



Welsh Government - Post Hearing Note in response to Action Point 20

1. Introduction

This note is submitted on behalf of Welsh Government in response to the following Action Point.

20	IACC, Gwynedd Council, NWP and WG to include concerns regarding: section 106 in a separate post-hearing note; and, level of detail within the Code of Construction Practices
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Following the DCO issue specific hearing (“ISH”) the Welsh Government (“WG”) was provided on 26 October 2018 with a first draft of the proposed section 106 prepared by Horizon Nuclear Power (“HNP”).

Detailed comments were returned to HNP on behalf of WG on 10 November. The WG welcomes sight of the draft section 106 agreement and the draft timeline it has received from HNP in relation to proposed future engagement with both IoACC and the WG on the section 106 agreement.

In the circumstances, we do not consider it productive to submit to the Examining Authority (“ExA”) all of our extensive detailed comments on the first version of the draft section 106 agreement (these run to some 14 pages), including both detailed drafting points and other more fundamental points. We will though be happy to share these comments if so requested by the ExA and at future deadlines if appropriate progress on outstanding issues has not been made in accordance with the suggested revised timeline set out in a letter from Horizon Nuclear Power to the ExA dated 12th November 2018.

This note therefore focusses primarily on the following:

- a) matters relating to the proposed “Programme Board” (as described in the Code of Construction Practice (“CoCP”) or “WNMPOP” (as described in the section 106 agreement) and the interaction with the section 106 agreement in respect of contingency funding; and
- b) Key gaps in the section 106 agreement from WG’s perspective

By way of background, WG is keen to ensure that effective mitigation is secured both pursuant to DCO requirements and the section 106 agreement. The significant adverse impacts that this project will result in across the region in Wales if ineffective mitigation is secured (pursuant to a DCO granted by the Secretary of State) all fall (with the exception of North Wales Police) within areas of devolved responsibility of Welsh Ministers. The project is intended to benefit the UK as a whole and the costs of mitigation should not be borne by the Welsh public purse.

Areas of responsibility pursuant to the Government of Wales Act 2006 (as amended by the Wales Act 2017) which are devolved to WG and which WG therefore provides funding for (including to local authorities and other public bodies) include;

- Economic development;
- Education and training;
- Environment;
- Health and health services;
- Highways and transport;
- Housing;
- Tourism;
- Planning (TCPA 1990); and
- Welsh Language.

The WG is keen to fully respect and support the key role that the local planning authority (Isle of Anglesey County Council – “**IoACC**”) will play in relation to the S106 agreement as host authority. The WG will therefore work with HNP, IoACC, other affected local authorities and other key stakeholders as part of a Team Wales approach and focus its attention on:

- a) mitigation of impacts which will be felt beyond the administrative boundary of IoACC and/or where legal responsibility or funding sits with the WG. Examples include: the strategic highway network (A55 and Britannia Bridge), tackling rehousing in cases of homelessness in neighbouring local authorities, post 16 education and training, economic development across the region, health, heritage matters and tourism beyond Anglesey;
- b) the role of WNMPOP/ the Project Board and contingency funding for mitigation in the event that unforeseen impacts arise so to avoid the cost of mitigation being borne by the public purse; and
- c) supporting IoACC in its work to secure effective mitigation for Anglesey

2. CoCP - WNMPOP/ The Programme Board

WG welcomed a recent meeting which was held by WG officers with HNP and IoACC officers to discuss the proposed Programme Board and its interaction with the section 106 agreement. These discussions were generally positive. WNMPOP is to be the subject of further discussion and HNP is to work up a revised proposal for consideration by WG and IoACC. WG looks forward to positively engaging in this process.

WG welcomes the proposed role in principle of a Programme Board in respect of monitoring and the release of contingency funding for mitigation measures under the section 106 agreement. It was clear from the recent meeting that this role would not impact on IoACC’s role as discharging authority in respect of DCO requirements, enforcement of the section 106 agreement, WG’s appellate role in respect of DCO requirements, or IoACC’s role in respect of the section 106 agreement generally on matters other than contingency funding/ WNMPOP.

