

Kemsley Paper Mill (K4) CHP Plant Project

Section 51 Advice – ‘Early Submission’ of draft application documents by DS Smith Paper Ltd for PINS review

This advice relates solely to matters raised upon PINS review of the draft application documents submitted by DS Smith Paper Ltd, and not the merits of the proposal. The advice is limited by the time available for consideration, and raised without prejudice to the acceptance or otherwise of the eventual application. It is provided to assist the preparation of the next iteration.

Abbreviations used

PA2008	<i>Planning Act 2008</i>	dDCO	<i>draft Development Consent Order</i>	CR	<i>Consultation Report</i>
EM	<i>Explanatory Memorandum</i>	ES	<i>Environmental Statement</i>	ExA	<i>Examining Authority</i>
PINS	<i>Planning Inspectorate</i>	SoR	<i>Statement of Reasons</i>	SoS	<i>Secretary of State</i>

Draft Development Consent Order			
Q No.	Article (A)/ Requirement (R)	Extract from DCO (for ease of reference)	Comment/Question
1.	A2	Definition of “authorised development” “and any other development authorised by this Order which is development within the meaning of section 32 (meaning of development) of the 2008 Act”	What “any other development” is intended to be included in this? Could this other development not be identified and set out in Schedule 1?
2.	A2	Definition of “commence” “other than operations consisting of archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, and the temporary display of site notices or advertisements”	How are these exclusions from the statutory definition of commencement justified? As restrictions on commencement of development are commonly used in requirements, there are often conflicts with the definition of “commence”. For example, if a requirement to secure an archaeological scheme of investigation before commencement were to be added, how would this work when archaeological investigations are currently excluded from the definition of commencement?

Draft Development Consent Order			
Q No.	Article (A)/ Requirement (R)	Extract from DCO (for ease of reference)	Comment/Question
3.	A2	Definition of "maintain" "includes inspect, repair, adjust, alter, remove, reconstruct or replace in relation to the authorised development"	Have the impacts of the various activities listed all been assessed in the ES?
4.	A2	Definition of "maintain" "provided such works do not give rise to any materially new or materially different environmental effects to those identified in the environmental statement"	Would a wording similar to the Wrexham DCO, which allows the activities "to the extent assessed in the environmental statement", be more appropriate?
5.	A2	Definition of "Order Land"	The definition used will need to be assessed against the land and Works plans in due course to ensure that it is consistent with the plan markings.
6.	A2	Definition of "owner"	Is this definition used in the order?
7.	A4	Procedure in relation to certain approvals, etc. under requirements	This would usually be in Part 4, "Miscellaneous and General"
8.	A5	Maintenance of authorised development	The recent Wrexham DCO limits this power to within the Order Limits. Would this be appropriate here?
9.	A8	Consent to transfer benefit of Order "[KCHP Limited]"	KCHP Limited is not currently defined
10.	A9	Defence to proceedings in respect of statutory nuisance "nuisance falling within paragraph (c), (d), (e), (fb), (g), (ga) or (h) of section 79(1) (statutory nuisances and inspections therefor)"	How are these defences justified? Usually, the defences are limited to those types of nuisance which are explicitly controlled by requirements. Is this the case here?

Draft Development Consent Order			
Q No.	Article (A)/ Requirement (R)	Extract from DCO (for ease of reference)	Comment/Question
11.	A10	<i>Access to works</i>	Would the wording used for the recent Wrexham DCO be more appropriate? This requires, for example, consultation with the highway authority for the creation of new means of access.
12.	A11	<i>Statutory undertakers</i>	This appears to imply a power to compulsorily interfere with the rights of statutory undertakers with regard to the positioning of their apparatus. Does this power need to be explicitly identified? See, for example, A28 - 30 of the Wrexham DCO.
13.	A12(9)	<i>Discharge of water</i> <i>"fails to notify the undertaker of a decision within 28 days of receiving an application, that person is deemed to have granted consent or given approval"</i>	Is this 28-day deemed approval appropriate?
14.	A15	<i>Certification of plans, etc.</i>	Should the Book of Reference be included in the certified documents?
15.	Schedule 1	<i>Existing elements of K1 works</i>	The applicant may wish to consider whether, if those elements are necessary for the operation of the new plant, they should be included as retained works. If existing elements are to continue to be used, then at least the connection to those elements should be included in the list of works.
16.	R6	<i>Decommissioning of existing generating station</i> <i>"(2) Sub-paragraph (2) does not require..."</i>	Should this instead refer to sub-paragraph (1)?

