided by the applicant and accepted by the Regulator as being adequate to discharge the condition of planning:

1. The ES should be seen as the starting point of the process in which the CEMP becomes a vital tool for managing potential environmental impacts. Issues raised in the ES should thus be followed up in the CEMP to ensure that they are addressed in more detail. However, key issues, such as the dewatering process for the excavation and how to manage the risks posed by contamination within the 'made ground' of the La Collette site, were not given appropriate consideration within the CEMP. This is considered as a missed opportunity on the part of the Regulator.

2. The checklist for environmental impact assessments produced by P&E in July 2007 states*: 'Should the Minister approve the application it should be on the condition that the developer submits a detailed Construction Environmental Action Plan'*. It is also stated that the document should include particular considerations pertinent to the site in question that should be considered and action plans to ensure that these considerations are adhered to. The purpose of the document is to facilitate dialogue between enforcing authorities, contractors and all interested parties and set out clearly defined, accessible and understandable environmental standards and good practice methodologies for the construction phase. **The CEMP for the EfW Plant lists environmental standards and good practice methodologies, but does not include particular considerations pertinent to the site in question. P&E should have requested more detail on specifics to satisfy their own recommendations.**

3. The CEMP is clearly written as a prescriptive document for a contractor to implement and does not facilitate a dialogue between all interested parties. The emphasis is clearly to pass the responsibility to deliver the appropriate environmental management on site on to the contractor. **This is strongly at odds with recommended best practice and should have been identified as a concern by the Regulator, given their acknowledgement that the CEMP should facilitate dialogue between interested parties.**

4. The CEMP is largely a generic document. For example, Section J: 'Emissions to water' does not include any specific references to the EfW Plant at La Collette. A range of documents is listed but these do not refer to site-specific considerations of 'how it should be done' and 'how can the action be verified'. **The Regulator should have specified more detail to ensure that impacts were minimised.**

5. Key to the effectiveness of the CEMP is the requirement to monitor and report on compliance, to update and modify documentation as appropriate and to keep records and routine reports of environmental performance. The CEMP clearly states: *'Minor amendments to the CEMP shall be made to a controlled copy by hand in red ink and dated'*. Despite numerous requests to TTS such a document has not been produced to the Panel, so the only document considered to represent the CEMP is the static document submitted with the Reserved Matters application. The detail included in this is not sufficient to ensure that impacts on the environment can be minimised. While other documents have been produced by the contractor since the submission of the

CEMP to P&E, these were not considered as part of the Reserved Matters submission and were not material to the discharge of planning conditions.

Adviser Comment:
'The CEMP submitted to satisfy reserved matters should have been considered by the regulator as representing, at best, a 'heads of terms' document. The regulator should have requested that a more robust and site specific document be produced prior to discharging the planning condition in order to satisfy both best practice and their own concerns.'

2.1.2 Effect on Monitoring

The Panel is of the opinion that the CEMP for the EfW development is weak and generic. The evidence provided in its adviser's report indicates that this will have negative consequences for environmental protection. Lack of detailed consideration of site-specific mitigation measures causes delay in responding to environmental incidents on site, and implies a reactive rather than a pro-active approach. This is not consistent with the philosophy for mitigation and pollution control proposed by TTS.

Further, monitoring of the CEMP is an essential part of project management to ensure that the implementation of mitigation measures is adequately audited and their success or otherwise recorded and acted upon. The CEMP states that a range of routine monitoring shall be carried out, including:

- Daily inspections of the site;
- The preparation and implementation of weekly audits;
- A daily record of observations kept in the site diary (which shall be made available immediately upon request by the Employer (TTS)); and
- The CEMP should be updated and re-issued to the Employer for review at least every three months.

Rigorous monitoring can add considerable value to the CEMP by identifying shortcomings in the plan. Common issues arising include limits to contractual obligations, cost-effectiveness of mitigation measures, lack of guidance and poor communications and training.

TTS were requested to provide relevant documentation to enable the Panel's adviser to assess monitoring and reporting of the CEMP since construction commenced. The following key issues were identified:

- Incomplete site diaries have been provided for both the project manager (Babtie Fichtner) and the contractor (Camerons, as part of SBC Ltd). The appointed contractor, SBC Ltd, has produced numerous documents as part of their Environmental Management System (EMS). A range of reports relating to the EMS have also been provided including environmental risk assessments, tool box talks, remedial action (or risk assessment) method statements (RAMS), HSE reporting and auditing forms and site inspection forms

- Documents provided appear as piecemeal evidence and not as part of a cohesive plan for managing potential construction impacts on the environment. No evidence has been provided to demonstrate that the CEMP has been updated or monitored in accordance with its own requirements

- **Consequently it is clear to the Panel that the CEMP cannot have been used as an effective tool for managing the impacts of the development during construction**

2.1.3 Incidents During Construction

TTS maintain that '*the approach taken on the project throughout has been to avoid impact on the Ramsar site.'* Unfortunately, information provided to the Panel suggests that results have fallen well short of what was intended.

2.1.4 Excavation Works and Dewatering

Prior to commencing excavation works, the risk to the marine environment through the remobilisation of potentially contaminated material and the ingress of tidal water was clearly recognised in the EMS. A range of mechanisms, including the production of a method statement, were identified in order to protect a sensitive receptor.

Excavation works started in late January 2009. However, concerns were raised by the project manager that RAMS for the excavation did not adequately address the issue of groundwater ingress. In compliance with the EMS, excavation should not have commenced until this issue had been resolved.

P&E discussed the issue of groundwater ingress and a possible discharge consent with the project manager on 3rd February 2009 and again on the 16th February 2009.

On the 17th February excavation works were put on hold until a decision could be made on how construction could continue given the presence of sea water ingress. Excavations recommenced on the 2nd March at the north end of the culvert.