There are though a number of concerns with the current mechanism for securing the Programme Board/ WNMPOP and release of contingency funds:

1. The draft section 106 currently doesn't include figures and so it is not currently clear what money will be allocated for mitigation and what will be contingency. WG's priority is to ensure effective mitigation for all anticipated effects and full implementation of mitigation in accordance with the assessments/ assumptions carried out in the environmental statement. Contingency should be for mitigation of unforeseen effects and available when needed to avoid adverse impacts;
2. As a number of parties have noted, the so-called "control documents" which are referred to in the draft DCO requirements do not provide sufficient control. They are currently drafted at a very high level, and do not read as final form documents, more like a draft document containing a series of proposals which may or may not be taken forward in a final version.
3. Revised "control" documents should be submitted for agreement by the appropriate body. The DCO requirements also need to make it clear what any revised and final document must contain (which is currently unclear) in order to ensure the required mitigation is subject to the approval of the relevant local planning authority.
4. Additional specific DCO requirements are also needed on key mitigation requirements so the DCO is clear on its face as to what needs to be achieved, with clear enforceable trigger points, rather than being buried as vague proposals within generic lengthy "control" documents. WG will provide a list of additional specific DCO requirements with its written representations. Key examples include: detailed phasing (as anticipated by the phasing strategy), delivery of worker accommodation and trigger for delivery of the MOLF.
5. The Code of Construction Practice ("CoCP") does not effectively secure the Programme Board. It does not include specific obligations or clear triggers (which you would expect to see in a section 106 agreement) relating to establishment and conduct of the Panel, or obligations relating to funding/ resourcing of the various groups which public bodies are expected to actively participate in. Nor does it secure detailed terms of reference or a binding dispute resolution mechanism. These are all matters which should be secured in the section 106 agreement but are currently lacking;
6. It is worth noting that the scope for this section 106 agreement differs from the usual approach of a single local planning authority collecting defined contributions and then passing to third parties. Instead, under the draft section 106 agreement there are to be capped contingency funds per topic area and a decision will then be needed by WNMPOP as to where and how these funds should be spent to mitigate impacts across North Wales on a range of priorities. Based on the approach of the current draft s.106, contingency monies aren't to be transferred to IACC, but to the body which WNMPOP directs. This is acceptable in principle to WG, but a number of amendments are required to the section 106 and DCO to give effect to this – see below.
7. The drafting of the section 106 agreement around the contingency funds is currently too retrospective. Based on the majority of the schedules, significant adverse effects will have arisen before payment is to be made. This is unacceptable in terms of compliance with planning policy and environmental legislation. Clearer eligibility criteria need to be set out to and clearer parameters for decisions of the programme board. There is also a need for increased clarity as to what contingency funds can be drawn down when. In contrast, the Hinkley Point section 106 agreements includes clear criteria, prioritisation of spend to the areas most affected, staggered and early release of payments to public bodies. WG has raised in its relevant representation the need to ensure that the Site Campus is delivered

and occupied. There should also be a housing fund to mitigate shortfalls and address impacts on local housing market. Contingency measures should also be readily available in the event of unforeseen circumstances. WG also recognises the need for some flexibility to respond to unforeseen circumstances.