Draft Development Consent Order			
Q No.	Article (A)/ Requirement (R)	Extract from DCO (for ease of reference)	Comment/Question
17.	R7	<p><i>Construction Environmental Management Plan</i></p> <p><i>"No stage of the authorised development (excluding archaeological, soil movement and ecological mitigation works) may be commenced"</i></p>	See comments on the definition of "commence" above. This requirement includes further exclusions.
18.	General	<i>Use of "shall"</i>	The Office of the Parliamentary Counsel Drafting Guidance document advises against the use of "shall" (see para 1.2.9). The current draft uses shall in R5, R10 and Schedule 3 Part 1 Para 7
19.	General	<i>Explanatory Memorandum</i>	<p>The PINS Advice Note 13 recommends that a tracked changes version showing changes from model provisions would be useful. This also applies where the precedent for wording is not a model provision but instead a previously granted DCO or other form of order ("The relevant precedent and the rationale for including the particular wording of a provision will need to be set out and justified in the explanatory memorandum"). The EM does not identify the source or the justification for the wording used, and it instead simply summarises the effect of the wording.</p> <p>This is likely to generate extensive questioning from the eventual ExA in order to establish the justification for the proposed wording. Clarifying the need and origin for each provision at an early stage is likely to reduce this.</p>

Draft Consultation Report		
Q No.	Paragraph	Comment/Question
1.	General	<p>In the Applicant's section 46 Notice of 23 January 2018 the Applicant confirmed that statutory consultation under s42 was conducted between 27 January and 2 March 2018. PINS would advise the Applicant to ensure that the consultation period, separate from s47 consultation, is clearly defined and explained in the Consultation Report (CR) to avoid any confusion.</p> <p>PINS recommends that the Applicant cross-refers their CR to the s55 Acceptance Checklist to ensure compliance with the PA2008. The Applicant must clearly show how it has complied with their statutory duties under the PA2008 (e.g. s49 - having regard to any relevant consultation responses). The recently updated s55 Checklist can be found as Appendix 3 to the Advice note six</p>
2.	General	<p>Where possible it would be beneficial if the Applicant could sign-post references to sections / paragraphs within the CR and other application documents. Where references are provided to other application documents this is useful; however, please ensure that final versions of application documents are checked for consistency and accurate in all material submitted, this is particularly important when referring to dates.</p> <p>By way of example, the letter to PINS containing the Applicant's s46 notification is dated 23 January 2018, was sent by the Applicant on 25 January and received on 26 January. Table 2.1 provides timeline of consultation and the commencement date of the s42 consultation (27 January 2018). The example provided above could be mentioned here to provide clarity on this timeline.</p>
3.	General	The Applicant should consider providing clarity with their CR as to how the consultation complies with relevant DCLG Planning Act 2008 – Guidance on Pre-Application Consultation, and PINS Advice Notes (AN). The Applicant may wish to review AN16: The Developer's Pre-Application Duties.
4.	General	The information provided within the CR should demonstrate how the Applicant has complied with their statutory duties under the PA2008. The Applicant may benefit from reviewing CRs presently published on the National Infrastructure website, which provides " best example " documents. It would be useful perhaps for the Applicant to illustrate how they have complied with relevant legislation/guidance by way of Tables?
5.	Table 3.1	Ensure that correct legislation is quoted. This table refers to Regulation 9(11)(c) of the Infrastructure Planning Environmental Impact Assessment Regulations 2017. It should be noted that there have been some legislative changes to the 2009 EIA Regulations from the Infrastructure Planning Environmental Impact Assessment Regulations 2017. The Applicant will note in the Scoping Opinion issued by PINS on 28 September 2017 that Regulation 9(11)(c) has been superseded by Regulation 11(1)(a). We would encourage the Applicant to please ensure that final versions of application documents are checked for consistency and accurate in all material submitted for Examination.

Draft Consultation Report		
Q No.	Paragraph	Comment/Question
6.	Para 9.1	<p>Paragraph 9.1 of the CR states: <i>A S42 consultation pack has been sent to [TO BE DEFINED], as they are the freeholders of the Kemsley Paper Mill site. There are no other parties covered by the categories set out within Section 44 who need to be consulted regarding the proposed scheme’.</i></p> <p>As the Order land is in possession of the Applicant it must be clearly demonstrated within the CR how, why and which parties were consulted/notified when undertaken statutory consultation.</p>