BURGES SALMON

Mr M Wilson
Infrastructure Planning Commission
Temple Quay House
Temple Quay
Bristol
BS1 6PN

IPC
-4 JUN 2010
REF:

Narrow Quay House
Narrow Quay
Bristol BS1 4AH
Tel: +44 (0)117 939 2000
Fax: +44 (0)117 902 4400
email: email@burges-salmon.com
www.burges-salmon.com
DX 7829 Bristol

Direct Line: +44 (0)117 307 6851
julian.boswal@burges-salmon.com

Our ref: JB13/36313.2/BOSWA Your ref:

28 May 2010

Dear Mr Wilson

Covanta Energy Limited Infrastructure Planning Commission Application for 77MW Brig y Cwm Energy from Waste Facility, near Merthyr Tydfil - Common land

We enclose a letter we have sent to the Welsh Assembly Government regarding a commons issue in relation to this project. We touched on this issue at a recent meeting with you.

We are keen to ensure that we avoid a situation where a technical objection is raised to the approach we are intending to follow, even though we do not think there is an issue. We have accordingly sought comfort in this letter that WAG does not have concerns about the proposed use of section 132 of the Planning Act 2008, which seems entirely appropriate on the facts, as compared to the "standalone" regime in Wales. As you will see we are not raising any issue of merits and we fully accept that we will have to meet the requirements to obtain a certificate from the Secretary of State and satisfy the usual public interest CPO test required in this case.

We had hoped to meet WAG officials to discuss the matter before writing to them, but they are taking the view that this might call into question their impartiality. We find this stance very surprising, but will endeavour to make progress through correspondence.

We are aware that the IPC is encouraging applicants to submit draft DCOs to it for consideration on technical grounds, as opposed to the merits.

With that in mind, we would like to address one of the questions we have posed to WAG to the IPC, even though we are not setting it out in draft DCO form. In doing so, you will see that we are repeating much of the content of our letter to WAG. We are seeking to avoid a situation where the IPC raises a technical concern regarding the proposed approach at the draft DCO-review stage, or a Commissioner does at the Examination stage. We accept, of course, that the views of the IPC and WAG on this technical issue do not preclude others raising it as part of the overall process.

1 Covanta's proposed access will be on common land (the "Access Land"). It will involve creating a new access road with a footprint of approximately 1,000 square metres. It will not be fenced. The land is currently rough grazing land, with commons rights of grazing over it.

2 Our understanding of WAG (and DEFRA) policy in relation to this kind of new access road, which will not serve a commons purpose, is that exchange land should be provided. In other words, a works consent under section 194 of the Law of Property Act 1925, which is still in force in Wales, is not sufficient.

3 There is provision in section 131 and 132 of the Planning Act 2008 for the compulsory acquisition of common land or rights over common land. Under section 139 of that Act it is stated that "an order granting development consent may not authorise the suspension of or extinguishment or interference with, registered rights of common, except in accordance with section 131 or 132."

4 The common land in question is owned by a third party.

5 The IPC regime under the Planning Act 2008 is intended to follow a holistic approach, and include as many matters within a Development Consent Order as can sensibly be achieved. The general approach of the IPC regime is to be "devolution-neutral".

6 Covanta has negotiated an option with the third party landowner to construct, use and maintain the new site access over the Access Land. However its right to exercise this option in practical terms is encumbered by the commons rights, and the necessary works cannot lawfully be carried out unless those commons rights are legally authorised to be removed (by way of exchange land) or overridden.

7 It is Covanta's intention to use section 132 to compulsorily acquire the right to construct, use and maintain the new site access over the Access Land, which is unencumbered by the rights of common. This appears to be in accordance with the intention of section 139. It is also consistent with the fact that other compulsory purchase powers which generally apply in Wales all have equivalent provisions for the compulsory grant of rights over common land.

8 It is Covanta's intention to come within section 132(4), which relates to the provision of "replacement land" in exchange for the grant of the "order right" i.e. the right to construct, use and maintain the new access.

9 This replacement land will need to satisfy the normal requirements of suitability and there will need to be a certificate to that effect issued by the Secretary of State for Energy and Climate Change under section 132(2) as part of the overall process. There is guidance on this procedure in Annex 1 of the IPC "Guidance related to procedures for compulsory acquisition" issued by Communities and Local Government.

10 Covanta will be acquiring the replacement land from the same third party who owns the Access Land, to enable the exchange to be effected under the development consent order (DCO) for the project.