8. Under the current proposals, there are no reciprocal binding obligations between the key proposed members of the Project Board (HNP, IoACC and WG) who will be voting on what is likely to be substantial contingency funds which may be required to provide mitigation across the North Wales region as a whole. There are currently no detailed terms of reference or agreed legally binding process for dispute resolution in respect of WNMPOP. The proposed draft section 106 also seeks to place obligations on the WNMPOP and sub-groups, yet those bodies will not be bound by the section 106 agreement. WG is not currently listed as a party to the agreement to sign up to these provisions;
9. We need much clearer contractual commitments on HNP (which can be relied on by WG) relating to the establishment, membership, operation and resourcing of WNMPOP and Sub-Groups and securing the Terms of Reference and dispute resolution mechanism.
10. Security for Contingency Funding – based on current drafting HNP is contractually obliged to pay monies when directed by WNMPOP (up to capped amounts). The relevant HNP signatory is a special purpose vehicle. The obligations should be worded in negative terms to prevent further works unless the monies have been paid. WG also wishes to see either monies paid into an escrow account at the outset (with annual top up payments) which can then be called upon or the provision of adequate security
11. Clause 6.2 of the draft section 106 agreement must be deleted as this provides that the WNMPOP could be disbanded with no certainty of what would replace it, with risk that mitigation required across North Wales would not be secured.
12. Parties to the section 106 agreement are to be discussed further at the next tripartite meeting. We reserve WG's position pending these discussions, in the context of how best to secure WNMPOP and release of contingency monies, compliance with terms of reference, a binding dispute resolution mechanism between key WNMPOP parties, funding of participation by stakeholders in the sub-groups and any obligations specifically relating to WG functions (e.g. relating to the strategic highway network, Tourism Wales, heritage matters etc).
13. WG and IoACC appear to agree that Community Fund allocation (which community groups can bid for) should not be dealt with by WNMPOP. Instead WNMPOP should retain its focus on strategic matters relating to the issuing directions for the release of contingency funding and an advisory role in respect of mitigation.
14. It is currently unclear which members of WNMPOP are proposed to have a vote on key strategic issues. HNP is looking into the possibility of having an independent chair of WNMPOP, which WG supports in principle. HNP has previously proposed one Community Liaison Group be a member of WNMPOP (although this may change if the Community Fund is dealt with in a different manner). Whilst this and other community liaison groups should have a way of voicing concerns, the appropriate forum may not be WNMPOP. Care needs to be taken over which bodies have a vote on WNMPOP, which is intended to be for strategic matters. WG is concerned this could distort voting on strategic issues affecting north wales (such as re-housing in other local authorities, strategic highway matters etc).

3. Section 106 Agreement – Outline of Key Concerns/ Gaps

As noted, detailed comments have been provided to HNP on the draft section 106 agreement. The following outlines a number of key gaps and concerns from WG's perspective.

1. HNP Wylfa Limited is a special purpose vehicle with limited assets and so security or payment on account may be required in respect of restoration obligations and contingency funds or adequate security for payments should be provided
2. Many of the obligations are not triggered until the Implementation Date (as defined in the draft agreement). However, as defined, this will exclude the SPC Works, Marine Works, and Offline Road Works – which could take 2 years to complete and result in over 3,000 workers towards the end of this process without any mitigation being triggered under the section 106 agreement.
3. The draft DCO section 106 agreement currently contains no restoration obligation or security and so relies on those obligations under the SPC section 106 to be entered into. This requires further discussion to ensure that this agreement covers the full extent of restoration. There is also a potential difference in the scale of works under the TCPA application and those under Work No.12 (SPC Works), which contains provision for other Associated Development that includes excavation works.

4. Third Party Payments –:

- a) The agreement currently allows HNP to refuse payment to third party recipients. Payments to third parties cannot be dependent on HNP first entering into (at its discretion) an undefined deed of covenant. At the very least, a simple form of deed of covenant should be annexed to this section 106 agreement in a form where it only requires execution by the relevant third party and no other, with covenants given to both HNP and IoACC
- b) Mechanisms for payments to third parties – the section 106 agreement envisages payments being made to “third parties” other than IoACC. We have suggested a number of drafting points to lawfully secure these payments, whilst ensuring they are enforceable and bind successors in title:
 - i. All payments which aren't to the LPA should be worded in negative terms. The agreement envisages payments being made to people other than the Council (e.g. on direction of WNMPOP). The payment obligations should therefore be worded in negative terms to ensure the obligations fall within section 106(a) to (c) of the 1990 Act i.e. no operation unless the payment has been made etc. This will also assist IoACC enforcement.
 - ii. In addition, suggest amending para 5 of Schedule 19 of the DCO to amend the effect of s.106(d) of the 1990 Act on the DCO to expressly provide for payments to be made to other named persons (such as WG) under positive obligations under the section 106. Paragraph 5(2) of Schedule 19 of the draft DCO already includes an amendment to section 106 of the 1990 Act.
 - iii. Article 9(3) of the DCO should be amended to expressly refer to all covenants in this Deed. An article could also be included in the DCO preventing a disposition of the site unless a deed of covenant has been entered into by the donee agreeing to be bound by the terms of the section 106 agreement.

