Bath and North East Somerset Council			
MEETING: **Development Control Committee** MEETING DATE: **13 February 2013**	AGENDA ITEM NO:		
REPORT OF **David Trigwell, Divisional Director of Planning and Transport Development.** REPORT ORIGINATOR: **Mrs A Hoey, External Consultant** DATE PREPARED: 25 January 2013			
AN OPEN PUBLIC ITEM			
BACKGROUND PAPERS: **Planning permission 97/02626/MINW** **S73 Applications 05/00723/VAR, 05/01993/VAR and 11/00022/VAR**			
TITLE: Enforcement Report: **Parcel 5319, Charlton Field lane, Queen Charlton, Bristol, BS31 2TN**			
WARD : **Farmborough**			

1.0 PURPOSE OF REPORT

To seek Members' authority to serve an enforcement notice in the event that Members refuse planning permission for the following applications re the Composting site at Queen Charlton:-

05/00723/VAR, Variation of condition 13 and 16 of Planning Permission: 97/02626/MINW dated 02/12/1998 to allow permanent recycling of cardboard waste and increase in truck movements.

05/01993/FUL - Increase size of concrete storage area and variation of condition 13 of planning permission 97/02626/MINW to accept wood waste.

11/00022/VAR Variation of conditions 13, 16 and 19 of permission no. 97/02626/MINW to extend composting operations, increase vehicle movements and permit cardboard and wood recycling (Temporary use of land for 10 years for manufacture of organic green compost as amended by revised drawings received 14th April 1998 at land formerly Queen Charlton Quarry).

2.0 LOCATION OF PLANNING CONTRAVENTION

Parcel 5319, Charlton Field lane, Queen Charlton, Bristol, BS31 2TN ("the Property"), as outlined in bold on the attached site location plan (Appendix 1).

3.0 OUTLINE OF PLANNING CONTRAVENTION

The planning contravention is the continued use of the site for the production of compost. The above applications, which seek to legitimise the continued use of the site, are recommended for refusal in a separate report elsewhere on the agenda for this meeting.

The continued operation of the composting site has been held by the Secretary of State to be EIA development with the result that the Council is prohibited from approving the development without considering an environmental statement. No environmental statement has been provided.

4.0 RELEVANT PLANNING HISTORY

Composting operations began at the site in January 2001 under planning permission 97/0626/MINW. Condition 19 of that permission states;

The green waste composting operations authorised by this permission shall cease not later than 10 years from the commencement of composting operations.

Reason: To enable the Local Planning authority to review then impact of the development and to maintain the openness of the Green Belt.

Applications 05/000723 and 05/01993, submitted in 2005, sought to vary conditions in the 1999 permission relating to the range of materials that may be composted, and lorry movements. Application 05/01993 also sought retrospective permission for the extension of the concrete hardstanding at the site. These applications were granted in November 2006 but the two decisions were quashed in February 2009 because the court held that they required to be screened. Hence the applications require to be redetermined.

The period of use permitted by permission 97/02626 expired in January 2011.

Application 11/00022 seeks permission for a further period of use. The original application stated that the applicant sought permission to continue the use for 18 months after permission 97/02626, however in a letter dated 25 April 2012, the applicant changed this to 18 months from a favourable determination of the application.

As explained in the separate report, these applications cannot be approved because the information accompanying the applications is not considered to constitute an environmental statement.

5.0 CORRECT APPROACH TO ENFORCEMENT ACTION

<u>The law</u>

It is very important to appreciate that the purpose of the EIA Directive is to ensure that development which is likely significant effects on the environment is not allowed to take place *before* those effects have been properly assessed. Article 2(1) of the Directive states -

> 'Member States shall adopt all measures necessary to ensure that, *before consent is given*, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.'

The Directive is therefore breached if EIA development is allowed to take place at times when there has been no assessment of the likely effects. It is no answer to say that an assessment done after the development has started would be just as good, nor that the benefits of the development are so great that the unassessed impacts just have to be accepted, whatever they are.