On the 12th May 2009 SBC issued a final RAMS for groundwater removal and dewatering of the excavation for the main bunker hall tipping pit. Despite this issue being identified in the ES, and the associated concerns raised by P&E in the determination process, no appropriate method statement was produced prior to the excavation commencing. The time taken from the initial identification of the issue on site to the final production of the RAMS was approximately three months. During this period the project manager, the contractor, the applicant and the regulator were all aware of the issue. **This is considered to represent a serious failure of process which has exposed the marine environment, and in particular a site of international importance, to unnecessary risks.**

Adviser Comment:
Whilst the magnitude of any impact on the marine environment remains unknown, the delay in implementing robust mitigation measures gives rise to genuine environmental concerns. There is a need to evaluate more fully the extent of any impact on the marine environment and the degree to which there has been a significant effect or a change in ecological character.

Cont'd overleaf

Two residual issues also arise from the dewatering process that have the potential to generate environmental concerns. Firstly, the settled water has been taken to Bellozanne for treatment before being discharged to the marine environment. The process which has proposed this as a solution has not been sufficiently clear and transparent to facilitate dialogue among interested parties, as recommended by P&E, as to whether the treatment works can cope with the potentially contaminated water and that the subsequent discharge of this water has not also contributed to environmental degradation within St Aubin's Bay. Secondly, no information has been presented on the potential impact of the disposal of settled silt back into the excavation pit and whether this will generate an impact on the marine environment.

2.1.5 Ash Pit Problems

The presence of the adjacent ash mounds containing contaminated material was highlighted in the ES. However, this environmental issue was omitted from the CEMP and not identified by the contractor in the EMS. Given that the construction of a trench was required for the route of an electric cable this issue should have been identified by both the project proponent and the regulator and information should have been provided on how the environment was to be protected.

The absence of an appropriate action plan or working methodology to prevent remobilisation of buried ash and associated polluted water during construction demonstrates a failure in process and a lack of rigour on both the part of the project proponent (T&TS), their contractors (Babtie Fichtner and SBC) and the regulator. The ash pits were a known source of contamination and an appropriate working method should have been established prior to excavation works commencing.

From evidence received, during excavation works on the 13th March 2009 water was noted entering the trench and ash-like material was observed. The evidence indicates that P&E were informed of the incident a week later; however TTS maintain that they were informed on the same day. A remedial action method statement was produced on the 20th March 2009 and remedial action commenced on the 26th March.

The Panel is concerned that while this incident may have been resolved on site to the satisfaction of the Regulator, recording and reporting of this matter in site diaries and associated documents is entirely inadequate and inconsistent. **This calls into question the appropriateness and robustness of on-site reporting, monitoring and auditing procedures which are considered as essential elements of a CEMP to ensure environmental protection.**

Adviser Comment:
It has been stated that the ultimate resolution of this incident was to the satisfaction of the regulator. This final resolution is not in question. However, what is most apparent is the failure of the ES-CEMP-EMS process to produce a practical method for managing the potential environmental impacts of the development during the construction phase. Once again a failure to consider appropriate and proportionate responses in advance of works commencing has resulted in delays in implementing environmental protection. Additionally it is not clear whether there has been any lasting environmental impact associated with this incident.

The way the CEMP has been implemented and working practices followed on site have clearly failed to provide sufficient protection against environmental impacts. Construction activities have commenced in advance of appropriate mitigation measures being developed and implemented; these should either have been in place prior to starting work, or work should have ceased until an appropriate solution had been implemented. **The Regulator should have been more rigorous in ensuring that appropriate mitigation measures were in place prior to construction activities commencing.**

2.2 Environmental Concerns during Operation

These primarily relate to two issues: air quality and site drainage.

2.2.1 Air Quality Monitoring

In respect of air quality, as noted in the section on the ES (1.3.7), overall air quality issues were subject to an adequate assessment which followed accepted methodology. Essentially it was found that by operating within UK and European standards the plant will contribute to a considerable improvement in air quality over the current operation at Bellozanne.

However, a weakness was identified in the lack of provision for air quality monitoring with respect to the marine environment and Ramsar site. **A management plan for the Ramsar site should be established which includes reports of air quality monitoring and evaluation of potential impacts of aerial deposition.**

2.2.2 Site drainage issues

The schedule of foul and surface water drainage should contain sufficient information to allow the Regulator to ensure that there would be no unreasonable impact on the environment as a result of the operation of the EfW Plant. It indicates that during operation water will be discharged to three locations: foul sewer; cooling water culvert; and soakaway. Provisions for foul water and discharge to soakaways are considered acceptable. **However, concerns remain in respect of discharge via the cooling water culvert.**

The culvert currently discharges cooling water under consent from the JEC power station directly into the Ramsar site. Three new sources are proposed to be added to the existing discharge, all to be covered under the existing consent:

- cooling water from the steam turbine's water-cooled condenser
- excess rain water from the plant
- surface water run-off from external areas of hard-standing

The Panel's adviser has highlighted the following concerns with these proposals:

Adviser Comment:
The information provided on all three water sources is very limited. Proposed discharge rates, volumes, and chemical and thermal characteristics are absent. No consideration is given to climate change and how rainfall intensity and totals will alter over time. Therefore the ability to assess whether the environment will be protected by the proposed drainage measures is limited.

Cont'd overleaf

Detail on the proposed thermal discharge is highly limited. No estimates of rates of discharge, dilution factors within the existing culvert or potential thermal regimes at the discharge point into the Ramsar site are provided.

Rain water is to be collected from the plant for re-use. A $20m^3$ tank is proposed for rain water storage. Excess water (i.e. more than $20m^3$) will be discharged to the culvert. No volumetric values are provided for rainfall events (such as a 1 in 10 year return event) therefore the utility of the storage facility cannot be assessed. Similarly climate change induced variations in rainfall are not considered.

