



The Millbrook Power (Gas Fired Power Station) Order

Written Summary of the Issue Specific Hearing on DCO – Submitted at Deadline 2

Planning Act 2008
The Infrastructure Planning
(Applications: Prescribed Forms and Procedure) Regulations 2009

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WRITTEN SUMMARY OF MILLBROOK POWER LIMITED'S ("THE APPLICANT") ORAL CASE PUT AT THE DEVELOPMENT CONSENT ORDER ISSUE SPECIFIC HEARING

1. INTRODUCTORY REMARKS

- 1.1 The Issue Specific Hearing ("**ISH**") regarding the draft Development Consent Order ("**dDCO**") was held at 14:00 on 13 March 2018 at the Forest Centre, Station Road, Marston Moretaine, Bedfordshire, MK43 0PR.
- 1.2 The ISH took the form of running through items listed in the agenda contained in Annex G to the Examining Authority's ("**ExA**") Rule 6 Letter dated 12 February 2018 ("**the Agenda**"). The format of this note follows that of the Agenda. Where substantive submissions have been made subsequently in the Applicant's **Response to the ExA's First Written Questions submitted at Deadline 2**, such submissions have been referred to below instead of summarising the oral response in order to avoid repetition. The Applicant's substantive oral submissions commenced at item 2 of the Agenda, therefore this note does not cover item 1 which was procedural and administrative in nature.

2. THE PARTICIPATING PARTIES

- 2.1 The ExA: - Planning Inspector, Jonathan Green.
- 2.2 The Applicant:
 - 2.2.1 Speaking on behalf of the Applicant: - Richard Griffiths (Partner at Pinsent Masons LLP).
 - 2.2.2 Present from the Applicant: - David Ball (Drax Power, parent company of the Applicant), Nick Johnson (Stag Energy, project managers for the Applicant), Chris McKerrow (Stag Energy, project managers for the Applicant).
 - 2.2.3 The Applicant's consultants and legal advisors:- Claire Brodrick (Pinsent Masons LLP), Matthew Carpenter (Pinsent Masons LLP), Chris Leach (Environmental Assessment technical lead, Peter Brett Associates) and Sarah Chandler (Principal Infrastructure Planner, Peter Brett Associates).
- 2.3 The following parties participated in the ISH:
 - 2.3.1 Central Bedfordshire Council ("**CBC**"):- Roy Romans (Planning Officer).
 - 2.3.2 Marston Moretaine Parish Council ("**MMPC**"):- Peter Neale (Councillor).
 - 2.3.3 Covanta Rookery South Limited ("**Covanta**"):- David Wood (Hogan Lovells International LLP).

3. AGENDA ITEM 2 – ISSUES ARISING FROM THE DRAFT DCO

3.1 Interpretation

Ref	ExA's Agenda Item	Summary of Applicant's Response
2.1	<p>Inter-relationship between the Low Level Restoration Scheme (LLRS) of Rookery South Pit (reference number BC/CM/2000/8) (the LLRS) and the draft DCO.</p> <ul style="list-style-type: none"> • Provision of the full plans for the LLRS? • Certification of planning permission and plans? 	<p>Richard Griffiths on behalf of the Applicant set out that the Low-Level Restoration Scheme (LLRS) for Rookery Pit is described in section 3.4 of the Planning Statement (Examination Library Reference: APP-056) and a copy of planning permission BC/CM/2000/8 is included as Appendix 2. An indicative scheme plan of the proposed LLRS works is contained in Figure 3.4.</p> <p>The LLRS covers the whole of Rookery Pit. The LLRS has four phases of works involving extraction of clay from a previously unworked area to be used in the pit for the purposes of re-profiling. On completion, the pit is intended to have a drainage system installed in accordance with approved details. This system is intended to drain the restored pit into an internal balancing pond.</p> <p>A copy of the approved drawings referred to in condition 2 of the LLRS planning permission will be submitted at Deadline 2.</p> <p>The Applicant does not consider that there is a need to certify the planning permission and plans as they are publicly available documents, granted by the local planning authority and copies are kept by the local planning authority.</p> <p>The Applicant understands that the purpose of certification in a DCO is to ensure that application documents for the DCO can be cited in Court proceedings. The admissibility and status of application documents would otherwise be uncertain. This is not the case with a pre-existing planning permission, which is already a public document.</p>
2.2	<p>Completion of the LLRS is assumed in defining the baseline for the Environmental Statement (ES).</p>	<p>The Applicant refers to questions 1.0.7 and 1.11.2 in its Response to the ExA's First Written Questions submitted at Deadline 2 where a response is</p>

