

Mr S Collings
By email

20 September 2011

Dear Mr Collings,

**Proposed Brechfa Forest West Wind Farm
Draft Development Consent Order and Explanatory Memorandum**

I refer to your email dated 16 August 2011 seeking the IPC's comments on the draft Development Consent Order (DCO) and draft Explanatory Memorandum. As you know we're not able to comment on the merits of the proposed development, but welcome the opportunity to raise any technical issues. I set out below the points discussed at our meeting on 1 September 2011.

Please note, the following is advice and is not intended to be prescriptive. It is for developers to satisfy themselves that they have complied with relevant legislation and had regard to relevant guidance.. We must also stress the decision of whether or not to accept an application will be taken by a Commissioner who has had no involvement in the pre-application stage for this proposal. All advice the Commission provides at this stage does not prejudice or pre-judge the decision of the Commissioner regarding acceptance or non-acceptance of an application.

Draft Development Consent Order

We note from our meeting that most of the land you require for the project is owned by the Welsh Assembly Government and managed by the Forestry Commission on their behalf. You confirmed that you were aware that this land is therefore Crown land. S135 of the Planning Act 2008 (PA 2008) will apply and the consent of the Welsh Ministers (as the appropriate Crown authority) will be needed to the inclusion of any provisions which relate to WAG land in the draft DCO regardless of whether you will need to acquire this land compulsorily or not (s135(1) and (2)).

Although we note that at the meeting you explained that a number of the provisions have previously been included in Transport and Works Act (TWA) Orders, you will wish to satisfy yourself that this proposed approach is relevant to the PA 2008 regime. If you consider that these provisions are necessary for this particular project then explanation and justification for this approach should be fully set out in the Explanatory Memorandum (ExM).

Article 2

- Definition of “designated land” and omission of “order land” and “the Order limits”: You explained that you sought to confine the compulsory acquisition provisions to a limited area and have therefore introduced the concept of “designated land”. To date you considered the order land to be congruous with the limits of deviation and have therefore taken out the definition for the order limits. As the physical limit to the order needs to be clearly defined you were going to reconsider this approach and set out clearly in the ExM the reasons for the adopted approach. As part of this you were going to check whether the additional wording in the model provision, which has been omitted from this article, is relevant and applicable and should be included.
- Definition of "maintain": As we mentioned at the meeting, we consider that this definition is too broad in scope. You confirmed that you would be redrafting this definition.

Article 3 (1)

We suggest that “to be carried out within the order limits” is re-inserted to limit the physical extent of the development consent.

Article 4

The rationale for the insertion of “from time to time” should be explained in the ExM.

Article 5

You will need to ensure that the limits of deviation do not extend beyond the order limits and have been fully assessed in the Environmental Statement. You explained that you’re seeking 50m micro-siting tolerance for the turbines and are aware of the policy contained in EN-3. We further understand that you’ve discussed and agreed with the Forestry Commission Wales the appropriate corridor width for clearing access tracks and other works (eg substation, burrow pit).

Article 6

You informed us that discussions with the other relevant consenting bodies are still on-going. Your approach will reflect the responses that you receive. Eg concerning public rights of way Carmarthenshire County Council (CCC) may be agreeable for this to be dealt with in the draft DCO. You explained that the application does not have a permanent impact on public rights of way. You will need to ensure though that *any* impact on public rights of way (whether permanent or temporary) is adequately dealt with and clearly explained in the ExM. If authorisation is not sought through the DCO but another consenting route you will need to set out the approach including approximate timing in the application form (see paragraph 47 of the CLG Guidance on the Application Form). Also, IPC Advice Note 13 on Preparation of the draft DCO and Explanatory Memorandum states that : “(...) The Explanatory Memorandum supplied to the IPC by the promoter should identify the authorisation, the reasons why the promoter is following this route and should state how close the promoter is to achieving consent of the authority concerned. (...).”

Other consents/licences/permits are an important part of the DCO application. Understanding how these interrelate with the DCO application is particularly relevant to ensure that at submission of an application all necessary information is included to enable the efficient examination of all relevant matters including e.g. requirements necessitated or obviated by other licences/consents.