A simple estimate has been calculated based on information freely available on the Jersey Meteorological Department website (http://www.jerseymet.gov.je/). The 1971-2000 period average total rainfall for the wettest month (December) is approximately 110mm. If this rainfall was distributed evenly over the month this would equate to approximately to 3.5mm per 24 hours. The building surface area will be approximately $5,250m^2$ (ES para. 7.2.1). Assuming that evaporation would be negligible and that there was no infiltration or other losses daily rainfall of 3.5mm would generate approximately $18.6m^3$ of rainwater run off. Therefore the storage volume would be utilised rapidly. Estimates of extreme rainfall events have been generated for Jersey. A 1 in 10 year return period event has been estimated to generate approximately 51mm in 24 hours. Based on the assumptions described above this would generate approximately $267m^3$ of rainwater run off, greatly exceeding the $20m^3$ storage volume. Alternatively, the storage capacity would be reached in less than two hours for a 1 in 10 year rainfall event.

No estimates are provided regarding potential contamination of roof surfaces from atmospheric deposition from the EfW Plant. This should have been at least considered.

Surface water run off from areas of hardstanding is proposed to be discharged via a full retention separator (class 1) with a volume of $15m^3$ prior to discharge into the culvert. Again no volumetric values for rainfall events (such as a 1 in 10 year return event) or operational limitations relating to rainfall intensity are provided therefore the utility of the separator tank storage cannot be assessed. Similarly climate change induced variations in rainfall are not considered.

An interceptor will only be effective against substances that are immiscible with and less dense than water, such as hydrocarbons. There is the potential for other contamination to occur but this has not been considered. This issue was raised by the regulator in the checklist for environmental impact assessments produced by P&E in July 2007. However, despite their concerns, the regulator considered the information provided in the reserved matters submission adequate to protect the environment from potential surface water pollution.

Details have not been provided, beyond generic statements in the ES, as to how process water will be managed in order to protect sensitive environmental receptors. The assumption is that this will be routed via discharge to foul sewer and be covered by discharge consent. The Regulator will need to ensure that this aspect is fully covered within the proposed Working Plan.

2.3 Conclusion: Environmental Concerns

This review concludes that there are genuine environmental concerns which still need to be addressed regarding the possible impact of the EfW Plant on the Ramsar Site and adjacent land areas. The Panel is aware of environmental

incidents during the construction phase of the project which support issues that have been raised in this report. At the time of writing further information is expected in respect of an environmental incident alleged to have occurred in April 2009, which has been under investigation by the Regulator for over eight months. In view of the circumstances the Panel has reserved comment on this matter in this report but intends to address it early in 2010.

2.4 Key Findings

1. The CEMP provided is lacking in detail, based on generic solutions, has not generated a wider dialogue and fails to demonstrably address concerns raised by Planning and Environment.

2. Key issues raised by P&E (including dewatering of the excavation and the potential for remobilising contaminated material) have not been addressed. The Regulator should have followed these up and requested additional information to ensure that the CEMP provided a robust basis to minimise potential for environmental impacts during construction.

3. By discharging the condition on the basis of the submitted CEMP, the Regulator has exposed the environment, and the Ramsar site in particular, to unnecessary risks.

4. Monitoring and reporting protocols associated with managing environmental effects during construction appear to be weak and lacking in co-ordination. TTS as the project proponent relied on the contractor to implement their own environmental management system. Evidence provided indicates weak lines of communication, poor record keeping and a dismissive attitude to the need to provide evidence that the approach taken on the project throughout has been to avoid impact on the Ramsar site.

5. Despite concerns raised by the Project Manager, and in the full knowledge of Planning and Environment construction activities have commenced and continued on site without resolution of appropriate mitigation measures.

6. Both the ingress of tidal water and the potential for the site to hold contaminated material were known about prior to construction commencing. However, it took more than three months from the date that water ingress was first encountered within the excavation to the production of a detailed method statement. During this time the exchange of seawater continued between the excavation and the Ramsar site. This is considered unacceptable practice which has unnecessarily exposed a sensitive environmental receptor to a potential pollution risk.

7. The drainage schedule provides limited information. There are no quantified design values regarding chemical, thermal or volumetric issues, therefore the suitability of the proposed measures cannot be evaluated. Issues raised by P&E, such as the suitability of interceptors to deal with other potential contaminants, have not been addressed in the submitted drainage schedule. These should have been followed up by the Regulator.

8. No consideration has been given to potential changes in run-off resulting from climate change and how this may affect the proposed solutions, despite the project having a design life of twenty-five years.

9. There is a genuine concern that unless discharges via the cooling water culvert are adequately consented and monitored these could result in environmental impacts.

2.5 Recommendations – Environmental Concerns

1. **An urgent review should be carried out by TTS and P&E of all procedures for implementing environmental mitigation and protection measures relevant to the remainder of the construction phase of the EfW Plant, including method statements, monitoring and reporting.**

2. **P&E should adopt a more robust approach to consenting discharges. All discharge consents should include quantifiable values wherever possible. Values should be set at a level designed to maximise environmental protection, not based on any design constraints or plans notified by the applicant.**

3. **Future CEMPs should be more robust and closely monitored for compliance. P&E should adopt the best practice guidance published by the Institute of Environmental Management and Assessment as a minimum standard.**

4. **A robust baseline data set for the Ramsar site and other coastal waters should be developed as part of a strategy to protect the marine environment from further unnecessary risks. This should include a thorough investigation of sediments, appropriate biota and water quality, with particular attention to areas considered likely to be affected by pollution. The results of these studies should be made public and updated on a regular basis.**

5. **There should be a clear separation between the roles and responsibilities of government departments regarding future planning applications. P&E as the Regulator and responsible planning authority should treat States departments as they would any other applicant, adopting a rigorous and challenging approach to maximise protection of the natural environment.**

6. **Future EIAs need to be conducted in a culture which ensures that all applicants, including States departments, and all stakeholders provide full details of environmental information relevant to each application.**

7. **The provision of relevant environmental information should ensure that the Minister, in determining any application, takes all material considerations into account.**

3. Term of reference:

‘To examine the consultation with stakeholders included in the planning process’.