	<ul style="list-style-type: none"> • How will the satisfactory completion of this work be ensured through the DCO – e.g. a “Grampian” requirement to provide for certification of completion by a third party? 	<p>set out in more detail.</p> <p>At the ISH, Richard Griffiths explained that in order to assist the ExA, the Applicant intends to submit a plan at Deadline 2 which details the elements of the LLRS that are assumed to have been completed prior to the commencement of the Project for the purposes of the baseline in the ES.</p> <p>The Applicant will also submit a document at Deadline 2 which confirms the current status of the elements of the LLRS referred to in the baseline of the ES (e.g. whether it has been completed as part of phase 1).</p> <p>The Applicant is prepared to offer a DCO requirement which states that no part of the authorised development may commence until the LLRS works shown on the plan that the Applicant will submit at Deadline 2 have been completed. This requirement has been added to the dDCO (Revision 1) submitted at Deadline 2 – please see requirement 20.</p> <p>In response to the ExA’s follow up question regarding who should certify that the works have been carried out, Richard Griffiths responded that CBC would be the appropriate authority. Roy Romans on behalf of CBC confirmed that it would be the appropriate body (especially given CBC’s experience with a similar requirement for the Rookery South (Resource Recovery Facility) Order 2011).</p> <p>Roy Romans suggested that it would be of assistance to the ExA to attend the site and view the status of the LLRS as this would help to provide clarity over the extent of the works.</p>
	<p>(Agenda item 2.3 was omitted from Annex G of Rule 6 letter this is assumed to be a formatting error).</p>	
<p>2.4 and 2.5</p>	<p>2.4 The LLRS drainage works defined in the DCO provides for the construction of a drainage channel which is different from the one provided for in BC/CM/2000/8. In the Explanatory Memorandum (EM) it is argued that the revised location is not materially different to that proposed</p>	<p>The Applicant refers to questions 1.11.3 and 1.11.4 in its Response to the ExA’s First Written Questions submitted at Deadline 2 where a response to Agenda items 2.4 and 2.5 is covered in more detail.</p> <p>At the ISH, Roy Romans explained that CBC did not consider the change to</p>

	<p>under the planning permission.</p> <ul style="list-style-type: none"> • Views of the party responsible for implementing the LLRS and Central Bedfordshire about this variation from the works as permitted? • Whether there would be any conflict with the planning permission? • Need for variation of the planning permission? <p>2.5 These drainage works are defined as 'permitted preliminary works' which fall outside of the definition of 'commencement of the development'.</p> <ul style="list-style-type: none"> • What are the reasons for excluding these works from commencement? 	<p>be materially different and that it was not an area of concern for CBC. The best course of action would be to amend the approved plan under condition 2 of the LLRS planning permission (BC/CM/2000/8).</p> <p>Richard Griffiths confirmed that the Applicant has discussed the relocation of the drainage channel with CBC. CBC has agreed that it would be minded to approve an amendment to the Phase 1 plan which can be amended by agreement pursuant to condition 2 of the LLRS planning permission.</p>
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3.2 Articles

Ref	Issue raised by ExA	Response
2.6	<p>Article 22 - authorises the compulsory acquisition of rights over the Order land. Document ref 2.5 drawing no J0008128-101 shows a substantial area marked as 4_PGP over which compulsory rights are sought. The note on the drawing states that a right of access of no more than 15m in width is required but the whole area has been included as a limit of deviation. This area is the land on which the main Rookery South development would take place.</p>	<p>The Applicant refers to question 1.12.2 in its Response to the ExA's First Written Questions submitted at Deadline 2 where a response to Agenda item 2.6 is covered in more detail. Such response also includes detail regarding how the requirement for such compulsory acquisition rights meets the conditions set out in s.122 of the Planning Act 2008 (PA 2008).</p> <p>At the ISH, Richard Griffiths explained that it is correct that the Applicant seeks a right of access of no more than 15 metres in width during construction and the right to construct, use and maintain a permanent access road of no more than 10 metres in width.</p>