The Directive therefore suggests that enforcement action *must* be taken in situations like the present. Since the EIA Regulations require that any application for retrospective planning permission in situations like the present must be refused, domestic law suggests the same (it is virtually impossible to envisage circumstances where it is necessary to refuse planning permission but not necessary to take enforcement action). Members should note that there is in fact no caselaw which addresses the present situation directly, presumably because no developer has been bold enough to argue that it might be proper to refrain from taking enforcement action in such a situation. However such caselaw as there is strongly indicates that the above suggestions are correct.

Wells v Secretary of State the Secretary of State
This considered a development consent for mineral working granted without the necessary environmental statement having been submitted. Enforcement action was not in issue as the development was not taking place. The ECJ held that the Directive required that environment assessment should be carried out at the earliest possible stage in the development consent process and that, if a development consent was granted without the necessary prior environmental assessment, the Member State had to consider *revoking or suspending* the consent while the assessment was carried out. If a planning permission has to be revoked or suspended while an assessment is made, it cannot be acceptable for the development to take place in the meantime. If it does, it should presumably be subject to enforcement action.

Commission v Ireland
This concerned Irish legislation on retrospective planning permissions for EIA development, which, if anything, was more restrictive than the equivalent UK legislation. Irish law allowed for EIA development started without prior environmental assessment to be legitimised by a grant of retrospective permission, with an environmental statement being considered at the time the permission was granted (ie late). The ECJ held that the legislation was inconsistent with the requirement in the Directive that a developer should not be able to start its development until after likely environmental effects had been assessed. However the ECJ did not rule out the grant of retrospective permission following late consideration of an environmental statement in exceptional circumstances.

Ardagh Glass v Chester CC
In this case the Court of Appeal endorsed the following comments by the first instance judge in relation to retrospective planning permission granted after late consideration of an environmental statement -

> "The [decision-taker] ... should also consider, in order to uphold the Directive, whether granting permission would give the developer an advantage he ought to be denied, whether the public can be given an equal opportunity to form and advance their views and whether the circumstances can be said to be exceptional. There will be no encouragement to the pre-emptive developer where the [decision-taker] ensures that he gains no improper advantage and *he knows he will be required to remove his development unless [he] can demonstrate that exceptional circumstances justify its retention*." (Italics added)

Sullivan LJ added -

> '… there is a discretion to grant retrospective planning permission conferred by section 73A and section 177, but there is no requirement that planning permission shall be granted. It is therefore perfectly possible for the decision taker to ensure that the discretion is exercised so as to conform with the ECJ's judgment [in *Ireland*] …' (Paragraph 31)

The implication is that, in unexceptional cases (presumably the majority of cases), retrospective planning permission following late consideration of an environmental statement will *not* be granted and enforcement action will be taken. If so, it is impossible to see how it could ever be right to refrain from enforcement action in a situation like the present, where there is no environmental statement at all.

Enforcement notice

There are only three enforcement measures available to the Council, an enforcement notice, a stop notice (which depends on there being an enforcement notice) and an injunction. An injunction requiring the cessation of the use of the site would have the same effect as a stop notice but would not prevent the development from acquiring immunity.

For the above reasons officers strongly recommend the service of an enforcement notice. Whether the Council should also serve a stop notice is considered below.

Expediency

It must be stressed that the reason for the service of an enforcement notice will be that the development is EIA development, that there has been no assessment of the environmental effects, and that, unless enforcement action is taken, the Council will be participating in a breach of the Directive. This is relevant to the issue of expediency. It is axiomatic in a situation like the present that the development is (at least) likely to have (at least) significant effects on the environment. Beyond this the merits of the development and the requirements of the development plan are not material. If the developer has good reason for not having produced an environmental statement, this might be relevant to issues of expediency, or at least to the timing of enforcement action in some cases. However where, as here, there are applications for retrospective planning permission, the local planning authority will already have decided to determine the applications: the reasons for the absence of an environmental statement will be taken into account in reaching this determination decision and should not be reconsidered at the stage of deciding on enforcement action.

There may be cases where it is expedient to take enforcement measures in addition to an enforcement notice for the purpose of securing effective compliance with the Directive. However it is impossible to see how considerations of effectiveness could ever make it expedient *not* to serve an enforcement notice. Only an enforcement notice prevents continuing unassessed EIA development from acquiring immunity.