Adviser Comment:
Consultation is a key component in the EIA process. It is implicit in Article 19 of the Planning and Building (Jersey) Law 2002 and is clearly expressed within Environmental Policy Advice Note 1 where it states “following extensive consultation with stakeholders, the EIA will be prepared”. The process of consultation should not be limited to statutory agencies or be seen as a one-way process. The public and non-statutory consultees should have the opportunity to comment on, and contribute to, the EIA process. Best practice advocated by the Institute of Environmental Management and Assessment recommends that consultation should be participative and start with the scoping process in order to consider the perspective of the affected community. However, there are various stages in the process where the opinions of stakeholders can be sought and integrated.

The need for public consultation is also highlighted in EC Directive 85/337/EEC as amended by EC Directive 97/11/EC which states, “Member States shall ensure that any request for development consent and any information gathered . . . . are made available to the public within a reasonable time in order to give the public concerned the opportunity to express an opinion before the development consent is granted.”
Furthermore, Resolution VIII.16 of the Ramsar Convention encourages Contracting Parties to ensure that impact assessment processes relating to wetlands are undertaken in a transparent and participatory manner which includes local stakeholders. This guidance extends to the States of Jersey.

The following stages have been identified within the EIA consultation process:

- Pre–scoping and Scoping
- ES compilation and pre-determination
- Post determination and the Community Liaison Group

3.1 Pre-Scoping and Scoping

In terms of external consultation, it is noted that discussions and consultation around the Island’s solid waste strategy had been ongoing for a considerable time. There was widespread knowledge (if not full public acceptance) that the EfW Plant project was going ahead at La Collette, and much media attention had been focused on the matter. However, it also appears that some NGOs either were not approached formally during the pre-scoping process, or chose not to engage with it. There appears to have been a sense shared between them and some other witnesses that decisions had already been taken, and so any objections would have been overlooked. While this is hard to qualify as objective evidence it does seem as though a more positive effort to engage and involve NGOs at this stage could have been of benefit; both in terms of understanding and allaying public concerns and to

obtain wider information from sources with specialist knowledge about the marine environment in particular.

3.2 ES Compilation and Pre-Determination

Specific public consultation during the compilation of the ES was limited to a Health Impact Assessment organised by the University of Liverpool. This used standard techniques and questionnaires to assess the public perception of health impacts that might be associated with the development and operation of the plant.

Circulation of the ES within Planning and Environment generated a selection of comments which indicated appropriate levels of involvement and questioning from the various sections represented. However, this process appears to have been let down subsequently by a lack of determination or persistence in requiring additional information from the applicant to answer many of the questions or comments raised.

The ES was made available for the public to consult and circulated to a very limited number of NGOs upon submission. There was a nine month period during which interested parties could have commented on the ES, which is considered appropriate and in line with good practice. However, it is noted that P&E did not employ their own 'Environmental Who's Who in Jersey' to guide the applicant in seeking views from NGOs or members of the public, or to inform a circulation list when the ES was submitted.

Perhaps as a result of this, only a handful of organisations actually received a physical copy of the ES, and only one (Société Jersiaise Marine Section) submitted a reply. The Durrell Wildlife Conversation Trust, Marine Conservation Society and Save Our Shoreline were amongst a long list of others who were not asked to comment. Although the project was common knowledge, the Panel finds it somewhat inconsistent that some stakeholders received a copy of the ES directly from the department, while others had to approach P&E for information.

Ultimately, whether through lack of direct contact, disillusionment or cynicism about the planning process, or for other reasons, many organisations which one might have expected to have a strong interest in the consultation (and to possess information of value) simply failed to contribute, thus forgoing the opportunity to influence the eventual determination. While not necessarily attributable to a failure of process, this is seen as serious disappointment by the Panel, and something which it feels should be addressed more pro-actively in future.

3.3 Post Determination and the Community Liaison Group

3.3.1 Public Consultation Programme

A programme of public consultation was required as a condition of the outline planning permission granted on 26th October 2007.

Public notices of the intention to create a Community Liaison Group (CLG) were widely publicised in late 2007, inviting local residents and business representatives from St Helier to attend. The group was intended to facilitate identification of any local issues with the EfW proposals so that these could be addressed.

Four meetings were eventually held, between January and October 2008. They were attended by the Minister for Transport and Technical Services, department officers and (according to records supplied) up to eight members of the public. Informal minutes indicate that residents were informed of aspects of the development and their concerns were recorded, together with the department's responses.

This process was considered by P&E to satisfy the planning condition. However, questions remain concerning the nature and purpose of the meetings. In particular, was information gained from the public used to assist the determination process; and was this seen as a worthwhile end in itself, or were the meetings primarily viewed by the department as an opportunity to promote the project to local residents? The Panel has not interviewed all those who participated in the CLG meetings in the course of its review, but two attendees have commented that they felt it was geared much more towards informing the public than taking note of their concerns.

Adviser Comment:
EIA best practice guidance recommends that public consultation should take several forms including public meetings, focus groups or workshops in order to be as participative and inclusive as possible. The mixture of public meetings and the CLG should have assisted this process. However, T&TS have indicated that the two sets of meetings served very different purposes with the CLG meetings not having a role to play in contributing to the ES. This was an opportunity missed. Furthermore, it was the assertion of T&TS that the CLG was established to keep residents from a particular area informed during the construction phase of the project and to create a linkage between the residents and the project. If this was the intention there is no justification provided as to why the CLG never met again post discharging of reserved matters and has never met during the construction phase of the project.

There is no evidence of how any of the comments received from the public consultation meetings held in October 2008 were subsequently considered by P&E in discharging the condition and therefore assisting the Minister in making a decision. No formal minutes or report of the meetings have been provided. In addition, in a letter from the Minister for Transport and Technical Services dated 24th September 2008 he assured the Minister for Planning and Environment that the reserved matters were submitted to P&E on the 23rd September 2008 with completion of all matters conditioned within the Outline Permission. Given that the reserved matters consultation meetings had not been held at this point it is not clear how the outcomes of these meetings could have been included. One conclusion drawn is that the wording of the condition is such that for successful discharge the reserved matters submission should include a programme of public consultation rather than the actual outcomes of the consultation process. An alternative conclusion is that the public consultation process was considered simply as a regulatory hurdle that had to be overcome in order to discharge the reserved matters rather than a process by which environmental impacts could be identified and reduced.

