



Report No. SRL/EL/001.2

# Environmental and Legal Objections

to the Application by RWE Npower to

Fill Lakes 'E' and 'F' at Radley

by

John Dunleavy

## **Summary Environmental & Legal Report**

commissioned by

Save Radley Lakes

**August 2005**



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**Summary:** This paper states our objections to the current RWE npower application and to their scheme to dispose of PFA in Lakes E and F, based on issues concerning environmental and planning law, the conditions of the existing planning permission, and other aspects concerning the environment and the law. It should be read in conjunction with the other papers which state our objections based on different factors such as ecology and wildlife, pollution and flooding. These and other papers will also raise objections based on legal and planning issues..

**August 2005**

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## **ENVIRONMENTAL AND LEGAL OBJECTIONS**

A summary report prepared by J Dunleavy, with contributions from R M G Eeles Ph.D.

### **SUMMARY**

*This paper states our objections to the current RWE npower application and to their scheme to dispose of PFA in Lakes E and F, based on issues concerning environmental and planning law, the conditions of the existing planning permission, and other aspects concerning the environment and the law. It should be read in conjunction with the other papers which state our objections based on different factors such as ecology and wildlife, pollution and flooding. These and other papers will also raise objections based on legal and planning issues.*

### **EXECUTIVE SUMMARY**

The main points of this document can be summarised by stating that the Save Radley Lakes Group believes that:

1. The RWE npower scheme to dispose of PFA in Lakes E and F is contrary to the policies of the Oxfordshire Structure Plan (EN5) and the Vale of White Horse District Local Plan (NE5) and Paragraph 1 (vi) of PPS 9: Biodiversity and Geological Conservation which states:

(vi) The aim of planning decisions should be to prevent harm to biodiversity and geological conservation interests. Where granting planning permission would result in significant harm to those interests, local planning authorities will need to be satisfied that the development cannot reasonably be located on any alternative sites that would result in less or no harm. In the absence of any such alternatives, local planning authorities should ensure that, before planning permission is granted, adequate mitigation measures are put in place. Where a planning decision would result in significant harm to biodiversity and geological interests which cannot be prevented or adequately mitigated against, appropriate compensation measures should be sought. If that significant harm cannot be prevented, adequately mitigated against, or compensated for, then planning permission should be refused.

2. The Radley Lakes site contains species protected by the Habitats Directive, and should Oxfordshire County Council continue to maintain that neither an Environmental Impact Assessment (EIA) nor an 'appropriate assessment' is required in this case, then this would represent a misunderstanding and potential misapplication of the Planning and Environmental Law relevant to the planning application under consideration by them.
3. Oxfordshire County Council are now obliged to ensure that both an EIA and an appropriate assessment are carried out, before a decision is taken by them on this application.
4. Condition 13 (g) of the 1982 Conditional Planning Permission still applies, and requires "the retention of all hedgerows, trees and fencing".
5. Condition 13 (g) of the 1982 Conditional Planning Permission applied when many trees were felled during site preparation work at previous lakes in Radley. This raises questions as to why this condition was breached and why it was not enforced at the time.

6. The Environment Agency has been consistent in opposing the building of structures on the Thames floodplain, in accordance with PPG25 guidelines. It is therefore quite unacceptable to further increase flood risk in the built up areas, such as Abingdon and Lower Radley, by removing more large areas of floodplain, as proposed in the plan for Lakes E and F, which involves the construction of massive bunds around their perimeter.

## **INTRODUCTION**

The Save Radley Lakes Group has retained Manches to act as the Group's solicitors since an important aspect of the Group's objections to this application concerns planning and environmental law. Richard Smith is the partner within Manches who specialises in this area and he is recognised within his profession as an authority on environmental law.

Manches in turn has engaged the services of Joe Weston, a Senior Lecturer in Environmental Impact Assessment at Oxford Brookes University, who is one of the leading experts in this field. Joe Weston has been responsible for writing some of the guidance material about the Habitats Directive on behalf of the EU.

The Save Radley Lakes Group is responsible for the content of this document . However much of the content is based on advice and information provided by these two experts in the field of environmental and planning law and Environmental Impact Assessments. Text of introduction

## **HABITATS DIRECTIVE AND ASSOCIATED LEGISLATION**

- We believe that the RWE npower scheme to dump PFA in Lakes E and F cannot legally go ahead because:
- Several species have been found on the site which are protected under the Habitats Directive and associated legislation.
- It is immaterial whether the site has already been designated or not. The presence of a protected species affords protection to a site even if it has not yet been designated.
- In this case none of the conditions apply which could allow a development to go ahead which would have significant adverse effects on protected species or habitats.
- There is no doubt that the proposed development would almost completely destroy the site and have an enormous impact on the protected species and their habitats. Indeed Oxfordshire County Council and even RWE npower have accepted that the site will suffer significant damage if the scheme goes ahead.