	<ul style="list-style-type: none"> • What are your reasons for including all of 4_PGP? • Scope for defining a specific access route? 	<p>As the Applicant will need to connect to the end of the access road used for the Rookery RRF Project, and in light of the fact that the location of such road is not specified in the RRF Order, there is a need for the Applicant to maintain flexibility until such time as the location of the access road for the Rookery RRF Project is fixed and built.</p> <p>David Wood on behalf of Covanta confirmed that the limits of deviation for the access road were very broad.</p> <p>Roy Romans confirmed on behalf of CBC that the access road was making good progress and that in accordance with the current timetable it should be virtually completed by the end of the Examination.</p>
2.7	<p>Article 39 - provides for the modification and amendment of the Rookery South (Resource Recovery Facility) Order 2011 with the detailed proposal set out in Schedule 11. The EM sets out the basis on which the Secretary of State could use s120 of PA 2008 to make such a modification.</p> <ul style="list-style-type: none"> • Elaboration of the case for using s120 rather than s153 and schedule 6? Supporting legal advice? • Use of s120 without agreement with Covanta? 	<p>The Applicant refers to question 1.12.8 in its Response to the ExA's First Written Questions submitted at Deadline 2 and to the Opinion of Michael Humphries QC included as an appendix of the same document.</p> <p>At the ISH, David Wood on behalf of Covanta provided an update to the ExA setting out that works on the Rookery South scheme commenced on 8 January 2018 which were sufficient to implement the DCO.</p> <p>The ExA explained that a late further written submission had been received by the ExA from Covanta regarding the use of section 120 PA 2008 to vary the Rookery South (Resource Recovery Facility) Order 2011 (the Covanta legal opinion).</p> <p>Richard Griffiths explained that the Applicant would consider the Covanta legal opinion in detail and provide a full response at Deadline 2. Having considered the Covanta legal opinion in brief, it is clear that there is no disagreement between the parties that section 120 PA 2008 can be used in order to modify a DCO. Richard Griffiths also provided a summary of the justification for the use of section 120 (the detail of which is included in the Applicant's response to question 1.12.8 in its Response to the ExA's First Written Questions submitted at Deadline 2.)</p>

		<p>David Wood set out on behalf of Covanta that the Applicant's summary was fair. Where the parties diverge in relation to section 120 PA 2008 is over whether section 120(5)(a) or section 120(5)(b) should be used. Covanta does, however, consider that the most appropriate way to regulate the relationship between the parties would be by way of an agreement as opposed to through amending the DCO.</p> <p>Richard Griffiths argued that while an agreement may be appropriate in certain circumstances, a reasonable and sensible approach needs to be taken. The Rookery South (Resource Recovery Facility) Order 2011 is very wide in scope yet its infrastructure is in a narrow area. The Applicant's concern is to prevent an impediment to the proposed Nationally Significant Infrastructure Project. The Applicant has been in discussions with Covanta (contrary to the implication of the letter accompanying the Covanta legal opinion) and the Applicant is actively exploring what can be agreed on a practical level through property documentation. However, regarding the need to regulate the statutory powers contained in the Rookery South (Resource Recovery Facility) Order 2011, the Applicant's position is that this needs to be done via a modification to the RRF Order. More detail is provided in the Applicant's response to questions 1.12.8, 1.12.9 and 1.12.10 contained in its Response to the ExA's First Written Questions submitted at Deadline 2.</p> <p>The ExA acknowledged that the RRF Order was very wide in scope and permitted far reaching powers in comparison to more recent made DCOs. The ExA enquired as to why such powers were required by Covanta and in response David Wood stated that he was not aware of the reason for such powers being in place.</p>
2.7 (repeated)	Covanta has set out its view in its relevant representation that its preferred approach to addressing the physical overlaps between the two projects is to have an interface agreement between	The Applicant refers to its response to question 1.12.9 in its Response to the ExA's First Written Questions submitted at Deadline 2 .

	<p>the two operators and not to amend its DCO.</p> <ul style="list-style-type: none"> • Pros and cons of this approach? • Update on progress on discussions with Covanta? 	
2.8	<p>Schedule 11 sets out the specific proposals for amending the Rookery South DCO. I will examine this in more detail when we get to the next DCO hearing and when I have received any further comments that Covanta wish to make on the draft DCO. One point on which I would welcome early clarification is the inclusion of paragraphs 27 and 28 of Schedule 11. These appear to provide a defence for unspecific non-compliance with requirements in the Rookery South DCO.</p> <ul style="list-style-type: none"> • Can you provide justification for the inclusion of this provision? • Powers in PA 2008 which allow the creation of a defence in a protective provision? 	<p>The Applicant refers to its response to question 1.14.6 in its Response to the ExA's First Written Questions submitted at Deadline 2.</p>
2.9	<p>Article 40 provides for the certification of plans. This list does not include all the plans referred to elsewhere in the DCO which set the way in which different aspects of the development will be defined – e.g. the outline Construction Environment Management Plan, the outline Landscape and Ecological Mitigation and Management Strategy and others.</p> <ul style="list-style-type: none"> • Is there a reason that plans such as these are not listed for certification? 	<p>The Applicant refers to question 1.12.12 in its Response to the ExA's First Written Questions submitted at Deadline 2.</p> <p>The plans not expressly referred to in Article 40 are plans that are contained in the Environmental Statement, which is included in Article 40. Accordingly, by virtue of the Environmental Statement being certified, the plans are certified.</p> <p>However, the dDCO (Revision 1) submitted at Deadline 2 has been amended so Article 39 (formerly Article 40) contains all plans referred to in the dDCO.</p> <p>The ExA confirmed that this would be a helpful approach and Roy Romans</p>