11 Under section 132(11) the Act provides the normal mechanism for the vesting of the replacement land with the same rights, trusts and incidents as the Order land (i.e. the Access Land) and for discharging the Order land from all rights, trusts and incidents to which it has previously been subject so far as their continuance would be inconsistent with the exercise of the Order right. It is the latter aspect that creates the new unencumbered right which Covanta needs.

12 As you will be aware, there is no practical mechanism for removing these commons rights by agreement with the commoners and therefore some form of statutory process is required.

13 In our view the approach outlined in this letter is an entirely appropriate way of dealing with this matter as part of the proposed development consent order. Furthermore, it seems to be that envisaged by the Act, given the terms of section 139, quoted at paragraph 3 above.

14 Lastly, it would appear to be consistent with the Welsh Ministers general approach to the matter, though this is precisely the point on which we are seeking clarification separately from them. We say this because the current "standalone" power to exchange common land for suitable replacement land has been

BURGES SALMON

included in the Regulations which allow such an exchange to be included within a Development Consent Order with the agreement of the Welsh Ministers, though not the provision under new legislation which will supersede it in due course. This is explained further in the next paragraph.

15 As you are aware, the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 prescribe those consents and authorisations whose requirement can be removed by a DCO with the approval of the relevant granting body. Part 1 of the Schedule relates to England and Wales, and does not include reference to the exchange land provisions of the Commons Act 2006 (which have superseded the previous provision, namely section 147 of the Inclosure Act 1845 in England. Section 147 is still in force in Wales). Part 2 of the Schedule relates to Wales only, and includes at item 28 "An order under section 147 of the Inclosure Act 1845 (power to exchange common land for other lands)". The omission of the Commons Act from the Schedule is consistent with section 139(1) of the Planning Act 2008 which bars the exclusion or modification of a provision of or made under the Commons Act except in accordance with section 131 or 132.

16 Given the timing of the expected introduction of the Commons Act 2006 in Wales, and the clear intention in the Regulations that section 150 not apply to the Commons Act 2006, and the provisions of section 139(1) it appears very clear that it is not intended that this avenue should be available under the IPC regime for commons consents or exchange orders. This might otherwise have been an alternative to the use of the compulsory acquisition route.

17 The only other option would be for Covanta to apply for the exchange land order completely outside the IPC regime i.e. (at present) under section 147 of the Inclosure Act 1845, to run to a different timetable to the IPC application. This would go against the holistic approach under the Planning Act 2008 and, in the worst case, might give rise to a situation where an issue on the DCO caused a significant difficulty with the other application or vice versa. This would be avoided by the matters being dealt with as part of a single IPC process, though it would include the use of compulsory powers (against a willing landowner) which would otherwise be avoided.

Questions

18 We would welcome confirmation that, assuming Covanta makes its IPC application in the manner set out in this letter (i.e. with the use of section 132 to compulsorily acquire an unencumbered right to construct, use and maintain the proposed access road, with suitable replacement land) that the IPC would not consider this an inappropriate use of section 132 in Wales. As explained above, we consider it is an entirely appropriate use of section 132, but if the IPC has any concerns on this score, we would like to be aware of them now.

If you require any further information before responding substantively to this letter, please let me know.

An early reply would be much appreciated.

Yours sincerely

Julian Boswall
Partner

IPC Infrastructure Planning Commission

Infrastructure Planning Commission
Temple Quay House
Temple Quay
Bristol
BS1 6PN

t: 0303 444 5000
f: 0303 444 5002
e: ipcenquiries@infrastructure.gsi.gov.uk

7 June 2010

Our Ref: EN010004_COR1014
Your Ref: JB13/36313.2/BOSWA

Mr J Boswell
Partner
Burges Salmon
Narrow Quay House
Bristol
BS1 4AH

Dear Mr Boswell

RE: Covanta Energy – Brig y Cwm Energy from Waste (EfW) facility

Following your letter dated 17 May, which sets out issues for consideration, the Commission wish to provide the following advice.

1. LEVEL AND SCOPE OF EIA

Heat pipe and grid connection

It is understood that, at this stage, the grid connection would not be included within the proposed development consent order application and that you do not have full information about the likely environmental effects. Therefore, a high level assessment should be carried out in the light of the information available (as stated in the applicant's scoping report at paragraph 5.5) which might include a desktop assessment of the search area and an appropriate level of assessment on any likely environmental impacts. Depending on the outcome, the same approach should be taken with regards to the heat pipe.