## **MISUNDERSTANDING AND POTENTIAL MISAPPLICATION OF PLANNING AND ENVIRONMENTAL LAW**

We believe that Oxfordshire County Council are obliged to ensure that an "appropriate assessment" and a full Environmental Impact Assessment are both carried out before a decision can be taken on the current application by RWE npower.

At the time of writing this document (21st August 2005) the Council was maintaining that neither of these is required. We believe that this represents a misunderstanding and potential misapplication of the Planning and Environmental Law relevant to the planning application under consideration by Oxfordshire County Council. This is not merely the

opinion of the Save Radley Lakes Group but is the assessment of both our solicitor and an expert in this field.

The Save Radley Lakes Group has retained Manches to act as the Group's solicitors, since an important aspect of the Group's objections to this application concerns planning and environmental law. Richard Smith is the partner within Manches who specialises in this area and he is recognised within his profession as an authority on environmental law.

Manches in turn has engaged the services of Joe Weston, a Senior Lecturer in Environmental Impact Assessment at Oxford Brookes University, who is one of the leading experts in this field. Joe Weston has been responsible for writing some of the guidance material about the Habitats Directive on behalf of the EU.

Included in APPENDIX 1: are letters from Joe Weston and from Manches, which set out the grounds for believing that Oxfordshire County Council have a duty to ensure that both a full Environmental Impact Assessment and an "appropriate assessment" are carried out in this case. Also shown is a letter from Oxfordshire County Council, which Joe Weston and Richard Smith have reviewed and to which they respond in their letters.

The full argument is presented in APPENDIX 1: but the main points can be summarised as:

### **Appropriate Assessment**

- Under Article 6 of the Habitats Directive, an "appropriate assessment" must be carried out, since the RWE npower application relates to a development which would significantly affect a site where protected species have been identified
- There is a requirement to carry out an "appropriate assessment" irrespective of whether the site has yet been "designated" or not
- If planning permission were to be granted for this application without an "appropriate assessment" being carried out, then the planning permission could be challenged as unlawful by way of a judicial review

### **Environmental Impact Assessment**

- Oxfordshire County Council has already acknowledged in writing that the RWE npower scheme will have significant impact on local wildlife.
- This is sufficient to trigger the need for an Environmental Impact Assessment;
- There has been a considerable shift in national policy towards wildlife conservation since the original planning permissions were granted, and following the publication of PPS 9: Biodiversity and Geological Conservation, greater weight should be given to the loss of habitats containing protected species and the loss of sites that contribute to wider biodiversity interests. OCC have failed to take this into account in their screening opinion;
- Failure to ensure that an Environmental Impact Assessment is carried out could also be grounds for a judicial review
- Furthermore the European Commission's publication '*Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites: Non Mandatory Methodological Guidance*' (CeC 2002) makes it clear that, when a project is of a type covered by the EIA Directive and is likely to have adverse effects on a site or species protected by the

Habitats Directive, that project should be subject to both an 'appropriate assessment' and an Environmental Impact Assessment.

### **The Need for a revised Screening Opinion**

We believe that, in order to comply with the Environmental and Planning Law that is relevant to this application, Oxfordshire County Council must now:

- publish a revised Screening Opinion.
- ensure that both a full Environmental Impact Assessment and an 'appropriate assessment' are carried out before a decision is made as to whether to grant planning permission.

### **PROTECTION UNDER OTHER WILDLIFE LEGISLATION AND OTHER ECOLOGICAL CONSIDERATIONS**

This site and its wildlife are also protected under other wildlife legislation, including the Birds Directive (1979), the Wildlife and Countryside Act (1981).

Rare species of conservation significance are being discovered on a frequent basis including UK Biodiversity Action Plan Priority (vertebrate) Species and Species of Conservation Concern.

A number of legally protected species are directly dependent for food and shelter either in summer, winter or all year round, upon the lakes and surrounding habitats. Their habitats are protected as well as the animals themselves, and additional survey work is required in order to make a proper scientific evaluation of the direct and indirect affects that the proposals contained within the application will have on these species.