3.3.2 Consultation Fatigue?

From discussions with various witnesses to the review it seems clear that the long-running saga of the Island's solid waste strategy may have had a significant impact on the consultation process for the EfW Plant. Some have commented on 'consultation fatigue'; others that they felt the exercise was a 'fait accompli', and therefore commenting would not make a material contribution to the final outcome, despite the fact that consultation was an essential element in the planning process.

Also of concern is the degree of cynicism that has been communicated to the Panel during its review regarding the ability of the Regulator to influence the final outcome in order to provide adequate protection for the marine environment. The knowledge that a finding against development in this case would have involved resisting pressure from another States department to proceed with a multi-million pound project may have helped to fuel these doubts. However, evidence reviewed by the Panel supports the view that the relationship between TTS and P&E is too close, resulting in a lack of challenge, and ultimately rigour, in the application of regulatory oversight and control. This can only add to a long-standing (if unsubstantiated) public concern that large development projects in the Island are given preferential treatment.

The amount of interest and comment that has been generated since construction work actually began at La Collette and this Scrutiny review was announced could be considered somewhat surprising. Representations have been received from NGOs and members of the public; individuals and groups have written to the Jersey Evening Post, some have contacted Scrutiny and the Ramsar Secretariat. Detailed critiques of the ES have also been presented. Had these been made available through proper channels during the nine months that the public consultation period was open they would have represented material considerations within the planning decision-making process; as it was, they were not forthcoming when it mattered most.

It is thought that the Scrutiny process has been seen by some as an opportunity to have an impartial examination of concerns independent of the planning process, even if the fundamental decision to grant planning permission could not be changed. If so, this hopefully complements the Panel's aim to conduct its review as objectively as possible and present findings with a view to informing and improving future practice, rather than seeking to criticise or apportion blame for any perceived shortcomings.

3.4 Key Findings

1. NGOs and the wider public were not actively engaged during the pre-scoping/scoping stage of the project. In some quarters this may have contributed to a feeling that the decision to grant planning permission was a fait accompli.

2. The HIA consultation process was adequate.

3. The initial inter-departmental consultation was adequate but there was a failure by P&E to ensure that their consultation responses were addressed appropriately.

4. P&E should have circulated the ES to a wider selection of NGOs. For its part, the NGO sector should have been more pro-active in its response at the appropriate stage in the process.

5. TTS should have used a wider range of approaches to public consultation and adopted a more participative approach.

6. There appears to be a strong element of mistrust in respect of both the applicant and the Regulator among some members of the public and NGOs. This seems to extend to the independence of government departments and their technical ability to protect the marine environment.

3.5 Recommendations – Consultation

1. **A culture of inclusivity, participation and empowerment needs to be developed in order to rebuild trust between NGOs, the Regulator and the wider public regarding the EIA process. This could be assisted by inviting consultation during the preparation of guidance on the EIA process as recommended above.**

2. **The "Environmental Who's Who" should be maintained, updated and used as a matter of course in guiding public participation and consultation.**

3. **Public consultation should follow best practice guidance, use a variety of fora and be as participative and inclusive as possible.**

4. **Steps should be taken to encourage both NGOs and the public to maintain active involvement in the consultation process, especially where this may be prolonged as a result of change or delay to the application.**

5. **TTS should re-establish the Community Liaison Group to provide a forum for consultation on ongoing developments at La Collette. However, there is a legitimate concern that this may prove counterproductive.**

4. Term of Reference:

‘To consider whether Jersey has fulfilled its international obligations under the Ramsar Convention’.

The advisers selected to assist the Panel in this review include acknowledged experts in matters pertaining to the Ramsar Convention. Obligations under the Ramsar Convention were seen as a key factor from an early stage in the review, partly because of the significance of the Ramsar site and the importance of ensuring it enjoys the highest level of protection, and partly because the Island’s performance in protecting a site of such internationally-recognised importance could also be seen as an indicator of its commitment (and ability) to protect the wider environment.

In a report dated 6th December 2008 Save Our Shoreline (SOS) highlighted concerns that Jersey had not notified the Ramsar Secretariat (via Defra) in advance of plans to construct the EfW Plant immediately adjacent to the boundary of the Ramsar site, which they viewed as potentially constituting a ‘likely change’ under the terms of Article 3.2 of the Convention; this raised the question as to whether the Island could be in breach of its obligations.

4.1 Requirement to Notify Change or Likely Change to Ecological Character

Adviser Comment:
The main channel of communication between the UK government and the three Crown Dependencies is provided by the UK Ministry of Justice. For day-to-day technical matters concerning the environment, however, liaison takes place directly with the Department of Environment, Food and Rural Affairs (Defra); and Defra’s Wildlife, Habitats and Biodiversity Division takes the lead on Ramsar matters. The Ramsar Secretariat identifies Defra as the national “Administrative Authority” for the Convention in the UK, and there is a named individual in Wildlife, Habitats and Biodiversity Division as the “national focal point” or “daily contact” for communications with the Secretariat.

The Secretariat may also seek elucidation directly from others, which could include the States of Jersey; but it will always copy the Administrative Authority’s national focal point into any such communications.

Normally therefore the most straightforward expectation would be that the body in the States of Jersey which has lead responsibility for Ramsar implementation matters, in this case P&E, having arranged to be informed of any change or likely change to any of the Island’s Ramsar sites and on becoming aware of such an instance, would send details to Defra’s Wildlife, Habitats and Biodiversity Division, who then on their joint behalf would submit appropriate details to the Ramsar Secretariat.

Article 3.2 of the Ramsar Convention provides that:

> ‘*Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of*

technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organisation or government responsible for the continuing bureau duties specified in Article 8 (i.e. the Ramsar Secretariat)'.