Off-Site highway works

As stated in the Commission's opinion any highway works associated with the proposed development should be subject to EIA (as stated in paragraphs 2.20, 2.26 and 4.5 of the Opinion).

Treatment Centres / Transfer Stations (TSTS)

In your letter you acknowledge the 'inherent uncertainty' associated with identifying the number, distribution and consenting arrangements for TSTSs supplying the proposed development and the alternative options for an ash recycling plant.

The Commission considers that the cumulative effects of any infrastructure, which is associated with the proposed development, should be considered as

part of an integrated approach to environmental impact assessment (EIA). As you know, if the Commission fails to consider the environmental impact of the proposed development (including cumulative effects within Schedule 4 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009) this will be a breach of those EIA Regulations. The ES should therefore provide both a general description of the intended TCTS arrangements and a high level assessment of the likely impacts, for example on local road and rail infrastructure. The level of this assessment will clearly depend on the information available (having regard to current knowledge). As a minimum, however, the ES should provide an outline of the main alternatives which were considered both for the network of TCTSs and the ash recycling plant.

Where there is an element of uncertainty the Commission considers that the EIA should be carried out on the basis of the most likely options and design(s), and on a 'worst case' basis. A level of care should be exercised in preparing the worst case and it is recommended that consultation on this issue should take place between the applicant and the statutory consultees to determine the most suitable approach.

2. ASSOCIATED DEVELOPMENT

A letter is being sent under separate cover relating to this query (IPC Ref: COR1008).

3. OTHER APPROVALS (OTHER REGULATORY REGIMES)

As stated at paragraph 3.4 of the Opinion, the Commission recommends that the applicant should clearly state what regulatory areas are addressed in the ES. It should also be clear that any likely significant effects of the proposed development, which may be regulated by other statutory regimes, have been properly taken into account in the EIA.

Draft policy guidance (in EN1 4.10.8) states that consent should not be refused unless the Commission "has good reason to believe" that any relevant necessary permits licences etc will not be subsequently granted and that early discussions by the applicant will help ensure that relevant regulators are able to provide "assurance to the IPC" (EN1 para 4.10.9). There is no statutory or policy requirement to provide a specific letter of comfort. However, applicants are encouraged to make early contact with other relevant regulators as the Commission will require some level of assurance or comfort from these bodies that the design or plan is acceptable and likely to be approved by them before a decision or recommendation on the application is made. The information which you have suggested in your letter at points (i) to (iv) is considered helpful and should also be supplemented where available by copy correspondence with the relevant regulators to support Covanta's view that there is no obvious reason why other consents will not be forthcoming. If not provided with the application, evidence on this point may in any event be sought during the examination.

In relation to consents required for the TCTSs, ash recycling plant, highway works and heat pipe, any information available at the time (as noted above) should also be supplied.

We hope this meets with your current understanding. However, should you wish to discuss any of these matters further please do not hesitate to contact me.

Yours sincerely

Simon Butler

Senior EIA and Land Rights Officer

Tel: 0303 444 5051
Email: Simon.Butler@infrastructure.gsi.gov.uk

IPC Infrastructure Planning Commission

Infrastructure Planning Commission
Temple Quay House
Temple Quay
Bristol
BS1 6PN

t: 0303 444 5000
f: 0303 444 5002
e: ipcenquiries@infrastructure.gsi.gov.uk

11th June 2010

Mr Julian Boswall
Burges Salmon
Narrow Quay
Bristol
BS1 4AH

IPC Ref: EN010004

Dear Julian,

Section 51 Planning Act 2008
Re: Proposed Energy from Waste Facility, Brig y Cwm, Merthyr Tydfil

Thank you for your letter dated 28th May 2010 and apologies for the delay in responding to you.

We note that you have opened discussions with the Planning Division of the Welsh Assembly Government (WAG) about the procedure to be undertaken in relation to the common land. This approach is consistent with the frontloaded system that the Planning Act 2008 seeks to establish and the IPC encourages applicants to discuss consents requirements with other regulators at an early stage in the process. The IPC as you know has a role in advising applicants and others on application procedures under the Planning Act and this letter of advice will be published on our website. I have also copied this letter of advice to Mr Jones.

I will now deal with your specific points in more detail.