A list of additional species of conservation concern (including 22 Amber List and 6 Red List bird species) is given in the BioScan Report (E1340R2). This report only gives ecological/conservation details on birds observed by BioScan during their 'biological appraisal' and does not classify the rest of the bird inhabitants recorded by the Oxford Ornithological Society and others such as ourselves. A breeding bird/population survey incorporating measures of abundance has not been carried out and would be a legal requirement under a number of Acts/Directives.

Undoubtedly Lake E and Lake F possess substantive wildlife value in their own right. However, these lakes and surrounding habitats have great importance to wildlife in the wider countryside. This importance has significantly increased in recent years by the almost complete destruction of remaining wetland habitats in the immediate locality. The amplification of importance has arisen since the infilling, and hence loss of all except the last two remaining lakes in the Radley Area, with PFA.

The remaining lakes are, in consequence, critical for the continued survival of both protected and more common species in this wider environment. They are essential for the continued recovery of endangered species such as otters whose numbers have risen recently in the Radley Lakes area.

Full details of these issues are given in APPENDIX 2:.

### **CONDITION 13 ( G ) OF THE 1982 CONDITIONAL PLANNING PERMISSION**

Condition 13 (g) of the original Conditional Planning Permission (SUT/RAD/5948) requires “the retention of all hedgerows, trees and fencing”. Condition 13 (g) becomes condition 11g in SUT/RAD/5948/12-CM but its wording is otherwise unchanged.

Our understanding is that this condition has never been revoked or amended other than the change of numbering referred to in the previous paragraph. It therefore still applies to any development carried out by RWE npower or by contractors working on their behalf.

Because the condition stipulates “the retention of all hedgerows, trees and fencing” it means exactly that: all the existing trees and hedgerows must be retained. This includes those trees which are on the strip of land between Lakes E and F and the trees on the islands in Lake E. It is also immaterial whether a tree is living or dead and indeed dead trees are a valuable habitat for many species of wildlife including bats which are protected under the Habitats Directive and other legislation.

This raises two important issues:

1. Many trees were felled when the site preparation work was carried out at previous lakes. There are some important questions with regard to this issue:
  - Why did RWE npower and/or contractors working for them break this condition? Did they do it knowingly, or did they not know about this planning condition?
  - Why did Oxfordshire County Council not enforce this planning condition?
  - Were they aware that this condition had been breached? If they were not, then were they negligent in their duty to ensure that planning conditions are adhered to?
  - If they were aware that this condition had been disregarded, was this ever raised with RWE npower and/or with the contractors working on their behalf?
  - If this issue was raised, then what was the outcome?
  - If Oxfordshire County Council were aware that this condition had been breached but this was never raised with RWE npower, then why was this?
  
2. If the current application is approved by Oxfordshire County Council, RWE npower and their contractors will have to carry out the work without removing any of the hedgerows and trees on the site. RWE npower have been told that we believe that this planning condition still applies. Unless they can prove that this is not true any future tree felling on the site would be carried out with RWE npower knowing that this is breaching an existing planning condition.

These issues are important because they raise the question as to whether RWE npower are willing to abide strictly by the conditions of the planning permission in any future work on this site. They also raise the question as to whether Oxfordshire County Council will in future strictly enforce the planning conditions if they give their consent to the current RWE npower application.

The Save Radley Lakes Group also intends to examine further the documents concerning the existing planning permission to ascertain whether any other conditions appear to have been breached in the past and to clarify which conditions still apply. We intend to submit the results of any such scrutiny to Oxfordshire County Council when they become available.

## **HEIGHT OF BUNDS ABOVE THE SURROUNDING LAND**

The lakes which have already been filled to the west of the railway line have been surrounded by bunds which tower many metres above the surrounding land. Many local people feel these are ugly and make the spoiling of these lakes by dumping PFA in them even worse. We note that the intention of RWE npower is to build an equivalent structure around the area currently occupied by Lakes E and F, if they receive approval of their current application.

We would like to ask a series of questions about this issue:

- When was permission given to raise the levels of the bunds above the surrounding land for Lakes G and J and Lakes H and I?
- Was a limit imposed on how high the bunds could be above the surrounding land for these lakes?
- Has permission already been given to raise the levels of the bunds above the surrounding land for Lakes E and F, in the event that this scheme is allowed to go ahead?
- Has a limit been imposed on how high the bunds could be above the surrounding land for Lakes E and F, in the event that this scheme is allowed to go ahead?

## **NOTICE OF APPLICATION FOR PLANNING PERMISSION**

In the Notice of Application for Planning Permission which was placed in the Abingdon Herald dated July 21 2005 there is a sentence which reads:

The County Council considers that the application does not accord with its plans for the development for the County.