The (revised) definition of change in ecological character under the Convention is as follows:

> *'For the purposes of implementation of Article 3.2, change in ecological character is the human-induced adverse alteration of any ecosystem component, process, and/or ecosystem benefit/service.'*

It is noted that the Convention anticipated moves towards the 'precautionary approach' so often cited in recent studies involving the public interest by requiring formal communication not only about those site changes that have happened or are happening, but also about those deemed 'likely' to happen. The degree of likelihood can be debated, but the requirement to notify implies that planning and decision-making processes must take Article 3.2 into account. Guidance from 2008 also states that:

> *'In relation to Article 3.2, Contracting Parties will need to equip themselves with mechanisms to detect likely change as well as actual change. This may require processes for monitoring that go beyond monitoring of sites as such, to include also monitoring of planning and decision-making processes which may reveal a prospect or proposal of change, such as registers of consent applications for land-use/water-management change, development proposals, etc.'*

Article 3.2 implies that any change, no matter how trivial, should be reported. There are moves within the Ramsar organisation to clarify this, as it is felt that there needs to be some way of distinguishing between trivial changes that may not require a response, and more significant ones which do. **However, the Panel notes that at present there is no formal management plan for Jersey's South East Coast Ramsar site; so there is no coherent system for monitoring, recording or addressing these issues, or identifying potential tolerance thresholds within which change might be deemed insignificant.**

4.2 Grounds for Informing Ramsar of Likely Change

According to the P&E there are no grounds for notifying a likely change to the ecological character of the Ramsar site. This position has been maintained since the department's first response to letters on this matter was published in the JEP in November 2008. Subsequently a letter was sent to Defra and the Ramsar Secretariat by the Director of Environment on 13th February 2009, justifying the department's decision not to notify by referring to the EIA process:

> *'Because the EIA process did not identify any adverse impacts to the ecology of the Ramsar site, it was concluded that no notification was necessary under Article 3.2 of the Convention'.*

The letter also refers to significance of effect as part of the basis for the department's opinion about Article 3.2, noting for example that warm water discharge *'will not cause any significant change to the ecology of the Ramsar site'.*

In the view of the Panel's adviser, if the EIA process had been more robust and fully compliant with the relevant standards, there may indeed have been no need to notify Ramsar or Defra. However, irrespective of the numerous shortcomings identified in that process in section 1 of this report, the ES itself identifies the potential for impacts which call the department's position into question:

- *'Cooling water from the boilers would be discharged to sea via the existing outfall to the east of the power station.'*

- *'Marine habitats, including tidal areas within the breakwater, would not be directly affected by any development on site.'*

- *'The only potential impact on the RAMSAR (sic) site would be water pollution risk from the construction and operation of the new facility. There is a potential for impact from the discharge of cooling water from the boiler to the sea and subsequently having an impact on the RAMSAR site by changing temperature gradients near to the outfall and therefore affecting the composition of species in the shoreline habitat.'*

- *'As much of the power station equipment is now not used, additional load from the Energy from Waste facility cooling system would not exceed previous thermal loading from the existing power station and therefore the new facility would not have a significant impact and would operate within the conditions of the existing consent.'*

- *'Water pollution risk to the RAMSAR site would be mitigated through controls on construction placed on the Contractor and design measures designed to separate and collect and dispose potentially polluted leachate and site drainage.'*

- *'The main receptor is the coastal waters which are designated as the South East Coast of Jersey RAMSAR Site, due to its high ecological value and diversity of habitats. This RAMSAR site would potentially be vulnerable should pollutants be released during construction or operation of the site. The design of the facility would aim to break the links between sources of pollution during construction and operation and the receptor which is the coastal RAMSAR site.'*

The Panel considers that the above demonstrates recognition of risk of potential impacts, which in itself would be sufficient reason for notification under Article 3.2.

Further, it believes that submissions from third parties such as SOS demonstrate that there are very differing views about the likelihood and significance of potential impacts which should also have been taken into account. Finally, the emphasis on mitigation measures within the ES itself (notwithstanding the Panel's opinion that that document is flawed) also suggests that there was a recognised need to consider safeguards against potential environmental impacts, indicating some additional risk of change as a result of the EfW development. **A precautionary approach should thus have been taken to inform Defra and Ramsar. Since this was not done, it is considered that the spirit of obligations under the Convention in this respect was not fulfilled.**

4.3 Key Findings

4.3.1 Article 3.2 Reporting

1. TTS have stated that the ES was predicated on avoiding impacts to the Ramsar site. However, the ES still highlights numerous potential effects which could constitute a likely change in ecological character.

2. Despite the lack of detail regarding the assessment of significant environmental effects and the subsequent relevant mitigation measures the Regulator was apparently satisfied that the ES and wider EIA process was robust enough to ensure that there would be no change in ecological character within the Ramsar site. Therefore P&E considered it unnecessary to submit an Article 3.2 report, either directly to the Ramsar Secretariat or via Defra.

3. P&E have maintained this position despite recorded construction-related environmental incidents; no Article 3.2 report has been submitted.

4. The findings of this review consider the ES potentially to be unsound, the mitigation measures inappropriate and poorly considered and the implementation of the CEMP lacking in rigour. This has resulted in potential pollution of the marine environment.

5. The magnitude of this pollution is not a consideration under Article 3.2. Therefore there is a strong case to argue that an Article 3.2 report should have been submitted.

6. Failure to submit an Article 3.2 report and to ensure full protection of the Ramsar site throughout the pre and post-determination process is a failure to meet the obligations under the Ramsar Convention.

In addition to the Article 3.2 issues, the following additional concerns regarding the obligations under the Ramsar Convention have been identified:

4.3.2 Wider obligations under the Ramsar Convention

1. All Ramsar sites should have a management plan. The absence of a management plan for the South East Coast of Jersey Ramsar site makes assessment of significant environmental effects and change in ecological character more difficult.

2. Resources required to enable proper implementation of the Convention have not been forthcoming in the past. Whilst there is a strategic plan in place there does not appear to be a firm financial commitment to provide both the one-off and recurrent costs required to implement the Convention fully.

3. Recent studies have indicated a reduction in environmental quality over the last decade in the portion of the Ramsar site closest to La Collette. There is evidence that this is the combined result of a decrease in water quality (from point and diffuse discharges), reduced flushing rates due to structural changes and direct human recreational activity. These factors alone (without the EfW development) suggest that an Article 3.2 report should have been

submitted and an entry should have been made on the National Report from the UK to COP10.