Article 7

We note your explanation at the meeting that the benefit of the Order is to be specific to the named undertaker unless a transfer in accordance with article 7(3) has taken place. You agreed to reconsider whether the article as proposed is strictly necessary, depending on whether there will be a need to transfer the benefit of the Order to any of the third parties referred to in 7(2).

Article 8

At the meeting you explained that you changed this article following discussions with CCC as in your view it is not possible to draft a lawful requirement which addresses the LPA's concerns. The effect of this Article as drafted is to remove the defence of statutory immunity in respect of proceedings for statutory nuisance brought by individuals under s82(1) of the Environmental Protection Act 1990 although it does not prevent a local authority using its powers in relation to statutory nuisance under s80. We note that you're currently awaiting CCC's response and will reflect on this when finalising the draft DCO and ExM. You will also deal with the issue in the Statement of Statutory Nuisance to be submitted with the application.

Model Provision 12 Access to works - omitted

You confirmed that you would consider whether this provision was needed in respect of Work no 4.

Article 10

We note your explanation of the changes to article 10 to take account of the coming into effect of the Environmental Permitting (England and Wales) Regulations 2010. You confirmed that 10(8) should read "fails to respond within 28 days" and you will amend accordingly.

Article 11

You agreed to reconsider the reference to "designated land".

Model Provision 17 – omitted

You confirmed that you would check if it is necessary to include this in view of the burial mounds located within the site boundary.

Articles 12,13,15

The ExM should explain and justify the need for the wording you have omitted and/or changed from the corresponding articles in the model provisions. We note your approach to list all existing rights in the Book of Reference. New rights to be created/acquired through the draft DCO you're proposing to list in the draft DCO itself at schedule 3. You will need to ensure compliance with regulation 7 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 which sets out the required contents for the Book of Reference. If new rights are to be created or acquired compulsorily then the names and addresses of those people who are owners etc (see s57 of PA 2008) of the land affected need to be listed in Part 1 and the land itself shown on the land plan (Regulation 7 (1) (a) (i) and (ii)). At the meeting you explained that clause 14(4) and schedule 4 reflects in your opinion the standard approach taken in Transport and Work Act Orders. You agreed to reflect on this further and justify in the ExM accordingly.

Article 15

You will need to ensure that the ExM fully explains the changes to the Model Provisions and we suggest you consider whether the heading of the Article should refer to “Private rights” in the light of your proposed changes. .

Article 20

Felling or lopping of trees should be carried out in accordance with the plans and recommendations made in the Environmental Statement and a felling scheme agreed with the Forestry Commission which should show a defined area by reference to a plan. You agreed to consider how to reflect this in the draft DCO. You also confirmed that you were aware of the need to obtain the consent of the Welsh Ministers to the inclusion of these powers as the felling is to take place on land managed by the Forestry Commission and owned by the Welsh Assembly Government.

Article 21

You are anticipating that you will not need this provision to be included in the draft DCO as there are no trees subject to tree preservation orders on the order land. Should the article be required please note that a consent required under a tree preservation order is a prescribed consent listed in part 2 of the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010.

Article 23

We discussed the appropriate body to be included.. You may find it helpful to know that of the four applications accepted by the IPC to date the two railway draft DCOs are proposing “the President of the Institution of Civil Engineers”.. On the other hand the draft DCOs of the two Energy from Waste proposals are proposing “the decision maker”..

Schedule 1 Part 1 Authorised development

You should ensure that the description of the authorised development is consistent with the development which has been assessed in the environmental statement and that reference to the works plan and the maximum capacity of the generating station is included.

You confirmed that Work no 4 would be a private road for the benefit of the generating station and there would not be any improvements to the public highway. You are to consider how this road is to be connected to the highway and whether it is necessary to include model provision 12.

In the ExM you should also explain and justify how each of the works is integral to the proposed development.

We note that you do not anticipate any ancillary works to be included in the draft DCO.

Schedule 1 Part 2 Requirements

General points

The draft DCO needs to be consistent in itself both in terms of terminology and content. Eg the site access is referred to in different ways and the inclusion of ‘permanent improvements to the public highway’ in requirement 9 is at odds with the absence of an article on street works.