Stop notice

In *Ardagh Glass* the Claimant contended that EIA development which had started without a prior assessment of environmental effects should be immediately stopped and should therefore be met with a stop notice as well as an enforcement notice. Dealing with this Sullivan LJ said -

> '… once it is accepted that retrospective planning permission for unauthorised development is permissible in principle (subject to certain conditions), there is no substance in the appellant's further submission … that the respondent was bound to issue a stop notice and not merely to issue an enforcement notice. The latter was sufficient to ensure the removal of the unauthorised EIA development if retrospective planning permission was not granted either by the respondent under section 73A, or by the Secretary of State under section 177 …'

The present case is, as matters stand, more extreme than the situation in *Ardagh Glass*, because in the present case there has been no environmental statement at all, not merely a late one. However, as has been explained in the separate report, if an enforcement notice is served, the developer will be given a further opportunity to produce an environmental statement. If it does not take this opportunity, the Secretary of State will have no choice but to uphold the enforcement notice, which will lead to the removal of the development. If, however, the developer takes this opportunity, the Secretary of State will be empowered to grant retrospective planning permission, the situation considered by Sullivan LJ. It follows that the above reasoning is in substance applicable in the present case. Further it should be noted that a stop notice could not be used to prevent the development from continuing only while there is no environmental statement: any stop notice would remain in force until the determination of the enforcement notice appeal, which might be a considerable period.

Annex 3 of Circular 10/97 advises that a stop notice should 'only prohibit what is essential to safeguard amenity or public safety in the neighbourhood or to prevent serious or irreversible harm to the environment in the surrounding area' (3.21) and that a thorough assessment of the likely consequences (benefits and costs) of serving a stop notice should be made (3.19).

In the present case, since the only purpose of a stop notice would be to prevent the continuation of unassessed EIA development, a stop notice would have to stop all composting activities. It would be illogical (and therefore wrong) to confine the stop notice to only parts of the unassessed development. There having been no proper assessment, it is not known whether any aspect of the present use is causing 'serious or irreversible harm to the environment in the surrounding area'. As for safeguarding 'amenity or public safety in the neighbourhood', the development in its present form has been operating for the best part of a decade and the Council has previously granted planning permission for it (under different EIA Regulations). It is true that there have been breaches of the environmental permit (against which enforcement action has been taken), but there is no evidence that it is necessary to stop usage of the site to protect amenity or public safety. In a recent case it was found that odour from the site was *not* causing an actionable nuisance to nearby residential properties. In any event, as has been pointed out, the cessation of use achieved by a stop notice might only be temporary.

In these circumstances service of a stop notice would not be in accordance with C10/97.

The costs inflicted by a stop notice requiring the cessation of the use of the site would be considerable, comprising :-

Loss of at least 8 full time jobs and 4 part time jobs on site
Closure of the only composting facility operating in BANES
Diversion of deliveries of material for composting to alternative facilities

Additional costs to contractors who use the facility, with possible impact on employment

Officers consider that these costs substantially outweigh the limited benefits of a stop notice.

For these reasons Officers do not recommend service of a stop notice.

6.0 HUMAN RIGHTS

It is not apparent to Officers that enforcement action will interfere with the property or possessions of any human. Even if it does, the interference with his rights under Article 1 of Protocol 1 (peaceful enjoyment of possessions) is justified by the pressing social need to comply with the requirements of the EIA Directive. Anything less than the service of an enforcement notice will not secure compliance with the Directive.

7.0 RECOMMENDATION

That delegated authority be granted to the Development Manager, in consultation with the Planning and Environmental Law Manager, to issue an enforcement notice requiring the cessation of the use of the site.

This matter will be reported back to Members in the event that it proves unnecessary to take enforcement action.

The enforcement notice will be in accordance with the Council's strategy and programme and will follow consultation with the appropriate professional or technical officer of the Council in respect of matters not within the competence of the Head of Planning Services.

A proper record of the action taken will be made.