CITY & COUNTY OF SWANSEA

Fourth Deadline Comments

Abergelli Power Project

PINS REFERENCE: EN010069

CCS EXAMINATION REFERENCE: 20011204

CCS APPLICATION REFERENCE: 2018/1289/DCO

EN010069
Abergelli Power Limited: Proposed gas fired power station at land adjacent to Felindre Gas Compressor Station, Felindre, Swansea

Deadline 4 Submission

The following document constitutes CCS Deadline 4 Submission. These responses have been prepared to respond to the Deadline 3 submissions primarily submitted by the applicant.

Responses have only been provided elsewhere where the LPA considers it necessary and may aid the examination. Responses have not been made to the Compulsory Acquisition Hearing in which the Local Planning Authority did not participate.

The response comprises the following appendices:

Appendix A) CCS Response to Written Summary of Applicant's Oral Submission on Environmental Matters Issue Specific Hearing including Appendices (Deadline 3)

Appendix B) CCS Response to Written Summary of Applicant's Oral Submission on Draft Development Consent Order Issue Specific Hearing including Appendices (Deadline 3)

Appendix C) CCS Response to Applicant's Comments on Deadline 2 Submissions

Appendix D) CCS Response to Draft DCO (Revision 3)

Appendix E) CCS response to Updated Landscape and Ecological Mitigation Plan (Version 3)

Appendix F) "The Restoration and Aftercare of Coal and Aggregates Workings" – Capita Symonds 2009

Appendix A

CCS Response to:
Written Summary of Applicant's Oral Submission on Environmental Matters Issue Specific Hearing including Appendices (Deadline 3)

CCS has comments to make on the Hearing itself but considers it may be useful to update the Inspector on certain changes since the Hearing.

Agenda Item 6 – Reference 7

Changes since the LIR Summary:

1) CCS would like to update the Examining Authority in respect of the Strategic Site D of the Emerging Local Development Plan (Llangyfelach). Members of the Council resolved to approve the application on 8th January 2019 subject to conditions and a S106 agreement. The latter is currently being prepared. Under The Town and Country Planning (Notification) (Wales) Direction 2012, the Council have notified the Welsh Government of its intention to grant planning permission contrary to the provision of the Development Plan currently in force. The Welsh Government have 21 days to consider whether to "call-in" the application from 28th January 2019.

2) In addition, CCS expect to receive the Inspector's Binding Report into the Emerging LDP in the week commencing 4th February 2019. This should provide clarification on issues raised during the Examination process but in essence, the Council will have a statutory duty to adopt the LDP within 8 weeks (from receipt of the Binding Report). Once adopted, this would supersede the Unitary Development Plan as the statutory development plan for Swansea in accordance with S38(6) of the Planning and Compulsory Purchase Act 2004 (as amended).

3) Finally, CCS can confirm that the applicant's noise consultant and CCS Pollution Control Officer have been in dialogue regarding the noise limits included within the DCO which are commented upon below in the relevant section(s).

Appendix B

CCS Response to:
Written Summary of Applicant's Oral Submission on Draft Development Consent Order Issue Specific Hearing including Appendices (Deadline 3)

Agenda Item 4 – Development Consent Order Articles

Reference 1 – Article 2 Definitions

"Commencement"

Following concerns raised by CCS about the use of fencing being excluded from the definition of "commencement", the applicant has provided a post-hearing note that there is precedent for this wording in other Welsh DCOs (such as Swansea Bay Tidal Generating Station Order 2015 and the Glyn Rhonwy Pumped Storage Generating Station Order 2017).

As outlined in the Hearing, whilst precedent can be a relevant consideration, the Authority cannot comment on whether this issue was challenged/ considered as part of those Examinations. It should not be afforded the same weight as case law.

It is recommended that a straightforward amendment to this definition to clarify what the temporary fencing would constitute would overcome the concerns that CCS have raised.

[*Post-Hearing Note: It is understood that the applicant is willing to make a change to this effect which is welcomed and has been included in Draft DCO Version 4*.]