Requirement 3: You agreed to check the appropriate body to whom a decommissioning and site restoration scheme needs to be submitted.

Requirements 4, 6, 7, 9, 10, 13, 14, 15, 16, 18, 19, 20, 21: These are matters which you will need to discuss and agree with the appropriate authority such as the LPA. In practice, such authorities may prefer to approve the relevant schemes in place of the Commission, rather than merely being consultees. CLG guidance to Local Authorities indicates at paragraph 70 that “local authorities should continue to recommend any requirements (both during pre-application consultation and IPC examination) that they feel are appropriate to a NSIP, including any subsequent approvals to be delegated to local authorities for decision”.

Requirement 5: The caveat “unless otherwise approved in writing by the Commission” should be reconsidered. Please note that the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 comes into force on 1 October 2011 (<http://www.legislation.gov.uk/ukxi/2011/2055/made/data.pdf>). You will need to ensure that the draft DCO is compliant with the new regulations.

Requirements 6, 9, 10, 11, 21: We understand that you will reconsider (and explain in the ExM accordingly) the need to exempt the felling and lopping of trees from these requirements.

Requirement 21

You confirmed that you will include the words “The scheme of investigation shall be implemented as approved”.

Requirement 22: We understand that you will reconsider the drafting of this requirement to include that the ecological clerk of works should be a suitably qualified environmental professional and/or that the appointment would be made in agreement with the LPA.

Requirements 23-26: We discussed the rationale for including the Schedule of Noise Guidance Notes in Part 3 and whether a reference should also be included to ensure that the approach and standards are kept up to date as and when technical advances occur which change the way noise emissions are calculated and assessed..

Requirements - General

You will consider whether Model Requirements 14, 15, 32, 35, and 36 are necessary.

Requirements where subsequent approvals are needed: You will need to ensure that the Environmental Impact Assessment (EIA) presented in support of the application assesses in full the environmental impacts attributable to the development as described by the draft DCO. The scope of what’s being left for discharge after the DCO consent has been granted needs to be sufficiently confined to ensure that the impact cannot exceed that which will have already been assessed as part of the ES. IPC Advice Note 9: Rochdale Envelope provides further advice. The EIA should also assess any cumulative impacts with other development that could give rise to significant environmental effects.

Schedule 4 - Modification of compensation and compulsory purchase enactments

It is our view that this Schedule is unnecessary as the definition of land in s235 of PA 2008 states “and in relation to Part 7 must be read in accordance with s159”. This section states “land” includes any interest in or right over land (s159 (2)) and acquiring a right over land includes acquiring an existing one or creating a new one (s159 (3)).

Under s152(3) compensation is payable to any person whose land (which includes rights, in accordance with the definition above) is injuriously affected so there should be no need for the modifications as drafted to be included.

Additionally, s125 of PA 2008 applies Part 1 of the Compulsory Purchase Act 1965. S1 (3) states that land includes anything falling within any definition of that expression in the enactment under which the purchase is authorised. The purchase is authorised under PA 2008 (by the inclusion of a compulsory acquisition provision in the draft DCO) so the definition of land as contained in PA 2008 applies and the acquisition of rights (as defined in s159(3)) is subject to Part 1 of the Compulsory Purchase Act 1965.

Explanatory Memorandum

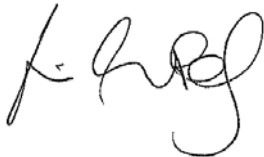
IPC Advice Note 13 on Preparation of a draft order granting development consent and explanatory memorandum states the following:

“The draft Order must be accompanied by an Explanatory Memorandum (Reg 5(2)(c)) explaining the purpose and effect of each provision in a draft Order (explaining, for example, why it is considered necessary) and any departures from the model provisions’.

Please note that the issues highlighted above and comments made in our earlier letter of 10 February 2011 do not constitute an exhaustive list. It is the applicant’s duty to ensure that *all* documents submitted with the DCO application comply with the relevant legislation and required standards.

Should you have any queries in relation to the above or any other matter, please do not hesitate to contact me.

Yours sincerely



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Cc Bethan Thomas – RWE Npower Ltd

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