We would like to ask a number of questions about this issue, since we feel it is germane to the question as to whether the application is approved or not:

1. In what ways does the application not accord with Oxfordshire County Council's plans for the development of the County?
2. Will this issue be addressed when the officers are preparing reports for the Planning Committee?
3. Will this issue be considered when the Planning Committee discusses this application?

## **SUMMARY OF OBJECTIONS**

- 1 The proposal to fill the remaining lakes at Radley will have a significant adverse effect on internationally protected species contrary to Paragraph 1(vi) of PPS9, Policy EN5 of the County Structure Plan and Policy NE5 of the Vale of White Horse District Council Local Plan, which states:  
  
Development likely to have an adverse affect on a specially protected species will not be permitted unless the adverse affects, either directly or indirectly, can be prevented or acceptably minimised or adequate alternative habitats can be provided.**
- 2 The proposed development should be subject to a full Environmental Impact Assessment and OCC have erred in law in not requiring an EIA, despite their acknowledgement that the proposals will have significant environmental effects.**
- 3 The project should be subject to an “appropriate assessment” under the Habitats Directive where all alternative solutions to the disposal of PFA at Radley Lakes must be considered.**
- 4 The County Council has failed to enforce conditions on earlier planning permissions for the site and the public cannot have any confidence that they will enforce new conditions.**
- 5 The loss of the remaining Radley Lakes is likely to contribute to flood risk problems as the lakes currently help in the hydro-geological balance of the area.**

**APPENDIX 1: The need for an EIA and an appropriate assessment**

The Save Radley Lakes Group has retained Manches to act as the Group's solicitors, since an important aspect of The Group's objections to this application concerns planning and environmental law. Richard Smith is the partner within Manches, who specialises in this area, and he is recognised within his profession as an authority on environmental law. They, in turn, have engaged the services of Joe Weston, a Senior Lecturer in Environmental Impact Assessment at Oxford Brookes University, who is one of the leading experts in this field. Joe Weston has been responsible for writing some of the guidance material about the Habitats Directive on behalf of the EU.

Included below are letters from Joe Weston and from Manches, which set out the grounds for believing that Oxfordshire County Council have a duty to ensure that both a full Environmental Impact Assessment, and an "appropriate assessment" are carried out in this case. Also shown is a letter from Oxfordshire County Council, which Joe Weston and Richard Smith have reviewed and to which they respond in their letters.

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15/08/05

Richard Smith,  
Manches LLP  
9400 Garsington Road,  
Oxford Business Park,  
Oxford OX4 2HN

Dear Richard,

**RE: RADLEY LAKES**

I write further to Oxfordshire County Council's letter and Screening Opinion regarding Radley Lakes

1) The European Commission's guidance document on *'Managing Natura 2000 sites: The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC (CeC 2000)* makes clear at paragraph 1.2 that the Habitats Directive provides protection for both sites and species. While certain species do not benefit directly from site conservation protection they remain protected by Article 6 of the Directive. Furthermore *'Managing Natura 2000'* also makes clear that the provisions of Articles 6(2), (3) and (4) apply to 'sites classified (i.e. designated) and those 'qualifying for classification'. Furthermore, in the *Santoña Marshes case (C-355/90 Commission v Spain)* the European Court of Justice made clear that the Birds Directive (and by implication the Habitats Directive) have Direct Effect on Member States. That ruling means that the requirement for an 'appropriate assessment' under Article 6 of the Directive applies to all sites that fulfil the ecological criteria for designation, regardless of whether they have been designated or not. Therefore, sites or species that meet the criteria for protection or designation but have yet to be so designated are protected by virtue of Article 6.3 and 6.4 of the Habitats Directive. Where a project or plan is likely to result in significant adverse effects to such areas or species an appropriate assessment is necessary. Failure to complete an appropriate assessment could, in my view, be grounds for a judicial review of any decision to approve the Radley Lakes project.

2) Nothing in either the EIA Directive or the UK's EIA Regulations specifies a limit on the number of 'significant environmental effects' required before an EIA is necessary. The Directive and the Regulations simply state that no project listed in Annex II (Schedule II) may be authorised where there are likely to be significant environmental effects. The case officer's letter and screening opinion sent to you on the 10th of

August clearly acknowledges that the Radley Lakes projects is likely to have 'a significant effect on local wildlife'. That statement is of itself sufficient to trigger the need for an EIA and failure to do could also be grounds for a judicial review. It should also be noted that in *Fernback and Others v Harrow LBC* (TLR 15/5/2001) it was held that a 'negative' screening opinion issued by an LPA did not determine whether an application for planning permission was 'EIA development'. This means that the fact that Oxfordshire County Council has issued a negative screening opinion for the Radley Lakes project does not safeguard their decision from Judicial Review if it is subsequently found that there are likely to be significant environmental effects. Citing the Bioscan report, Oxfordshire County Council can now issue a second screening opinion on the grounds that the report makes clear that there are likely to be significant environmental effects.