"Maintain"

With regards to "maintain", following a question from the Examining Authority, sets out precedent where the definition has been used before and cites the Wrexham Gas Fired Generating Station Order 2017 and the Hirwaun Generating Station Order 2015.

CCS maintains that precedent does not mean that the approach is acceptable or correct, just that it has been used before.

Precedent is not the same as case law (and won't have been subjected to the same levels of interrogation) which is itself open to debate, an example being the differing interpretations of the Redcar case in respect of 'associated development' that has been discussed in various Hearings as part of this Examination. In the same manner, just because the Secretary of State considered the gas and electrical connections to be associated development in the Hirwaun Generating Station Order does not mean that they would be definitively as part of this Order, or that the decision is legally sound if they do.

The circumstances and discussion behind both of those decisions has not been investigated to see whether any issues were raised or even whether they were considered in the first place. It should also be noted that the Hirwaun Order was also determined before the Dunnett Investments Ltd and Trump cases (cases provided at Deadline 2) and it is not clear whether these were assessed on a temporary permanent basis.

Therefore, precedent should be given very limited weight and each case should be determined on its merits.

Whilst the applicant refers to maintenance within the ES (and what has been assessed as such), as stated previously, there is minimal reference to maintenance specifically within the ES.

In terms of the post hearing note on maintenance activities, it would appear that the applicant has provided a comprehensive list of activities that are likely to be covered which is welcomed by CCS.

It would appear that the terms “replace and improve” would cover all of these items indicating that the terms “remove” and “reconstruct” can be removed without impacting on proposed maintenance activities.

Shut-Down Period

Following further discussions with colleagues in Pollution Control, the Council do not object to the proposed half hour shut down period indicated.

However, CCS remain concerned about the “start-up period” before 8am. Construction staff would undoubtedly arrive before this time so that they are ready to undertake the necessary activities/ talks on site which will lead to noise and disturbance. CCS would state that the start time should remain at 8am to ensure inevitable activities such as staff arrival on site before the designated start time are limited in the interests of residential amenity. With staff expected up to 15 minutes earlier, this would ensure the window for disturbance is from 7.45am onwards and the Council could take action if required as a result of increased disturbance before this time.

Agenda Item 5 – Schedule 1 Authorised Development

Reference 16 – Requirement 27 – Decommissioning

CCS wishes to point out that the “operator” on the draft Environmental Permit is Drax Power Ltd, even though the application was submitted by Abergelli Power Ltd. Article 6 of the draft DCO states that *“Subject to article 7 (consent to transfer benefit of the*

Order), the provisions of this Order have effect solely for the benefit of Abergelli Power Limited."

It is appreciated that Abergelli Power Limited is a subsidiary of Drax Group Limited so in practice it may not be an issue but they are separate Ltd companies and CCS would query why this is the case? CCS seeks confirmation that this discrepancy does not impact on future regulation of the gas fired power station.

In any event, CCS reiterates their stance that the current wording is not enforceable as a result of the inclusion of the phrase "subject to obtaining other necessary consents". The applicant acknowledges this when seeking to limit liability in their deadline 2 submission.

Reference 17 - Status of Environmental Permit application to Natural Resources Wales

See response above – CCS have queried why the operator in the Draft Environmental Permit differs from that in the application and included within Article 6 of the Draft Development Consent Order.

Reference 24 – Fees

CCS would maintain that any application fees should not be returned as this provision could inadvertently drive behaviour and the Council will have already undertaken work at cost to the public purse (and on the assumption that they are included within the DCO itself as opposed to a PPA).

However, should this provision be retained, CCS would suggest that it should reflect provisions within The Town and Country Planning (Fees for Applications, Deemed Applications and Site Visits) (Wales) Regulations 2015.

This provides for the fee to be returned *8 weeks after* the statutory determination period expires.

This has been included within the Glyn Rhonwy Pumped Storage Generating Station Order 2017, at Schedule 7, Paragraph 4.

[*Post-Hearing Note: The applicant has suggested that fees are included within a Planning Performance Agreement and CCS are satisfied with the approach being advocated by the applicant in this regard.]*

Annex 1 – Copy of Environmental Permit

CCS wishes to point out to the Examining Inspector that P1 of the Draft Environmental Permit shows that Drax Power are the "Operator" in reference to the points made above.