5. Schedules – general comments

- a. Need additional clarity over level of payments and the proportion which is to be contingency
- b. Need to see key annexes (e.g. Supply Chain Action Plan)
- c. WNMPOP and contingency structure to be discussed further as per comments above
- d. Throughout all Schedules covenants to be worded in negative terms to aid enforcement and clarity over the timing of the obligations e.g. no commencement or no operation unless [x] has been carried out

6. Tourism

- a. A contribution needs to be included for the purposes of mitigation of effects on tourism beyond North Anglesey. This contribution is required in advance of construction start for use on marketing throughout the wider KSA.
- b. WG are also concerned that there is no contingency for funding to promote tourism in the areas of Gwynedd or Conwy Councils, the wider KSA/ Tourism Wales.

7. Employment, Skills, Supply Chain

- a. This is an NSIP with a regional and national economic impact. The mitigation measures are vital for socio-economic impacts across Wales. The economic development function across the wider Wales region is the responsibility of the WG.
- b. The acceptability of the provisions in this schedule are dependent on what is contained in the Jobs and Skills Implementation Plan and the Supply Chain Action Plan which have not yet been provided by HNP despite repeated requests. It is now vital they are provided.
- c. Processes, programme for delivery, spatial coverage and monitoring all require agreement prior to the grant of the DCO.
- d. Funding of post 16 education/ training courses are WG's responsibility and so WG has a keen interest in ensuring the jobs and skills strategy is fit for purpose and adequately funded
- e. The s106 should commit HNP to fund, implement, and manage, at its own cost, the measures contained in the Jobs and Skills Implementation Plan and the Supply Chain Action Plan. Review points for the Jobs and Skills Implementation Plan should be agreed and included in the s106. The s106 agreement should commit to implementing and updated Jobs and Skills Implementation Plan on the basis that the current version of the Jobs and Skills Strategy presented in the DCO application requires further development. It is also not clear what relationship there is between the Jobs and Skills Strategy and Jobs and Skills Implementation Plan in the s106. Clarification is required.
- f. The Education Strategy should be defined to include a description of the existing programme of educational support and a commitment to deliver on that Strategy in the s106. Implementation of the Education Strategy should be secured in the s106.

8. Wylfa Newydd Employment and Skills Service (“WNESS”)

- a. WG should be included in the definition of “WNESS”;
- b. There is currently no commitment to a jobs and skills strategy or implementation plan to cover the operational workforce.
- c. There should be a stronger commitment to the WNESS and spatial coverage of it. This is said by HNP to be a key mechanism for mitigation as it allows backfilling to overcome issues of displacement.,

9. Worker Accommodation

- a. Clear phasing triggers relating to the delivery of worker accommodation are essential. It is vital that the section 106 secures mitigation measures, including contingency measures in the event that the occupancy rate of the on-site worker accommodation is lower than assumed in the ES
- b. “WAMS Oversight Board” – WG should be on this board and could be part of the role of Sub-group.
- c. WAMS is currently high level and so more specific obligations should be included in this section 106.
- d. The WAMS is a key component put forward by Horizon to mitigate the impacts of their non-home based workforce on the housing and tourism sector. There should be an absolute commitment to establish the necessary oversight board to ensure effective operation of the WAMS.
- e. An accommodation officer service will also be required for Gwynedd and Conwy.
- f. The section 106 as drafted provides HNP a right of first refusal on new housing delivered by IoACC with the housing contribution. This is unacceptable as the purpose of the fund is to increase the supply of suitable stock e.g. to re-house (including avoiding a burden on the public purse), or provide opportunities for first time buyers.
- g. Monitoring beyond IoACC boundary to be discussed in the context of the other affected authority areas and who will be providing data for such areas/ receiving funding for this role
- h. “Accommodation Contingency Fund” – release of monies is based on there first being a significant adverse effect, which is too retrospective. Request expanding contingency to base it also on non- take up of bedspaces on the site campus – as the 4,000 bedspaces are a key provision in the ES to limit impacts on the housing and tourism accommodation sector.
- i. The test for release of the housing contingency fund is dependent on the availability of accommodation monitoring data which has not been defined or agreed. WG request that the release of the contingency fund is not based on an assessment of significant effects but on an agreed set of indicators and monitoring against those indicators.
- j. Funds will need to be made available for a period post construction in case there is any delay in the impacts occurring that require mitigation if the “plan, monitor, manage” approach is to be endorsed.
- k. Need to see Annex 1 WAMS Terms of Reference