3) The OCC screening opinion goes on to say that the presence of a protected species alone is not sufficient to trigger a full EIA. This displays a lack of knowledge and understanding of the relationship between the EIA and Habitats Directives. The European Commission's publication *'Assessment of Plans and Projects Significantly Affecting Natura 2000 Sites: Non Mandatory Methodological Guidance'* (CeC 2002) (written here by the Impacts Assessment Unit) makes clear that where a project or plan is likely to have adverse effects on a site or species protected by the Habitats Directive, that project or plan should be subject to both an appropriate assessment and an EIA.

I hope you find this of help.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'Joe Weston', written in a cursive style.

Joe Weston  
Impacts Assessment Unit

Our reference: RXS/oxfloat2/146524/231544  
Your reference: JF/8.4/5193/3

# MANCHES

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Dear Madam

17th August 2005

**Proposed Development by RWE npower plc at Radley Lakes E and F, Thrupp Lane Radley**

Thank you for your letter of 10<sup>th</sup> August 2005.

We are surprised by the content of your letter which suggests a misunderstanding and potential misapplication of the Planning and Environmental Law relevant to the Planning Application under consideration by Oxfordshire County Council.

We have reviewed Oxfordshire County Council's Screening Opinion to determine whether the intended development may have a significant impact on the environment. We note that the Screening Opinion concludes that the development will have a significant impact on local wildlife. This is supported by our client's Ecological Report that states that the site is a habitat for 10 species protected under the EU Habitats Directive.

This conclusion is sufficient to trigger the legal requirement for an Environmental Impact Assessment to assess the significance of the environmental impact of the proposed development. It is inappropriate for Oxfordshire County Council to conclude in its Screening Opinion that the impact is not so significant as to require an Environmental Impact Assessment; this is the purpose of an EIA being prepared. If planning permission is granted for the proposed development without a full Environmental Impact Assessment having been undertaken, such planning permission will be subject to being challenged as being unlawful by way of judicial review.

It is also incorrect to state that in the absence of the site being designated as a protected habitat, the mere presence of species protected by the Habitats Directive does not give rise to the requirement to undertake an appropriate assessment under Article 6 of the Habitats Directives. There is European case law and European guidance on the operation of the Habitats Directive which states that if the site would otherwise meet the criteria for protection, the species must be protected under Article 6, whether or not the site has been designated at national level. The protection of species covered by the Habitats Directive is paramount and all the evidence available to date suggests that Lakes E and F are a habitat for 10 species protected under the Habitats Directive. An appropriate assessment under Article 6 must therefore be undertaken to avoid any subsequent planning permission being challenged as unlawful.

We have obtained an expert opinion from Mr Joe Weston, a Senior Lecturer in Environmental Impact Assessment at Oxford Brookes University. A copy our expert's letter is attached for your information.

Page 2  
Joanna Freyther  
17th August 2005

**MANCHES**

Please confirm that Oxfordshire County Council will undertake a new Screening Opinion and that it will also undertake an appropriate assessment pursuant to Article 6 of the Habitats Directive. We repeat that any planning permission granted in relation to Lakes E and F pursuant to the current planning application will be subject to challenge by judicial review unless all proper legal procedures under the relevant planning and environmental legislation have been followed in full.

We look forward to hearing from.

Yours faithfully

**Manches LLP**

Encs:





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10/08/2005

My ref JF/8.4/5193/3

Your ref:  
RXS/oxfloat2/146524/2315  
44

**Direct line: 01865 815901**

**Please ask for: Jo Freyther**

e-mail:joanna.freyther@oxfordshire.gov.uk

Dear Sir or Madam,

**Proposed development by RWE npower plc at Radley Lakes, Thrupp Lane Radley**

Thank you for your letter of the 28<sup>th</sup> July 2005. I am the case officer for the above application and have been asked to reply on behalf of Chris Cousins, Head of Sustainable Development.

The Ecological Reports prepared by Bioscan confirm the presence of European protected species on site. However, the site is not designated as a European protected site for nature conservation and there is therefore no requirement for Oxfordshire County Council to undertake an appropriate assessment.