4. Additional studies are required to assess the current status of the Ramsar site. This work should focus on providing information which will support the development and subsequent implementation of a site management plan.

5. There is evidence that water quality issues are affecting the classification of shellfish farmed within the Ramsar site. The reduction in the quality and value of this fishery represents a negative impact on a key ecosystem service. This in turn represents a change in ecological character. This, as well as other ecosystem services such as recreation, needs to be considered fully in the site management plan.

4.4 Recommendations – Obligations under the Ramsar Convention

1. **P&E should be awarded sufficient funding to enable adequate implementation of the Island's obligations under the Ramsar Convention.**

2. **P&E should complete and implement a management plan for the South East Coast of Jersey Ramsar site as a matter of urgency and the remaining States Ramsar sites as soon as possible.**

3. **Development of the management plan should give careful consideration to monitoring and assessment protocols. Physico-chemical sampling and biotic monitoring should be appropriate, stratified and fit for purpose in order to evaluate ecological character. The evaluation of ecological character needs to take into account wider ecosystem services provided by the Ramsar site. The development of the management plan should also be inclusive and involve local stakeholders.**

4. **An Article 3.2 report should be produced and submitted to the Ramsar Secretariat regarding the likely change in ecological character within the South East Coast of Jersey Ramsar site as a result of potential water vectored contamination. This report should also highlight the activities proposed to assess and understand this situation and to ensure appropriate protection and, if necessary, remediation is established.**

5. Term of Reference

‘Any other pertinent matters that may arise during the course of the review’.

The Panel’s task in conducting this review has been to gather and evaluate evidence in respect of its specified terms of reference. This final section refers to ‘any other pertinent matters’ and by definition is something of a catch-all for evidence which does not fit conveniently under other headings; however, this does not mean that it is unimportant. The Panel believes that these comments from its adviser highlight further matters which require attention from departments.

Adviser Comment:
The review process has provided a considerable insight into environmental standards and regulation within the States of Jersey. It has also garnered a broad understanding of the South East Coast of Jersey Ramsar site.

The following are key matters which warrant further consideration and to which the attention of the States should focus. They are not described in detail here but serve to highlight a range of issues which need to be considered by the appropriate bodies or individuals.

Evidence assessed as part of this review indicates that there are on-going potential impacts on the marine environment in the vicinity of La Collette. Impacts may currently result from changes in water quality, the presence of invasive species, the intensity of recreation use and the altered tidal flushing regime resulting from the reclamation activities. Further investigations are required to evaluate these impacts and to propose appropriate mitigation and/or remediation.

The boundaries of the Island’s existing Ramsar sites need to be protected and incursion into the sites, for whatever reason, unless in its urgent national interest, should not be allowed.

There is evidence of chronic marine pollution, and especially elevated levels of arsenic. This is recognised by P&E and whilst they are working towards a resolution of this matter it is essential that the impacts of this on the Ramsar site are clearly understood.

Progressive development is on-going along the coast of St Helier. The cumulative impacts on the marine environment, and the Ramsar site in particular, associated with the waterfront development need to be given careful consideration.

The ecological character of the Island’s Ramsar sites extends to the ecosystem services and the benefits the States gain from the natural environment. An excellent example of this is the oyster *Crassostrea gigas* fishery which matches the size of the industry for the whole of the UK and Northern Ireland. These essential ecosystem services need to be better understood, protected and where possible enhanced.

There is evidence that discharges to the marine environment may be impacting on the sea fishery, ultimately compromising the provision of ecosystem services. Specific issues relating to heavy metal accumulation and *Escherichia coli* need to be better understood in order to protect this vital resource.

Cont’d overleaf

Associated with this is the need to understand the source of any pollution. This review has identified a range of potential sources including the existing ash pits, the made ground within the reclamation area, the existing outfall from Bellozanne and a range of smaller piped and diffuse discharges along the coast. There may also be other sources which were not identified as part of this review.

There is a need for the environmental regulator to build trust and to reduce the degree of suspicion which exists in some parties. There are some excellent examples of co-operative working between P&E and citizens. These need to be built on in a participative and empowering way.

5.1 Environmental Degradation

As noted in the adviser's comment above, evidence has been provided to the review indicating that the quality of the marine environment in the area surrounding La Collette may be declining as a result of a combination of factors. The Panel has also seen evidence suggesting that a reduction in heavy metal concentrations in the fill at the reclamation site has been known about for some time, implying that leaching of such materials may have been occurring. The fate of any potential contamination is unknown. While it may be extremely difficult (or even impossible) to quantify precise impacts or pinpoint exactly where any leachate is actually going, given the hydraulic continuity of the site with surrounding waters there is strong justification for more detailed studies to investigate the matter. **The Panel believes that this issue should be considered as a priority and should also be addressed appropriately in the Ramsar site management plan.**

Although concerns have been raised on a number of occasions in respect of the potential impact of the major excavations at La Collette as well as other sites on the St Helier waterfront, responses to date have been unsatisfactory. Replying to questions in the States on 1st December 2009 the Assistant Minister for Planning and Environment attempted to allay concerns about possible mobilisation of toxic materials contained in the fill from previous reclamation schemes by stating that the Regulator was not aware of any evidence of pollution of controlled waters or any transgressions of the Water Pollution Law. He also commented that:

'The Water Pollution (Jersey) Law 2000 is not as black and white as the Deputy thinks. Pollution can be caused, but there has to be a mitigation process in order to clean up or to minimise any of the environmental problems that might occur.' (Hansard, 1st December 2009)

While this particular reply was in respect of a new application, there are clear parallels with the situation at la Collette. Bearing in mind the conclusions of its adviser's report the Panel views the above comments with considerable misgivings. Members are also concerned that they seem to imply a rather cavalier and uncaring approach to environmental concerns which the Panel would expect to be given more weight if a genuinely precautionary approach was being followed. They appear especially inappropriate when the (potential) pollutants in question include heavy metals and other toxic substances with a known tendency to bio-accumulate within certain marine organisms and thus have implications further up the food chain.