Appendix C

CCS Response to:
Applicant's Comments on Deadline 2 Submissions

Appendix A - 23.1.40 – Decommissioning: The applicant has indicated that the Directors would be bound by duties such as the Companies Act 2006 and would need to prioritise any creditors in the first instance.

Firstly, it should be clarified that being bound by these duties has not prevented other companies from going into liquidation unfortunately.

Secondly, CCS do not consider that they would be a creditor and as such, would not be protected above shareholders. In any event, this would only provide limited protection.

For information, the Welsh Government commissioned research into "The Restoration and Aftercare of Coal and Aggregates Workings" in 2009 which was undertaken by Capita Symonds Ltd (see Appendix F). This collated information on the progress of restoration and aftercare at mineral extraction sites in Wales which have ceased, permanently or temporarily, the winning and working of minerals during the ten year period since the end of February 1999.

The review identified 86 sites, 48 of which were sites where the permission for working had expired, or which had permanently ceased working for some other reason, and where restoration and/or aftercare conditions should therefore have been implemented. 20 of these were reported not to have complied with restoration and/or aftercare conditions, either fully or in part, and 16 of these were still considered by the Mineral Planning Authority to be an issue.

Paragraph 3.18 of this research indicates that liquidation was a consideration in 6 of these 48 sites and further supports the case for a bond to be provided irrespective of the wording of the Decommissioning Requirement (now Requirement 28).

In addition, the research indicates that bonds provided did not always cover the full cost of the works and therefore it recommended that they should be front-loaded and a larger contribution should be paid up front (Paragraph 4.34). Whilst it is appreciated that coal/ aggregate work is different in nature to the current proposal, the research highlights problems that have been faced even where conditions were included to provide site restoration and liquidation is one of those issues. A bond is considered to be an appropriate assurance as a result in light of concerns over liquidation. This stance is further reinforced given the terminology used in the Decommissioning Requirement.

The applicant subsequently refers to the requirement for a Generation License and they have to comply with the Generation License conditions. No reference is provide as to which conditions would ensure the company remains solvent or indication of what would happen to this license in the event of liquidation.

The main issue hasn't been answered in the applicant's response.

Without a bond in place, there is no protection for the Council in the event of the applicant getting into financial difficulty (for whatever reason) and entering liquidation (at any time).

As noted in Appendix E of the Deadline 3 submission, Planning Policy Wales (Edition 10) was released in December 2018 and replaces previous iterations providing the national planning policy context for this Examination.

PPW 10 has shifted in focus and its primary objective is to ensure that the planning system contributes towards the delivery of sustainable development and improves the social, economic, environmental and cultural well-being of Wales, as required by the Planning (Wales) Act 2015, the Well-being of Future Generations (Wales) Act 2015 and other key legislation.

Figure 3 Provides the key planning principles with the Maximising Environmental Protection and Limiting Environmental Impact section states: “The polluter pays principle applies where pollution cannot be prevented and applying the precautionary principle ensures cost effective measures to prevent environmental damage.” This is important and supports the Council’s case in requesting a fully repayable bond for decommissioning.

As indicated previously, CCS are not requesting that the bond is provided at the start of development but appreciate that it should be built up over time to cover the cost of decommissioning. CCS have also clarified that it is fully refundable.

However, CCS wishes to clarify that the public purse would still be under some risk until the full cost of decommissioning is provided for in this bond (which would need to cover inflation as well). PPW 10 introduces the “polluter pays” and “precautionary” principles. CCS considers the request for a bond to be important and entirely reasonable and are even taking on an element of the risk themselves in the event that the company fails (for whatever reason) prior to the bond being fully paid.

It is clear to all that the current economic climate is uncertain and within the current context (and considering the lifetime of the development), there is by no means any certainty that measures introduced at the current time would ensure the company remains solvent through to decommissioning.

It is therefore important, relevant and reasonable to include provision for a bond. This is even more important given concerns about the enforceability of Requirement 28 (previously 27) as drafted.