A Screening Opinion has been adopted and a copy sent to the Vale of White Horse District Council on the 18<sup>th</sup> July 2005, to be placed on the public register. A copy is enclosed. Your letter is expressed in general terms. I confirm that any decision made on the Radley Lakes application would be made in accordance with the relevant statutory requirements. If, however, you have any specific comments or concerns relating to the application, please contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read "Joanna Freyther".

Joanna Freyther  
Planning Officer

Copy to Joanna Simons – Chief Executive OCC  
Chris Cousins – Head of Sustainable Development OCC  
Robert Hanson – Legal Services OCC  
Cllr Bob Johnston

Enc

Richard Dudding Director for Environment & Economy

Chris Cousins, Head of Sustainable Development

Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999

**IS AN ENVIRONMENTAL IMPACT ASSESSMENT (EIA) NECESSARY?**

Application Title/Enforcement Site

Construction of new ash lagoon in existing void space (Lake E&F), filling the same with pulverised fuel ash, winning of clay from the base of the void space and its use to raise and restore adjacent land (Area N).

- 1 Has an Environmental Statement been submitted ~~Y~~/N
- 2 If not
  - a) Is the development listed in Schedule 1 ~~Y~~/N
  - b) Is the development listed in Schedule 2 Y/~~N~~
  - c) If the answer to (b) is YES does it exceed any of the relevant thresholds and criteria in Schedule 2 Y/~~N~~
- 3 Is there a Secretary of State Screening Direction or any pre-application screening opinion for the development? ~~Y~~/N
- 4 If the answer to 3 is NO then for any Schedule 2 development prepare a screening opinion as follows:-
  - a) Work through the sections as set out in Annex B of circular 02/99 (*Selection Criteria for Screening Schedule 2 Development*). Deal with each point under the following headings:
    - Characteristics of development
    - Location of development
    - Characteristics of the potential impact
  - b) State why the characteristics of the development, the environmental sensitivity of the location and the characteristics of the potential impact does or does not mean that an ES is necessary. (Refer to paragraph of EIA Circular 02/99 for advice).

Screening Opinion

I confirm that the development is a Schedule 2 development according to Category 11(b) (ii) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. The Category refers to 'Installations for the disposal of waste where the area of the development exceeds 0.5 hectares.

The scheme would involve the infill of pulverised fuel ash over an area measuring 13.6 hectares and I have considered whether the proposal is likely to have a significant environmental impact taking into account the selection criteria in Schedule 3 of the Regulations and the advice given in the DETR Circular 2/99

Characteristics of Development

Lakes E&F combined are relatively large lakes (approx 14 hectares) but their size does not make them of more than local importance. The lakes are bordered to the

\\zeus\user data\Land\_Use\Joanna Freyther\Radley Lakes\EIA screening form.rtf

Characteristics of the potential impacts

Any potential impacts of the development would be largely limited to the application site and would be irreversible. In terms of potential pollution, there was a dust blow incident in 1997 affecting the farmhouse adjacent to lake A and an incident in 2001 when some cenospheres were discharged via the outfall to Pumney Farm Ditch. Rwe NPower state that these were quickly recovered.

Water from the ash lagoons is discharged to a water course only following agreement from the Environment Agency that the water quality is high enough. Until this agreement is reached, the lagoon area will drain to an existing settling pool east of the railway.

Summary

Whilst it is clear that the conversion of a water body to dry land is a significant change, other lakes have been filled with ash at Radley and vegetation is flourishing and providing a different type of habitat. The characteristics of the potential impacts are limited to the effects on wildlife and the Lakes E&F are not designated as sensitive areas, however, protected species have been identified. Whilst I do not believe that the potential impacts of the proposal are significant enough to require a full environmental impact assessment, the creation of ash lagoons will have a significant impact on local wildlife. The presence of a protected species alone is not sufficient to trigger a full EIA, additional flora and fauna survey work should be undertaken to complement and add to the survey undertaken in March 2005.

An EIA is needed

~~Y~~/N

Signed <i>[Signature]</i> .....	(Case Officer)
Date <i>05/07/05</i> .....	
Report approved by <i>[Signature]</i> .....	(Officer)
On behalf of the Director for Environment & Economy	
Date <i>6/7/05</i> .....	

## APPENDIX 2: Protection Under Other Wildlife Legislation

The information in this Appendix was compiled by R M G Eeles Ph.D., and that relating to the Habitats Directive is included in his paper *Evaluation of the Wildlife and Habitats at 'Spinage's Field' and 'Thrupp Close'/'The Bullfield'* (SRL/WE/001) which has been submitted to Oxfordshire County Council as part of the Save Radley Lakes objections to this planning application. For full details of the ecology and wildlife in this area please refer to this report.