As you state in your letter, s139 (3) of the Planning Act prohibits the suspension, extinguishment or interference with registered rights of common except in accordance with s131 or 132. If the proposed DCO for Brig Y Cwm is to have the effect of suspending, extinguishing or interfering with registered rights (as defined in s139(4)) it will be necessary to proceed in accordance with s131 or 132. It is however for the applicant to decide the appropriate consents strategy and when assessing whether to include a CPO provision within the draft DCO your client will of course wish to consider whether the conditions in s122(2) and (3), s123 and s132 of the Act can be met. If it is proposed to provide land in exchange a certificate will need to be sought from the WAG. This is again something that you will no doubt wish to discuss with WAG at an early stage.

The IPC cannot comment on the need or otherwise for a s194 works consent. This will be for the WAG to confirm and I understand that you are currently awaiting advice on this point.

I hope this clarifies the procedural points you raised.

Yours sincerely

Mark Wilson
Case Leader
Tel: 0303 444 5062
Email: mark.wilson@infrastraucture.gsi.gov.uk

Cc Mr S Jones, Decisions Branch, Planning Division, Welsh Assembly Government

IPC

- 9 JUL 2010

REF:

BURGES SALMON

Mr M Wilson
Infrastructure Planning Commission
Temple Quay House
Temple Quay
Bristol
BS1 6PN

Narrow Quay House
Narrow Quay
Bristol BS1 4AH
Tel: +44 (0)117 939 2000
Fax: +44 (0)117 902 4400
email@burges-salmon.com
www.burges-salmon.com
DX 7829 Bristol

Direct Line: +44 (0)117 307 6851
julian.boswall@burges-salmon.com

Our ref: JB13/36313.2/BOSWA

Your ref:

8 July 2010

Dear Mr Wilson

Covanta Energy Limited Infrastructure Planning Commission Application for 77MW Brig y Cwm Energy from Waste Facility, near Merthyr Tydfil - Common land

I write further to our letter of 28 May 2010 and your response of 11 June.

I note from your letter that it is the IPC's view that it is the applicant's responsibility to determine the appropriate consents strategy for addressing both the suspension, extinguishment or interference with rights of common and any compulsory purchase matters. We agree with this as a general proposition.

Whilst we consider the approach set out in our letter of 28 May of using section 132 of the Planning Act 2008 to compulsorily acquire an unencumbered right to construct, use and maintain the proposed access road, with suitable replacement land to be entirely appropriate we have deliberately raised this with you at an early stage in order to ascertain and address any concerns that the IPC may have.

On the basis of your response, and noting that the IPC is empowered to give advice to applicants, we take your letter as confirmation that the IPC has no issue of legal principle with our proposed approach.

We have not yet received a substantive response from WAG to our earlier letter but, as you suggest, will continue to seek to progress these matters with them.

It would also be very helpful if you could clarify one further point. You state in your letter that any exchange land certificate should be sought from WAG. Whilst we believe this is correct under the existing commons legislation, it is our understanding, based upon sections 131 and 132 of the Planning Act and the CLG guidance on procedures for compulsory acquisition (paragraph 17 of Annex 2), that in relation to a DCO application (in England or Wales) any exchange certificate for common land should be provided by DEFRA.

I look forward to hearing from you

Yours sincerely

pp Julian Boswall

Julian Boswall
Partner

WORK\11874756\v.2

IPC Infrastructure Planning Commission

Infrastructure Planning Commission
Temple Quay House
Temple Quay
Bristol
BS1 6PN

t: 0303 444 5000
f: 0303 444 5002
e: ipcenquiries@infrastructure.gsi.gov.uk

6th August 2010

Mr Julian Boswall
Burges Salmon
Narrow Quay
Bristol
BS1 4AH

IPC Ref: EN010004

Dear Julian,

Section 51 Planning Act 2008
Re: Brig y Cwm, Merthyr Tydfil, Common Land Issue

Thank you for your letter dated 8th July 2010 seeking further clarification with regard to the correct authority from which to seek an exchange land certificate and your approach towards using section 132 more generally.

As we are unable to give legal advice we cannot confirm that your proposed approach raises no legal issues but can only reiterate that s139(3) of the Planning Act prohibits the suspension, extinguishment or interference with registered rights of common except in accordance with s131 or s132.

We understand that a letter, clarifying the position of the Welsh Assembly Government (WAG) in relation to s132 and s150 of the Planning Act 2008 and s147 of the Inclosure Act, will be sent to us and to you shortly. WAG has also clarified that the Welsh Ministers do not have power to provide exchange land certificates in relation to Section 131 and 132 of the Planning Act. The certificate must be provided by the Secretary of State, Defra.

I hope this clarifies the issue.