Appendix A - 23.1.42 – Requirement 27: Upon further consideration and dialogue with the applicant, it is understood that 27(1)(b) would be triggered at the same time as work item 1D is removed which is accepted.

Appendix D – Requirement 5 – Fencing and Other Means of Enclosure: As stated in CCS comments on the Draft DCO, it is appreciated that so called “wildlife-friendly” fencing may not be appropriate for all elements of the development at all times and there may be other legislative requirements that outweigh the need to provide fencing in certain circumstances. The Council appreciates this and has

requested an indication of this is provided to enable a balanced judgement to be made as to which fences will be expected to provide measures to allow access for certain species.

[*Post-Hearing Note: The applicant has indicated in discussions that Work No.1 should be excluded from this provision along with temporary fencing which are both accepted by the Council.]*

Appendix D

CCS Response to:
Draft DCO (Revision 3) (Deadline 3)

Issues raised previously by CCS that have not been addressed by the applicant are not repeated below as the Council have made their opinion on these matters clear in previous correspondence. It should be noted that Version 3 does not change anything substantively from previous comments.

N.B. The applicant has subsequently sent Draft DCO Revision 4 to CCS for consideration and for ease of reference, where issues have been resolved in the latest revision, this will be clarified in the comments as relating to Revision 4 specifically and included in italics.

Article 2
Definitions

"**commencement**" – the Council does not consider that the matter regarding fencing that is required temporarily before the development is lawfully commenced (as per the definition) and temporary fencing that requires approval prior to the commencement of development (as per Requirement 5) is sufficiently clear.

It is understood that the temporary fencing indicated to be excluded from the development relates solely to those activities that are expressly excluded from the commencement of development. CCS considers that some additional clarification in this section would alleviate concerns regarding the operation of the two.

Revision 4

CCS suggested the incorporation of the words "associated with and for the duration of the above specified works" after…temporary means of enclosure… in this definition to overcome these concerns (or wording to similar effect). This would greatly aid interpretation of the Order and its provisions in CCS's opinion and has been included in the latest draft.

CCS are agreeable to the revised terminology and welcome the clarification.

"**Shut Down Period**" – CCS have reconsidered their position in respect of this matter and do not object to the incorporation of a shut down period within the DCO, for the specified time indicated. CCS raise no further issues in this regard and are satisfied with the inclusion of the items of equipment indicated which would be cross-referenced in the CEMP.

"**Start Up Period**" – CCS maintain their concerns in this regard and considers it to be useful to clarify earlier comments provided at Deadlines 2 and 3.

CCS do not consider that site mobilisation should start before 8am and consider that the provision of a half hour period before hand would inevitably result in people turning up before this time to be ready to start on site at 7.30am as this would be the start of their working day, especially if they have to attend safety and other briefings within this 30 minute window. Therefore, CCS considers that staff are likely to turn up before 7.30am creating noise and disturbance during their arrival.

CCS would suggest that these duties (safety briefings, donning protective clothing etc) are carried out from 8am onwards. Whilst it is still likely that staff would arrive before this time, this would be from say 7.45am onwards for example which is considered more acceptable in this rural locale.

Schedule 2 – VERSION 4

Requirement 2 – Detailed Design

Requirement 2(6) – CCS understand the rationale behind the inclusion of this provision and has no issue with its inclusion or construction.

Requirement 3 - Provision and Maintenance of Landscaping

Requirement 3(5) – CCS raised concerns at Deadline 2 about how details included within the review (and any resultant works required) would be required as there was no mechanism for CCS to approve details or for them to be carried out.

The amended version is agreeable to the construction of this subsection.

Requirement 5 – Fencing and Other Means of Enclosure

At Deadline 2, CCS requested that clarification was included within this section to ensure consideration was given to what measures would be taken to ensure species such as otter, badger, etc are included within the fencing details. These have been referenced in other documentation and CCS considers it is important to explicitly include reference to this in the Requirement 5.

