

23 May 2011

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Your ref: JB13/ED04/36313.2

Dear Sirs

**Section 51 Planning Act 2008
Section 74 (4) Planning Act 2008
Proposed Brig Y Cwm (Energy from Waste Facility) Order**

I refer to your letter of 13 May 2011 in which you ask the IPC for a response to the approach which you intend to take in relation to proposed amendments to the application and to the submission of a document which you describe as the ES Addendum. The IPC has now considered the procedural implications and I am writing to set out the IPC's understanding of the legal framework and to provide Section 51 advice about the application. Your letter dated 13 May 2011 (and this Section 51 advice) has been passed to the Examining authority.

In summary (as explained further below) it is considered that providing an opportunity for the consultation bodies and others to express views on the environmental information is not sufficient in itself to make the argument that the proposed application changes should be accepted. Whilst any non-statutory consultation can be prayed in aid of the point, it is not the sole determining factor. Further information is required to enable the Examining authority to decide whether or not the proposed amended application can be accepted for examination.

Environmental Information

It is noted that you intend to provide updated information about the cumulative effects of development which is not integral to the proposed NSIP. This is "any other information" (as defined in the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("the EIA Regulations")) because it is information provided voluntarily by an applicant.

Regulations 8 and 9 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 ("the APFP") and Regulation 13 of the EIA Regulations do not apply in these circumstances. In *Linda Davies*¹ it was held that it is not necessary that additional environmental information provided voluntarily should be publicised and consulted on in accordance with procedures for the original environmental statement, and the EIA Regulations do not prescribe any publicity requirements in relation to "any other information" provided voluntarily by an applicant during the examination. If your client chooses to carry out non statutory consultation and publicity this should not cite the APFP and EIA Regulations and should not require representations to be submitted to the IPC as

¹ *The Queen on the application of Linda Davies v Secretary of State for Communities and Local Government 2008*

would be the case under the specific Regulations you mention. This will lead to confusion about the nature and status of any representations made. On receipt of the ES Addendum the Examining authority can provide an opportunity for interested parties and others to comment as part of the examination.

We consider that it would be sensible to send copies of the ES Addendum to the consultation bodies for comments before the preliminary meeting. Again however, this is a non-statutory process that might assist interested parties to make timely and informed written representations to the Examining authority.

Proposed changes to the application

The following points explain the legal framework which enables an Examining authority to take a decision in relation to a changed application:

- S37 of the Planning Act 2008 (“PA2008”) – an application for an order granting development consent may be made to the IPC
- S55 PA2008 – the IPC must decide whether or not to accept *the* application
- S56 PA 2008 – the applicant must give notice of *the* application to prescribed persons and others
- S98 PA2008 – the ExA is under a duty to complete examination of *the* application
- Rule 2(1) The Infrastructure Planning (Examination Procedure) Rules 2010 – “application” means an application for development consent under s37 and includes any amendments made to *the* application
- S114(2) PA 2008 – regulations may regulate procedure to be followed if the decision-maker proposes to make an order granting development consent in terms which are materially different from those proposed in *the* application giving a strong implication that there is an implied power to grant a development consent order on terms that are different to those proposed in *the* application. The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 regulate the procedure to be followed in circumstances where an application is amended to include additional land for compulsory acquisition. The Infrastructure Planning (Examination Procedure) Rules 2010 do not provide a procedure for the examination of a materially different application.
- Development may not be permitted which is in substance not that for which permission has been applied². A decision whether or not an amendment is substantial must not be perverse under the *Wednesbury* principle³. In both cases cited it is fundamental to the exercise of a decision-maker’s discretion whether those affected by a proposed change would have been deprived of an opportunity to be consulted about the change.

It is considered therefore that the Examining authority may, depending on the facts, lawfully accept an amended application for examination. However, if the Examining authority were to accept an amended application which was subsequently considered to be “substantially different” from the application which was made to the IPC under s37 of the PA2008 any decision to grant development consent could be open to challenge.

² *Bernard Wheatcroft Ltd v Secretary of State for the Environment and Another* 1982 43 P & C R 233

³ *Breckland District Council v Secretary of State for the Environment and Hill* 1993 65 P & C R 34

At this stage the Examining authority needs to be satisfied that the application as you propose to amend it is not a substantially different application. Factors (although not necessarily an exhaustive list) which may be relevant to the decision include:

- Changes in conclusions of environmental impact assessment (“EIA”) carried out in respect of the application as submitted, addressing relevant topic areas such as landscape and visual impacts, traffic and ground stability
- Proposed difference in size and scale of the proposed development
- Any other non-EIA implications of changes, for example in relation to the mitigation and restoration benefits of the Ffos y Fran land reclamation project
- Any changes to the proposed limits of deviation identified in the draft development consent order and works plan as submitted
- Degree of non statutory publicity and notification carried out (in view of the absence of a prescribed process in PA 2008 – see above) and the extent to which the examination provides an opportunity for those who should have been consulted on the changed development to make their views known to the Examining authority.

Providing further information

Full legal submissions covering the above points (and any others considered relevant) should be prepared as soon as possible. If the Examining authority is able to confirm its view at the preliminary meeting on the proposed changes, the timetable to be set would be likely to be based on the immediate availability of the ES Addendum and other amended documents. These documents would be made available on the IPC website at the start of the examination.

It should be clear where the ES Addendum has the effect of changing the environmental statement to address proposed amendments to the application or where it provides other environmental information about cumulative effects. An explanation should also be provided to explain what and why changes have been made to plans and other application documents.

I hope this Section 51 advice is helpful.

Yours faithfully

Mark Wilson
Case Leader

The IPC gives advice about applying for an order granting development consent or making representations about an application (or a proposed application). The IPC takes care to ensure that the advice we provide is accurate. This communication does not however constitute legal advice upon which you can rely and you should note that IPC lawyers are not covered by the compulsory professional indemnity insurance scheme. You should obtain your own legal advice and professional advice as required.

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