10.Education

- a. Suggest including further clarity as to what part of the contribution each authority is entitled to and there is also a need to ensure that mitigation for post 16 education is secured

11.Transport

- a. Mitigation and monitoring mechanisms to address impacts on the strategic highway network (for which the WG is the strategic highway authority) are not currently covered. WG is concerned about highway impacts on the strategic highway network both on Anglesey and beyond (A55 and Britannia Bridge). The A55 is of huge economic value to Wales and the bridge already experiences congestion.
- b. Based on the current proposal of HNP for a single park and ride site only, there is the potential for there to be significant adverse impacts on Britannia Bridge and A55. WG therefore requests the following:
 - i. A commitment to additional park & ride sites as previously requested by WG, and running bus services through these sites;
 - ii. Contribution to the Third Menai crossing to support early delivery and provide resilience in bad weather (having regard to cumulative impacts with the Grid DCO application and announcement of the preferred route for the third crossing). It is worth noting that HNP have raised both issues as justification to support their consultation in respect of the *Request for Non-Material Change no.5 HGV Movements (November 2018)*; and
 - iii. Clear commitments preventing pouring of nuclear concrete until the MOLF is delivered or limiting HGV movements to a maximum of 320 per day throughout the construction period.
 - iv. WG is keen to be involved in a discussion around edibility for use of the transport contingency funding to mitigate unforeseen impacts on the strategic road network.
- c. The release of the transport contingency fund is dependent on demonstration (unclear by whom) on significant adverse impacts on the transport network. There are no criteria for determining what is a significant adverse effect. Moreover, it will be difficult to determine without independent assessment and in the event that a significant adverse effect was determined, the ability to instigate timely mitigation is questionable. WG request that the release of the contingency fund is not based on an assessment of significant effects but on compliance with traffic management measures contained in a final revised CoCP (or other relevant management plans).
- d. Costs in relation to the strategic network for Highways Condition Surveys, Highways Design and Supervision Fees, contributions to traffic management schemes or walking and cycling initiatives should be provided for.

12. Health & Welfare

- a. WG funds health provision in Wales which is a devolved function. The protocol for referrals of non home based workers to NHS services is unclear. WG are concerned that these costs arising from the project should not be met by the health authorities. WG requests that the s106 includes a provision to agree a protocol for referrals to NHS services and ensures delivery of mitigation through a firm commitment to deliver the on-site medical facility (at the appropriate time) and that all necessary financial contributions are also secured and will be available in a satisfactory manner

13. Environment and Historic Heritage

- a. WG (CADW) has concerns with the heritage aspects of the proposed section 106 agreement in particular;
 - i. There is a need for a Conservation Management plan with clear binding commitments;
 - ii. There is a significant adverse impact on the registered park and garden and currently a lack of commitment to implement the mitigation measures. It is not acceptable that the Cestyll Gardens Payment may not be made until the Operational Period or that it is subject to a reasonable endeavours clause and lack of commitment to implement necessary measures. The measures need to be implemented and there has been plenty of time to reach agreement with third parties or secure necessary powers.
 - iii. There is also a need for HNP to provide a commitment to the provision of funds for the assessment, recording and archiving of artefacts found during onsite excavations.
 - iv. There is also a need for HNP to provide a commitment to the provision of funds for restoring historic buildings in the event of damage as result of construction activities.

14. Community Fund

- a. WG do not consider WNMPOP should be responsible for community fund allocations and that WNMPOP should focus on more strategic matters.

15. WNMPOP and Contingency

- a. see earlier comments above in respect of the proposed approach by HNP to this matter.

The Welsh Government is committed to working with HNP and IoACC to seek to resolve these issues and once again welcomes the proposed engagement in respect of the section 106 agreement and WNMPOP approach.

13 November 2018