CITY & COUNTY OF SWANSEA

POST HEARING –

WRITTEN SUBMISSION OF ORAL CASE

Abergelli Power Project

Issue Specific Hearing on the Draft Development Consent Order (DCO)

10th October 2018

PINS REFERENCE: EN010069

CCS EXAMINATION REFERENCE: 20011204

CCS APPLICATION REFERENCE: 2018/1289/DCO

Issue Specific Hearing on the Draft Development Consent Order (DCO)
Post Hearing Submission –
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10th October 2018 – The Village Hotel, Swansea

Introductions

The City and County of Swansea (CCS) were represented by Andrew Ferguson (Principal Planning Officer) and Jonathan Wills (Senior Lawyer).

DCO Articles

Part 1 – Definition of Maintain

The Local Authority have concerns with regards to the extent of the current definition of maintain. Firstly, the definition includes the terms "remove", "reconstruct" and "replace and improve", which when read together with the whole of the definition, and the DCO, causes some concern. The definition goes on to state that any this includes any part of, but not the whole of the authorised development…

The authorised development is fully laid out in Schedule 1 and comprises all of the works required, listed into separate work items. The current definition allows for a whole range of works providing that the whole of the authorised development isn't removed, reconstructed, replaced etc. The current wording suggests that they could reconstruct the whole of the generating equipment site like for like providing that they don't change the access as an example Work item 2). Alternately, they could replace and improve individual elements within the definition and have the same effect.

As the Authority have indicated in the Relevant Representation, a decommissioning strategy will be required in order to consider the safe removal of the generating equipment and apparatus at a later date. When you include the word "remove" in the definition, the developer could remove items as part of this definition provided it is not the 'whole' rendering the decommissioning strategy superfluous if they removed all of the generating equipment under the definition of maintenance for example. There would be no controls over this as required in Requirement 27 of the Order, provided the whole of the project is not removed. Buildings could therefore be removed without the requisite surveys for example.

In addition, allowing various parts to be reconstructed at various points (providing it's not the whole) would enable the plant to operate indefinitely providing it doesn't give rise to any materially new or different environmental effects from those assessed in the environmental statement.

Part 1 – Commencement of Development:

CCS had no comments on this section. *Subsequently however, it has come to light that there is a discrepancy within the definition which includes the erection of temporary fencing which contradicts Requirement 5 and this is included in the Local Impact Report).*

Part 2 – Article 6 and 7

CCS had no comments. *However, it is considered appropriate to include a mechanism to notify CCS of any changes in Article 7 and this is included in the Local Impact Report.*

Part 3 – Article 8

CCS were concerned that subsection 2(a) provided for a great deal of scope in the works that could have resultant impacts on drainage or ecology for example that wouldn't be considered and haven't been included in the ES.

Part 4 – Authority to survey and investigate the land

CCS had no comments.

Part 5 – Powers of Acquisition

CCS had no comments.

Part 6 – Operations

CCS queried whether S35(4) gave too much leeway to remove hedges and whether they would be outside of the limits included in the DCO.

Part 7 – Article 40 – Certification of Plans

CCS had no comments.

Article 42(4) – 8 week guillotine

If CCS don't agree to a request for consent, agreement or approval, it is automatically conferred after 8 weeks unless it is refused or an extension is agreed. It would be preferable if a right of appeal was conferred if agreement has not been reached within 8 weeks which the applicant could utilise otherwise it may lead to refusals late on and unnecessary appeals if extensions can't be agreed in writing. The applicant would have the right of appeal if a decision has not been given after this time but may wish to wait until a determination rather than have an application refused and then have to resubmit again.

Either way, Article 42(6) should be amended to include a requirement to clarify precisely what provision/ article that consent is being sought under (to ensure that the request is considered by the relevant person).

However, this is considered more important for Schedule 12, Regulation 1(2) as there are more details to be considered as part of Requirements.

Schedule 1 – Inclusion of permanent bridge structure

CCS had no comments at the current time but consider that the parameters should be included and CCS should be given the opportunity to comment on the details.

Schedule 2 – Requirements

Requirement 8 – Pre-Construction Ecological Constraints Review. The current wording of this requirement does not build in a timetable for implementation. It is accepted practice that ecological surveys have a 2 year shelf life and the current proposals don't require the works to be implemented in a certain time period following on from the survey being undertaken and approved. NRWs views sought.

Requirement 17 – CEMP:

CCS had no issue with the status of the CEMP. It was brought to the CCS attention before the hearing that this Requirement was drafted incorrectly and needed amending to exclude Work No. 5.

Requirements 18, 19 and 20

CCS had concerns about these requirements as they seemed to duplicate work included within Requirement 17. However, it was brought to CCS attention before the hearing that these Requirements had been drafted incorrectly and were just meant to refer to Work No. 5. Notwithstanding this, the Council would consider that some of the other requirements of the CEMP would also be required for this work item, such as community liaison, a complaints procedure and a protocol in the event that unexpected contamination was found. CCS queried whether a "CEMP-Light" approach could be adopted to provide the flexibility requested by the developer but also safeguarding the environment and ensuring compliance with the ES.