		on behalf of CBC agreed that this would be a helpful approach as it will make it clear for enforcing officers to find documents easily.
2.10	<p>Additional Article. At present the DCO does not provide any security that funds will be available to pay compensation for compulsory acquisition. The Funding Statement refers to the resources of the Drax Group plc being available to fund the project but no guarantee of payment is provided. Provisions to guarantee payments have been included in recent DCOs – e.g. Article 9 of the Keuper Underground Gas Storage Facility Order and Article 7 of the Progress Power (Gas Fired Power Station) Order.</p> <ul style="list-style-type: none"> • Do have reasons for not including such provisions? 	<p>Richard Griffiths confirmed that the Applicant is prepared to provide such an Article in revision 1 of the dDCO.</p> <p>The Applicant intends to use the drafting similar to that included at Article 39 of the Wrexham Gas Fired Generating Station Order 2017.</p>

3.3 Requirements

Ref	Issue raised by ExA	Response
2.11	<p>Requirement 18 provides for the decommissioning of the generation plant.</p> <ul style="list-style-type: none"> • Do you have reasons for not also including decommissioning of the electrical and gas connection works which are included in the DCO as associated development? 	<p>The Applicant refers to questions 1.0.18 and 1.13.1 in its Response to the ExA's First Written Questions submitted at Deadline 2 where this point is covered in more detail.</p> <p>At the ISH, Richard Griffiths confirmed that the usual position is that the electrical connection and the above ground gas infrastructure will not be included for decommissioning. The custodian, National Grid, may in future wish to use such connection to form part of the wider network. There are duties of statutory undertakers to connect in the most economical way and</p>

		these connections may therefore be used to connect future generation.
2.12	<p>Requirement 19 provides some flexibility on the details of the development set out in Requirement 2.</p> <ul style="list-style-type: none"> • What sorts of amendments is this requirement intended to cover? 	<p>The Applicant refers to question 1.13.2 in its Response to the ExA's First Written Questions submitted at Deadline 2 where this point is covered in more detail.</p> <p>At the ISH, Richard Griffiths set out that the purpose of this Requirement was for making very minor tweaks but that it was not drafted with any specific change in mind.</p>
2.13	<p>Requirement 20 appears to provide a wide-ranging defence to breach of conditions in the Rookery South Pit planning permission. This is similar to the provisions in paragraphs 27 and 28 of Schedule 11 relating to the Rookery South DCO.</p> <ul style="list-style-type: none"> • What are your reasons for including this provision? • Inclusion in requirements rather than the operative part of the DCO? • Precedents for this type of requirement? • What are the views of Central Bedfordshire Council? 	<p>The Applicant refers to question 1.13.5 in its Response to the ExA's First Written Questions submitted at Deadline 2 where this point is covered in more detail.</p>

3.4 Section 106 Agreement

Ref	Issue raised by ExA	Response
3.1	<p>Plans for S106 agreements?</p> <ul style="list-style-type: none"> • Parties to agreements and likely provisions? 	<p>Richard Griffiths confirmed that the Applicant is in discussions with CBC. The provisions of the agreement will relate to an education scheme for local schools to learn about the project and a scheme for the use of local services during construction. This would be agreed as soon as possible.</p>

	• Timing of first drafts?	
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3.5 **Next steps**

Ref	Issue raised by ExA	Response
4.1	<p>Next Steps</p> <ul style="list-style-type: none"> • First questions from the ExA • Next draft of DCO • Logging changes to the draft DCO • <p>Use of SI template → Need to remove all typographical errors</p> <ul style="list-style-type: none"> • Audit/ensure internally consistent. 	<p>Richard Griffiths stated that the Applicant intends to submit a revised dDCO for Deadline 2.</p> <p>As agreed at the Preliminary Meeting subsequent versions of the draft DCO submitted after the application version will be:</p> <p>(a) supplied in both pdf and Word formats;</p> <p>(b) accompanied by a tracked changed version showing changes from the previous version; and</p> <p>(c) accompanied by a table logging the changes made.</p> <p>The DCO is currently in the SI template format and a validation report has been provided. The Applicant will continue to draft all revisions of the DCO in the SI format.</p>