### Obligations under the Birds Directive 79/409/EEC (1979)

Under **Article 2** of this act member states are obliged to "take requisite measures to maintain the population of the species referred to in **Article 1** at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of recreational requirements, or to adapt the population to that level." **Article 3** states "In the light of the requirements referred to in **Article 2**, member states shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds listed in **Article 1**"<sup>1</sup>. Similar provisions are made for additional birds recorded at Lake E and Lake F under separate Annexes. The loss of the wetland and surrounding habitats caused by dewatering and infilling the lakes and removal of trees under the proposals contained in the application would directly displace or kill bird species listed and protected under the Birds Directive. This Directive applies to breeding and feeding sites all year round and is not intended to apply only during the breeding season. There is no possibility that these impacts can be mitigated against and, therefore, allowing the planned works to go ahead would be in breach of this Directive. It could also be argued that the loss of freshwater habitats in the Radley Area goes against the spirit if not the intent of the Ramsar Convention on Wetlands (1971).

### Obligations under the Habitats Directive 92/43/EEC (1992)

It is our contention that the Lakes require evaluation and, probably, designation as a Special Area of Conservation under the legal framework of the Habitats Directive (1992). This directive applies to both natural and semi-natural habitats, as listed in Annex 1<sup>2</sup>, as well as to the species they contain. This Act does not exclude old gravel workings. It is our contention that the lakes conform with the ecological description as being "hard oligo-mesotrophic waters with benthic vegetation of *Chara*<sup>3</sup> species", listed under Annex 1, (3), 3140, Freshwater Habitats. These habitats are possessed of international importance. Under Article 12 (protection of species) the Habitats Directive prohibits (a) all forms of deliberate capture or killing of species listed in Annex IV<sup>4</sup>, all stages of life, (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration, all stages of life, (c) deliberate destruction or taking of eggs from the wild, (d) deterioration or destruction of breeding sites or resting places. The Habitats Directive, therefore, explicitly stipulates that the habitat types occurring at Spinage's 'Field' and Thrupp Close are legally protected, as are many of the species living there (others are protected by other Acts/Directives, see below). On this basis there is no possibility that planning consent can be given for the destruction of these pristine wildlife sites. No mitigating factors can be applied whereby this habitat type, or the associated species, can be preserved. Your department is, therefore, obliged by the fact that this country is a signatory to the Habitats Directive (1992) to refuse this application.

<sup>1</sup> The relevant species occurring on the site and listed under **Annex 1** are kingfisher, *Alcedo atthis*, Slavonian grebe, *Podiceps auritus*, little egret, *Egretta garzetta*, Bewick's swan, *Cygnus columbianus bewickii*, white-fronted goose, *Anser albifrons*, barnacle goose, *Branta leucopsis*, osprey, *Pandion haliaetus*, red kite, *Milvus milvus*, peregrine falcon, *Falco peregrinus* and common tern, *Sterna hirundo*.

<sup>2</sup> Natural habitat types of community interest whose conservation requires the designation of "Special Areas of Conservation". The definition of natural habitats (Article 1b) states "natural habitats means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural".

<sup>3</sup> Commonly known as stoneworts.

<sup>4</sup> All species of bats and otters. Other protected species are listed under other acts/directives.

## Protected species inhabiting Lake E and Lake F

The proposed PFA lagoon will occupy a site that is lived in by the following UKBAP *Priority* (vertebrate) *Species*. Some of these are given protection under the 1981 British *Wildlife and Countryside Act\** and the Birds (1979) and Habitats Directives (1992)\*\*:-

- **Otter**, *Lutra lutra*,\*<sup>-\*\*</sup>, An adult and cub observed in Lake F in May 2005. Otters are increasingly being observed in the immediate locality, most recently in early July 2005 (an otter with two cubs in the nearby Thames). Otter population recruitment is very low (typically 1.64 otters per pair per year) and recovery is a very lengthy process. Clean lakes and streams are particularly essential for successful reproduction by otters as females plus cubs spend 86.7% of their time in these habitats. Dog otters spend most time along rivers. Lakes are important throughout the year for two reasons, firstly for feeding and, secondly, because otters have no breeding season and hence can give birth to cubs in any month of the year. Otters are particularly vulnerable to pollution and it was almost certainly elevated levels of mercury in rivers, and the bio-magnification of this metal in their tissues, that led to their extinction throughout lowland Britain in the middle of the last century. The currently high discharges of mercury into the Pumney Brook (estimated to be in the region of 20.3 kg per annum but difficult to calculate accurately due to data deficiency and highly variable amounts discharged between years) are likely to pose a significant threat to recovering animals such as otters which lie at the top of the food chain. A lethal dose is something in the region of only 33 ppm (in the livers) in otters<sup>5</sup>.
- **Water vole**, *Arvicola terrestris*,\*, A small population occurs and is increasing locally after many years of decline.
- **Pipistrelle bat**, *Pipistrellus pipistrellus*,\*<sup>-\*\*</sup>, Many individuals of both this and the 'soprano' species.
- **Reed bunting**, *Emberiza schoeniclus*,\*. Several pairs.
- **Great crested newt**, *Triturus cristatus*,\*<sup>-\*\*</sup> Breeds on site and in surrounding ponds.