Evidence received during its review strongly suggests to the Panel that during the planning process for the EfW Plant too much faith was put in assurances about mitigation and environmental management procedures during construction that have not delivered satisfactory results either by preventing

incidents or when problems have actually occurred at the La Collette site. This has potentially exacerbated the effects of environmental incidents that should have been entirely avoidable.

As noted by the Panel's adviser, there are also concerns about potential pollution from other sources, such as the Bellozanne outfall, as well as other discharges into the marine environment, for example at times of heavy rainfall. There is clearly a strong feeling amongst representatives of the Jersey Aquaculture Association that notwithstanding any problems with specific developments, a much more pro-active approach from the Regulator is needed in general to improve protection of the marine environment. The Panel believes that this might also help to improve public perception of the ability of the department as Regulator to stand up to pressure from developers and ensure that the environment is put before commercial interests.

5.2 Difficulties Obtaining Evidence

Adviser Comment:
The Scrutiny Review process is an essential mechanism to facilitate open government and to call the executive to account for its policies and decisions. However the following two observations are made regarding the process in relation to this review:

There is evidence of obfuscation by T&TS and an unwillingness to be proactive in providing information unless it was formally requested and identified in a precise form. This was especially the case in trying to identify the on-going environmental management and mitigation procedures in operation at La Collette. This has delayed the review process and potentially compromised some of the conclusions.

Due to circumstances outside of the control of the Review, key personnel within P&E did not participate fully in the process or were not available to attend public hearings. Given that these individuals held positions with either direct responsibility for or knowledge of the South East Coast of Jersey Ramsar site this is considered a significant omission from the process.

It is essential that moving forwards beyond this review the States adopt a precautionary approach in relation to the protection of Jersey's unique environment and that the lessons learnt as a result of this review are considered and acted upon.

The quantity of evidence required for this review has been considerable. Compiling and providing it in a manageable form will have taken a considerable number of hours of work by departmental staff during the course of the review, for which the Panel is grateful. The majority of information requested has been offered willingly and in a timely fashion by both departments involved.

However, some potentially important evidence has unfortunately been considerably delayed or has not been received at all. The adviser's comments draw attention to circumstances outside the control of this review which prevented the Panel receiving evidence from two key witnesses from P&E; **the Panel found this frustrating and believes that it may have compromised understanding of some of the issues.**

Further difficulties were caused by delays in receiving information requested from TTS relating to the contractor's Environmental Management System (including records of any incidents on the construction site and actions taken to respond to them). Some information was finally supplied in an incomplete and edited form the day before a Public Hearing with the Minister, nearly three months after it was first requested, despite numerous attempts to clarify what was required. Part of the explanation for this was that some of the information contained in site diaries was considered germane to an ongoing investigation by the Regulator into an alleged environmental incident, so was not considered appropriate for release into the public domain. There were also apparently some delays in obtaining the information from the contractors.

The Panel considers that the delay experienced in receiving the site diary records can only cast further doubts on the effectiveness of oversight of environmental controls and consequently the ability of management to respond to problems that have arisen in a robust or timely manner.

The Panel initially accepted the premise that the Regulator's investigation could be prejudiced if relevant information was prematurely released into the public domain. This was reinforced by comments from both P&E and TTS that they would not be prepared to answer questions on this particular matter in a public hearing, to which the Panel agreed in the circumstances. However, members found it harder to understand why the Regulator should refuse to provide any information about the alleged incident to the Panel in confidence, or to allow TTS to do so. Subsequent developments have added to the Panel's concerns about this information being withheld, since at the time of writing the investigation has apparently been ongoing for eight months or more without any case being brought. Therefore claims that the information was *sub judice* are untenable.

This matter raises important questions about the cooperation offered to Scrutiny when departments consider that their interests conflict with a public examination of evidence. **It has also put the Panel in a very difficult position with regard to its responsibilities to the States and the public, as members have been unable to verify the nature or seriousness of an alleged incident of direct relevance to the terms of its review. The Panel finds this unacceptable.**

5.3 Key Findings

1. There is evidence of ongoing potential impacts on the marine environment in the La Collette area, and of chronic marine pollution (particularly with regard to arsenic levels) both there and elsewhere.

2. There is a need for a greater understanding of issues relating to heavy metal accumulation and bacterial pollution to enable effective protection of Jersey's sea fisheries and the marine environment. Whilst some long-term monitoring has been established, there appears to have been little research carried out into the identification of potential sources of pollution.

3. Development proposals on the St Helier waterfront (both east and west of Albert) bring an elevated risk of cumulative impacts on the marine environment in general; and the Ramsar site and associated ecosystems in particular. There is a perception that development is being allowed to proceed without adequate consideration of consequences for the marine environment.

4. There is a lack of confidence amongst stakeholders in the ability or willingness of the Regulator and relevant States departments to protect the marine environment.

5. There have been issues with the provision of information to this review which call into question the willingness of States departments involved to share key information with Scrutiny.

5.4 Recommendations – Other Pertinent Matters

1. **Further investigations should be carried out to evaluate ongoing and potential impacts on the marine environment, to include consideration of further developments on the waterfront, and discharges from the Bellozanne outfall and other sources. These studies should be used as a basis for proposals to prevent further degradation of the marine environment.**

2. **Testing for cumulative impacts of heavy metals and other potential pollutants on marine biota should be extended to a wider range of sites and biota and carried out on a more frequent basis to enable the compilation of relevant and reliable baseline data. Key local stakeholders should be involved in this process.**

3. **A review of environmental protection mechanisms relevant to the marine environment should be carried out between Planning and Environment and other relevant departments in consultation with key stakeholders to identify areas of concern and establish a way forward.**

4. **Ministers and Chief Officers should meet with the Scrutiny Panel to discuss difficulties over access to potentially sensitive information and to establish how such problems can be avoided and requests expedited in future.**