Discussions have been had with the applicant to progress this further and it has been agreed that these measures would not be appropriate for temporary fencing or permanent fencing securing the generating station itself (work number 1) for health and safety reasons and to ensure security of the site.

CCS welcomes the provision of new subsection 3(4) and raises no issues with content or construction.

Requirement 6 – Surface and Foul Water Drainage

Requirement 6(1) – inclusion of water crossing details is welcomed.

Requirement 8 – Pre-construction Ecological Constraints Survey

Requirement 8(1) - CCS queried whether this subsection could technically be complied with if badgers, otters or water voles were found to be present on site given that the construction of the subsection.

The amended subsection is considered to overcome this concern.

Requirement 8(5) and 8(6) are welcomed and their construction is acceptable to CCS.

Requirement 10 - Invasive Species Survey and Remediation

CCS raised concerns about the precision of the phrase "suitably qualified and experienced persons" with regards to this Requirement. Ambiguity could arise in the survey themselves if CCS does not consider the person to be suitably qualified/ experienced without consideration of what the survey itself states.

The amendment to provide for the qualifications and experience of the relevant person(s) is considered appropriate to overcome concerns raised above and will aid interpretation of the surveys.

Requirement 12 – Reptile Method Statement

Requirement 12(3) – CCS have also raised concerns with regards to the inclusion of suitably qualified and experienced persons in this Requirements for the reasons set out above for Requirement 10.

The same approach has been adopted and is accepted.

Requirement 14 – Site Investigation

Requirement 14(3) – CCS have also raised concerns with regards to the inclusion of suitably qualified and experienced persons in this Requirements for the reasons set out above for Requirement 10.

The same approach has been adopted and is accepted.

Requirement 15 – Minerals Resources Survey

Requirement 15(2) – Update to refer to Decommissioning Strategy accepted (now Requirement 28 following the inclusion of the Operation of the Authorised Development).

Requirement 25 – Control of Noise During Operation Phase

CCS previously raised concerns with regards to the noise rating levels included in Requirement 25(1)Table 3. At the Issue Specific Hearing, the Examining Authority advised it would be useful for the relevant parties to consider this issue further.

The approach taken by the applicant is considered to be acceptable now that the rationale for the ratings has been explained and as a result, CCS do not consider that the levels indicated would result in any noise issues to surrounding properties.

As such, CCS do not consider that the table needs to be changed.

Requirement 27 – Operation of Authorised Development

The inclusion of this Requirement with the DCO itself is welcomed by CCS.

Requirement 28 – Decommissioning

Requirement 27(1) and (3) – CCS has queried why the Decommissioning Strategy does not include Work No. 2 (the access road). Once the development is complete, CCS does not want the road to be left in situ in what is a rural countryside area. The road (post decommissioning) will serve no practical purpose and could encourage further development on what is greenfield land, in the open countryside.

It is appreciated that removing the road could result in further environmental damage in the future, but it is suggested that this item is included within this Requirement to ensure that the road is soiled over/ narrowed to allow it to revegetate naturally over time. If circumstances have changed (in terms of the designation of the land or alternate need for the road, this can be considered further at that time in light of circumstances but the starting point should be that it is left to revegetate in an appropriate manner.

Requirement 27(4) – This subsection does not overcome CCS concerns with regards to the overall enforceability of this condition. This provision indicates APL are willing to go a bit further than currently in that they would apply for the necessary consents but applying for the necessary consents does not mean that they will be actively pursued to ensure they are appropriately provided. There is no further guarantee that decommissioning would be undertaken than is currently provided.

The applicant could still seek these permission but that could be in any form and does not mean that the requisite information is submitted or that approval will be granted.

Appendix E

CCS Response to:
Updated Landscape and Ecological Mitigation Strategy (Deadline 3)

CCS welcomes the amendments to Version 3 of the Updated LEMS.

Finally, CCS would request that the newly created ponds (excluding the attenuation ponds) are left to vegetate naturally rather than being planted (although it is appreciated that advice from the previous CCS ecologist may have been otherwise).

CCS has requested that APL amend paragraph 4.6.13 within the Outline LEMS to reflect this which has been agreed in principle.