CCS will need to consider this position further in discussion with the Pollution Control department.

Requirement 23

CCS advised that the Pollution Control Officer had requested that Requirement 23(3) be deleted from the Draft DCO. This provision extends the working day by an hour and goes beyond the reasonable working hours normally anticipated on a site such as this. The Authority have received numerous complaints from other sites when people are setting up beforehand and finishing up for the day.

Requirement 27(2): relevant permissions

Current requirement states that this is subject to obtaining the relevant permissions. The current wording of this requirement could result in the applicant not seeking to obtain the relevant consents and therefore they wouldn't have to comply with this requirement. It was not entirely clear what the relevant consents / permissions were before the Hearing and therefore it was not clear whether they could be obtained and the Project could and would be decommissioned. The applicant provided some information before the Hearing about what was envisaged (such as the Environmental Permit and Abnormal Loads) and CCS requested an idea of the full remit if the project was to be decommissioned at the current time to gain a better understanding of the issues.

Criminal sanctions are suggested but if the necessary consents aren't approved, the applicant wouldn't have breached this requirement and therefore no enforcement action would be possible.

They could submit a strategy with timeframes but it may never be implemented due to the them not being able or not attempting to get the "necessary consent" whatever that may be.

In addition, this section states that "unless otherwise agreed in writing" – planning case law indicates that tailpieces like this should not be used in general as they are imprecise and therefore fail to meet the relevant tests set out in the Planning Circular. The wording also states that a scheme has to be submitted and approved within 2 years but the date of submission would obviously impact on the approval (i.e. if submitted after 23.5 months).

This section needs to be cross-referenced with the section for a bond.

Annual Plant Output

CCS were of the opinion that 1,500hrs a year max over a rolling 5 years period and 2,250 maximum in any one year. This had been modelled in ES and would be controlled by Environmental Permit.

Time Limit for Generating Station Requirement:

The Project has a design life of 25 years and this is stated throughout the Environmental Statement and several management plans are written to last for the duration of the Project. In addition, the project has been designed for this design life, for example in terms of the attenuation requirements for surface water discharge which may not be adequately sized to cope with longer durations. The Council are therefore of the opinion that there should be a requirement limiting the lifetime of this Order for 25 years.

NPS-EN1, Para 5.9.16 states that the IPC should consider whether any adverse impact is temporary (in regard to landscape impact but this is used as an example), such as during construction, and/or whether any adverse impact on the landscape will be capable of being reversed in a timescale that the IPC considers reasonable. The Environmental Statement has been set out on the basis that the alterations are reversible, but no time limit has been set for this despite an assertion that there would have a design life of 25 years. A degree of certainty should be provided.

The Environmental Statement is misleading if no mechanism is put in place to limit the duration of the Project in that it refers throughout to the 25 year lifetime. If a limit is not included in the DCO, then it could still be operational permanently, even more likely given the current definition of the term "maintain" set out in Article 2 of the Order. The impacts have been assessed in the main as non-permanent and any reasonable reader would consider this to be the lifetime of the plant. Without this time limit, it is considered that the environmental considerations have been misrepresented and the assessment reached inaccurate.

Bond for Decommissioning:

Further to this, the Council are firmly of the belief that a bond should be provided to cover the full cost of decommissioning, repayable upon completion of this element, to ensure that there is funding available to dismantle/ decommission the project in the future. There have been various instances (for example in mining) whereby restoration works have not been undertaken as a company has entered liquidation and the Council do not consider that the public purse should have to pick up the cost of any decommissioning works.

The full cost of restoration does not need to be put on deposit at the outset, but it should build up commensurate with the programme of activity. The applicant states that there is no policy in National Policy Statements, PPW or at local level to support the provision of a bond, however, in terms of welsh policy, there is no reference to Development Consent Orders in either PPW or the Unitary Development Plan (or LDP which started in 2008 at the same time as the Planning Act introduced this legislation). It is clear in the Minerals section of Planning Policy Wales that financial guarantees are required as there have been legacy problems with this kind of infrastructure. It is also apparent that the requirement for these bonds was not foreseen at the outset and would not have been required when these were originally granted consent, but are in the current climate.

Given that the new consent regime introduced under the 2008 Planning Act is relatively new, it is highly unlikely that any issues on other projects will have been faced to date. To be truly sustainable, it is imperative that the Project is decommissioned at the end of its lifespan to avoid blight on the landscape and ensure the land can be used again productively in the future (as well as reducing long term reliance on the use of fossil fuels). This matter is both **important** and **relevant** to the determination of this Development Consent Order. The provision of a bond would meet the relevant tests of a condition or a Planning Obligation.

APL have commented that there is no policy requirement to provide a bond and similarly, there are enforcement powers in place should the decommissioning requirement be breached. In terms of the policy element, it is clear that the proposals are intended to be a short-medium term solution to aid a move towards a low carbon future. APL themselves consider that a decommissioning strategy is required on this basis (notwithstanding comments on a time limit on the permission). Whilst APL consider that the decommissioning strategy itself is enforceable, as noted above, this is subject to them obtaining the relevant permissions (at the current time).

