The Planning Inspectorate

4/08 Eagle Wing
Temple Quay House
2 The Square
Bristol, BS1 6PN

Customer Services: 0303 444 5000
e-mail: enquiries@infrastructure.gsi.gov.uk

Paul Wormald
Peter Brett Associates LLP
16 Brewhouse Yard
Clerkenwell
London
EC1V 4LJ

Your Ref: PGW/MPL

Our Ref: EN010068

Date:13 March 2015

Dear Mr Wormald

Application by Millbrook Power Ltd for an Order Granting Development Consent for a gas fired peaking plant and connection infrastructure with a capacity of 299MW at Rookery Pit (South) Near Stewartby, Bedfordshire.

On Friday 6th March you sent us an undated draft DCO with additional Schedules 10 and 11.

In the limited time available we have reviewed the contents of the parts of Schedule 10 and 11 that you have sent us. We have not considered whether the provisions have implications for the main part of the proposed DCO. We make the following general comments.

The updated parts of the Schedules seek to make provision for the operation of the proposed power station on land that falls, almost entirely, within the Order Limits of the Rookery South DCO ('the R Order'). Your aim is for both facilities to operate side by side and you seek to achieve this primarily by making changes to the R Order (in the draft Schedule 11) and by inserting specific provisions which impose obligations on Millbrook Power Ltd (M) in respect of overlapping powers in the draft Schedule 10.

This note will also refer to the draft Millbrook Order as 'your Order' and 'your' in this context means the Millbrook Power Limited, the intended beneficiaries.

Covanta Rookery South Limited is the beneficiary of the R Order (this note will refer to 'C' for ease of reference). We note that a definition of 'Covanta' is provided in Schedule 10 and where that expression is used it will have no application in circumstances where the benefit of the R Order is transferred.

Schedule 11 (para 24) will impose a restriction on most of the operative parts of the R Order to the extent that they have application in land within your Order Limits. C will be unable to exercise the rights granted to it by the provisions listed unless it obtains your prior written consent. We note and would question the necessity for the breadth of this

provision, the fact that there is no controls on M to prevent the unreasonable withholding of consent and no mechanism for resolving disputes.

Para 25 deals with the scenario of both facilities being constructed concurrently and imposes a duty on C *to cooperate* with M with a view to ensuring *coordination of construction programming* with M's and to ensure that M can access its facility. C is further required to *use its best endeavours* to avoid any conflict arising *between the carrying out of the respective authorised developments*. It appears to be unclear what is meant by the words in italics in the last sentence and we again note that there is no provision for dispute resolution.

We note that para 26 provides that C will not be subject to any of the requirements imposed by the R Order if complying with those requirements conflicts with the duty to cooperate that you seek to impose. We note that this provision could result in circumvention of the statutory controls imposed by the R Order. We note no provision to ensure that C does not act outside of the scope of its authorised development as assessed in the ES.

We note that it is proposed (para 27) that a specific defence, based on the duty to cooperate, will be available to C in circumstances where it cooperates with M. Mindful of the requirements of legal certainty, we note the imprecise expressions used and the existing *reasonable excuse defence* in section 161.

Schedule 10

We note that you intend that M would be required to consult with C before submitting written details in respect of location of the access road (para 76) street works, construction of the access road, temporary prohibition or restriction on use of streets (para 78). The latter would apply only over land within *the Rookery* limits of deviation.

We note that *limits of deviation* are secured in the R O by reference to individual works.

We note that reference to C would not apply provisions in the event of the benefit of C's Order being transferred.

We note that there are no controls on the duty to consult – no time limit for a response, no requirement for C's response to be taken into account etc.

Paragraph 77 deals with the situation where M commences the authorised development before C and provides that M will not submit its written strategy for landscaping and ecological mitigation for the works 6A or 6B and 7 without having first consulted C about M's plans to replace *the specified planting* (which we assume to mean the planting required by R Order requirements). The subsequent *reasonable endeavours* requirement is not clear. What does this mean in respect of the obligations on C imposed by the R Order? Again there is no dispute resolution mechanism.

Para 79 mirrors para 25 of Schedule 11 (see comments above on that) except that it does not impose a *reasonable endeavours* duty on M as para 25(b) does on C.

Finally we note that in the event that C is required to provide a rail facility pursuant to the s106 agreement, M will be required to *cooperate* with C *to ensure that Works 6 and*

7 can co-exist with delivery of any rail facility with C. Again we note that there is no provision for dispute resolution.

Please note that these comments are provided without prejudice to any decisions taken by the Secretary of State during acceptance or the Examining Authority during examination, if the proposed development is accepted for examination. The advice provided above does not constitute legal advice upon which the applicant (or others) can rely.

Yours sincerely,

Kenneth Taylor
Infrastructure Planning Lead