Yours sincerely

Mark Wilson
Case Leader
Tel: 0303 444 5062
Email: mark.wilson@infrastraucture.gsi.gov.uk

Adran yr Amgylchedd, Cynaliadwyedd a Thai
Department for Environment, Sustainability and Housing

Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Mr Julian Boswall
Burges Salmon LLP
Narrow Quay House
Narrow Quay
Bristol
BS1 4AH

Eich cyf : Your ref JB13/36313.2/BOSWA
Ein cyf : Our ref A-PAA-08-10-qA854690
Dyddiad : Date 4 August 2010

Dear Mr Boswall,

COVANTA ENERGY LIMITED – INFRASTRUCTURE PLANNING COMMISSION APPLICATION FOR 77MW BRIG Y CWM ENERGY FROM WASTE FACILITY NEAR MERTHYR TYDFIL – COMMON LAND

I refer to your letter of 28 May 2010 and apologise for the delay in replying to you.

We note that part of Covanta's proposed development is to construct a new access road over common land and that Covanta proposes to use section 132 of the Planning Act 2008 to compulsorily acquire the right to construct, use and maintain the new site access and will provide replacement land in accordance with section 132(4). We are asked to confirm that we agree with your view that any "exchange certificate" under section 132 should be provided by DEFRA. We do not agree and consider that your interpretation of Part 7 Chapter 1 of the Act is incorrect.

Section 150 of the Act provides that the IPC cannot make a provision in its Order if the effect will be to remove a requirement for a "prescribed consent" to be obtained. The Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010 (S.I. 2010/105) Regulation 2 prescribes for the purposes of section 150 a list of consents or authorisations that the Commission must first seek consent from the consenting body before including a provision in a development consent order the effect of which is to remove a requirement for any prescribed consents or authorisations to be granted. The Schedule Part 2 item 28 prescribes "An Order under section 147 of the Inclosure Act 1845 (power to exchange common land for other lands)".

Section 147 is extant in relation to Wales and therefore it will be necessary for you to make an application under section 147 which will be considered by the Welsh Ministers. The

Parc Cathays • Cathays Park
Caerdydd • Cardiff
CF10 3NQ

Ffôn • Tel 029 2082 3891
Ffacs • Fax 029 2082 5622
Stephenm.jones@wales.gsi.gov.uk
GTN: 1208 3891

interaction of the Commons Act 2006 and the Planning Act 2008 to which you refer is not relevant in relation to this particular matter. For the purpose of giving you a full response, however, we have considered your submissions.

You refer to the omission of the Commons Act from the Schedule to the Regulations and submit:

> "Given the timing of the expected introduction of the Commons Act 2006 in Wales, and the clear intention in the Regulations that section 150 not apply to the Commons Act 2006, and the provisions of section 139(1) it appears very clear that it is not intended that this avenue should be available under the IPC regime".

Your attention is drawn to the Explanatory Memorandum to the Regulations; in particular paragraph 7.31:

> "Many of the consents and other permissions which fall within the terms of these Regulations are devolved matters in Wales, and the consents listed in Part 2 of the schedule are included to help ensure the preservation of the devolution settlement. It would be disproportionate to list every devolved consent in these Regulations, and therefore only those likely to be engaged by an application under the Planning Act have been included. However, it is the clear policy intention that no devolved consent should be included in a draft development consent order without the explicit agreement of the relevant consenting body in Wales."

and paragraph 4.10 which sets out the commitment made in the Commons (Hansard 2 June 2008 Commons Report Col 546):

> "New clause 24 [now section 150] makes it clear that the IPC cannot use the powers in the Bill to override the requirements of operational consents unless the relevant consenting body agrees. We drew the measure from the operation of the Transport and Works Act 1992 and the orders that have been put in place under it. Experience tells us that it can be of benefit to promoters to incorporate certain operational consents into the original authorisation to proceed. However, the position and rights of the bodies that grant operational consents, a leading example of which is the Environment Agency, must be protected. Under the new clause, they must therefore agree to provisions in the development consent order that would override a requirement otherwise to seek operational consent from them. That is what happens under the Transport and Works Act with authorisations for the discharge of water, for example. Several operational consents are devolved matters, and we intend to preserve the devolution settlement, so there is a similar provision in relation to the Welsh Assembly Government."

It is clear that the IPC regime is intended to be devolution neutral. On this basis we consider that as and when the relevant provisions in the Commons Act are commenced it will still be necessary to make an application to the Welsh Ministers for consent to the exchange of common land.

Yours faithfully

S M JONES
Decisions Branch
Planning Division