The inference being that if they can't obtain the relevant permission's, they won't be able to decommission the project. In this event, they wouldn't have even breached the Requirement given the current wording.

In any event, APL refer to Section 161(1)(b) of the 2008 Planning Act which refers to enforcement of requirements. At the current time, the criminal sanction is only a fine, and this fine is currently limited at £50,000 (although the Examining Authority was clarified that the SoS could increase this). APL have previously indicated that the cost of the demolition would be circa £2,000,000 (this cost assumes that the pipeline is capped and left in situ, the cable left in situ, and the Generating Equipment Site taken back to ground level and land re-seeded) and on this basis, the financial penalties for enforcement are not considered satisfactory to require the Project to be decommissioned in a timely manner. APL have suggested previously that the materials that would be salvaged are thought to cover the cost of demolition, however this cannot be verified and with no timescale for demolition, it is not clear what condition the parts would be in, let alone their value at the time. Due to the actual costs of demolition indicated above, direct action would not be an option either as the Council would not recoup this money afterwards given the limited land value.

It is clear at the current time that public bodies are facing ongoing cuts and have been for a considerable period of time. These cuts are likely to continue at least in the short term putting even more pressure on Council budgets. Within this context, it is considered appropriate to require a fully refundable bond that would build up over its lifetime that would only be used in the event of the

applicant not decommissioning the Project itself at the end of its lifespan. The bond would be repayable at the end of the projects lifetime if not required. To this end, it has to be queried why the applicant is unwilling to accede to this request.

Discharging, Monitoring and Enforcement Payment:
LPA has suggested that provision is made within the Order for charging for the discharge or partial discharge of requirements and applicant appears happy with this. Each request for partial or full discharge should be submitted along with a covering letter explaining exactly what is being sought at any time and a payment should be received for each Requirement. Some requirements may be discharged in full whereas some may be partially discharged up to 5 times for each work item and it will be for the applicant to consider how best they submit these requests. Obviously, each request will result in work which is why each should be funded individually. If the applicant wants to submit information for all work items to save cost, that is at their discretion.

However, there is no funding provided for ongoing monitoring and enforcement operations (if required) and provision could be built in for an annual fee for this to cover some of the cost of ongoing monitoring and enforcement. This could be covered in a S106 agreement. This is likely to be more important in the earlier part of the development during construction and the first 5 years to ensure landscaping works become established and are maintained but there could be some on-going monitoring/ enforcement costs in respect of noise for example.

Schedule 12 – Discharge of Requirements:

CCS agree that 14 day period should be increased to 28 and APL appear happy with this arrangement. The LPA are required to consult (and would in any event) with various parties in order to discharge various requirements. At the current time, it is not clear whether these would be discharged individually (and in part) or as a whole. It is clear from the various requirements that there could be a considerable amount of work that is required to discharge requirements from various bodies. If it is assumed that an application is received and checked (which takes a few day), consultees will be given 21 days to respond which requires additional time to request additional information. Even 21 days would be insufficient as it would require consultations to be sent on day 1 which is unlikely at best).

As stated above, under Article 42(4), the default position should be a right of appeal against non-determination after 8 weeks if no decision has been provided by that stage. This would ensure that sufficient scrutiny is provided of a decision. The applicant has contended that they require a degree of certainty given the importance of the project, but it is also considered appropriate that there is scrutiny and transparency prior to a decision being made. The applicant maintains that if a requirement is refused, they can consider whether to appeal or resubmit. However, the proposed amendment would also allow the applicant to consider whether they wish to appeal the decision (as per their request) but would reduce the requirement for a further submission. This is an even simpler approach than resubmission and would reduce overall end-to-end times in the event that agreement was not reached within an 8 week timeframe. It would also avoid / reduce the need for appeals and associated costs for both parties.

This approach would also ensure that the Environmental information was considered as per the requirements of the EIA Regulations which a default approval would not. A default approval would be contrary to Regulation 3(3) of the Infrastructure Planning EIA Regs 2009. There may be cases

where the applicant has not submitted a Screening Opinion pursuant to Regulation 6 of the Infrastructure Planning EIA Regs 2009 and therefore this has to be undertaken as part of the application process. This may necessitate an Updated Environmental Statement which would necessitate that the Council cease consideration until it is provided, again indicating that the 8 week default approval is flawed.

S106 Agreement

CCS confirmed that this was subject to ongoing discussion but progress was being made and 4 areas had been suggested. Representatives of Drax were due to meet with Education the day after the hearing (and subsequently did meet) to progress this aspect and this will be progressed alongside the examination. CCS have a scheme called Beyond Bricks and mortar which seeks to provide employment opportunities for local residents and companies and this was being progressed although CCS currently have some concerns about the terminology used and what contracts will/ won't be excluded from the process. The Ecologist had requested Swift towers but this is unlikely to meet the relevant CIL tests and negotiation on PROW improvements were also ongoing. Progress was anticipated in the near future.

Living Wage

CCS were unsure if there was a proposal to incorporate the Living Wage into to LDP. It has subsequently been confirmed that there isn't.