It is also lived in by the following UKBAP *Species of Conservation Concern*, many of which are given protection under the 1981 British *Wildlife and Countryside Act\** and the Birds (1979) and Habitats Directives (1992)\*\*:-

- **Daubenton's bat**, *Myotis daubentoni*,\*<sup>-\*\*</sup>, population size is particularly high and is dependent upon invertebrates emerging from Lakes E and F.
- **Noctule bat**, *Nyctalus noctula*,\*<sup>-\*\*</sup>, several observed at tree top height.
- **Reed warbler**, *Acrocephalus scirpaceus*, several pairs.
- **Sedge warbler**, *Acrocephalus palustris*, several pairs.
- **Cetti's warbler**, *Cettia cetti*,\*, population size is notably high. At least 10 territories in and surrounding Lakes E & F.
- **Shoveller** (a duck), *Anas clypeata*, frequently seen.
- **Tufted duck**, *Aythya fuligula*, very common and regular breeder.
- **Pochard** (a duck), *Aythya ferrina*, regular visitor, and,
- **Kingfisher**, *Alcedo atthis*,\*<sup>-\*\*</sup>, breeds in most years including 2005.

The nationally rare RDB2 mayfly, *Ephemera lineata*, breeds in the lakes.

<sup>5</sup> Kruuk, H. (1995). *Wild Otters: Predation and Populations*. Oxford University Press, Oxford.

A number of other similarly protected species are directly dependent for food and shelter either in summer, winter or all year round, upon the lakes and surrounding habitats. Their habitats are protected as well as the animals themselves. Examples of these include:-

- **Hobby**, *Falco subbuteo*,\*<sup>-\*\*</sup>, frequently observed feeding on mayflies and dragonflies. Two nesting territories encompass Lakes E and F.
- **Red Kite**, *Milvus milvus*,\*<sup>-\*\*</sup> Two pairs breeding within 1 km.
- **Little ringed plover**, *Charadrius dubius*,\*<sup>-\*\*</sup> Less common than previously, breeds on less densely vegetated islands, and,
- **Badger**, *Meles meles*,\*<sup>-\*\*</sup>, several active setts occur in the vicinity. Badgers frequently utilise the site, notable foraging activity occurring most recently on the night of 20<sup>th</sup> July 2005 around the southern side of *Thrupp Close* and around the northwest and western sides of *Spinage's 'Field'*. Badgers regularly cross the southern part of the site to other feeding areas such as the garden at Thrupp Cottages and beyond towards *Longmead*, *Barton Fields* and the Abingdon Abbey golf course. The closest active setts are located at NGR SU 525975 (main) and NGR SU 525979 (outlier). Suitably competent surveyors are obliged to assess badger activity. Sufficient foraging areas must be left (average territory size in Britain is 50 hectares but is larger, c. 100-150 hectares<sup>6</sup>, in the Abingdon area because suitable feeding sites are limited) but the amount available to the local badgers was drastically reduced when *Goosey* (= Lakes H/I), *Great Holme's Field/Little Holme's Field* (= Lakes G & J) PFA lagoons were created and enclosed by chainlink fences. The proposed creation of a PFA complex at *Spinage's 'Field'* and *Thrupp Close* (= Lakes E & F) would further reduce available feeding territory, probably critically.

A list of similar species including 22 Amber List and 6 Red List birds is given in the BioScan Report (Number E1340R2; 2005). This report only gives information on birds observed by BioScan and does not classify the rest of the bird inhabitants recorded by OOS and others.

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<sup>6</sup> Eeles, RMG. (1992). *Territory and home range sizes of a colony of badgers at Culham, Oxfordshire, and comparisons with other areas*. Unpublished B.Sc.(hons) thesis.