

**South Humber Bank Energy Centre ("SHBEC") – EN010107**

**Section 51 Advice – Draft Application Documents Submitted by EP Waste Management Limited ("EPWM") for PINS Review**

**EPWM Responses – 10 March 2020**

<b>Development Consent Order (DCO)</b>			
<b>Q No.</b>	<b>Article (A) / Requirement (R)</b>	<b>Comment/Question</b>	<b>EPWM response</b>
1.	General	The Applicant should ensure that all cross references within the DCO are checked and corrected where necessary/relevant, this includes references to any plans and we would assume this will be corrected in the application version.	This is noted and we confirm this will be done.
2.	General	The Applicant will be asked to maintain a list of all plans and other documents that will require SoS certification (including plan/document references), updated throughout the examination process, and supplied to the ExA before the close of the examination.	This is noted and we confirm this will be done.
3.	General	The DCO is proposed to be a Statutory Instrument (SI) and so should follow the statutory drafting conventions. The DCO (and any subsequent revisions) should be in the form required by the SI template (see Planning Inspectorate AN13) and validated as such using the current SI template, including detailed footnotes to all statutory references.	This is noted and we confirm this will be done.
4.	General	<p>The application DCO and any subsequent versions submitted to the examination:</p> <ul style="list-style-type: none"> <li>• should be supplied in both .pdf and Word formats, the latter showing any changes from the previous version by way of tracked changes, with Word comments briefly outlining the reason for the change;</li> </ul>	This is noted and we confirm this will be done.

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		<ul style="list-style-type: none"> <li>the examination timetable will usually provide a deadline for receipt of the Applicant's final or preferred version of the DCO. That version should be supported by a report of the outcome of validating it through the Publishing section of the www.legislation.gov.uk website.</li> </ul>	
5.	General	The Applicant should explain whether the order limits for the DCO correspond with the red line boundary of the planning permission, and whether the DCO includes all the development for which consent has been granted under the planning permission. If the order limits are different, an overlap plan showing the consented planning permission and the order limits would be helpful.	<p>An overlap plan has been produced and a draft is provided now for information. A version of this will be provided within the DCO application documents.</p> <p>Please see additional text at paragraph 3.4.1 of the EM for an explanation of the differences between the consent boundaries.</p> <p>The DCO does include all the development for which consent was granted under the planning permission.</p>
6.	General	The Applicant should identify which works are the "additional works" referred to in the EM (para 1.5.10). A clear explanation of the differences between the planning permission that has been granted and the development consent which is sought is advisable.	The EM will be updated to include this information.
7.	Article 5 and Schedules 2 and 3	<p>It appears that the Applicant envisages a situation where they will want to switch from implementing the planning permission to implementing the DCO (if permission is granted). To enable this, they have included Article 5 in the DCO.</p> <p>Article 5 is a novel provision and there are a number of issues which arise. It would be advisable for the Applicant to provide legal submissions on the lawfulness of the Article, in particular the ability of a DCO to affect conditions of a planning permission so that they "cease to have effect". The Applicant should explain what legal effect this is intended to have on the planning permission, which will still</p>	<p>The Applicant has reviewed the terms of Article 5 and has provided an updated DCO, including changes to this Article.</p> <p>The Applicant does not consider that revocation of the permission is the appropriate mechanism to use. The permission is part of the planning history of the site, and is very likely to be relied on to build out SHBEC as a 50MW station. Revocation is akin to a form of enforcement action, and expunges the</p>

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		<p>exist. For example, will this in effect leave a planning permission for an Energy from Waste plant without any conditions? This is unlikely to be acceptable. Or is the intention to deem the conditions discharged? Until the equivalent requirements are discharged this is also unlikely to be acceptable. Even if it were acceptable in principle, how will it be clear from the face of the permission that its conditions "cease to have effect" and what are the implications of this for the permission?</p> <p>The Applicant may want to consider drafting to enable the revocation of the planning permission in its entirety instead.</p>	<p>permission.</p> <p>The Applicant considers that the terms of section 120 PA2008 and Schedule 5 are broad, and permit a DCO to (amongst other matters) amend, apply, disapply and vary legislation. A planning permission is an instrument granted pursuant to legislation, and can therefore be 'dealt with' by a DCO. The Applicant will consider this further and update the EM for the DCO application.</p> <p>The legal effect of Article 5(2) is that the planning permission continues to exist and it has no enforceable conditions. The fact that it continues to exist is not a concern, since Article 5(2)(a) makes clear that no further development can take place pursuant to it. The intention is that the DCO and requirements would immediately apply instead, and the drafting has been updated (at 5(2)(b)) to specify that the requirements apply from the moment the conditions are disapplied.</p>
8.	Article 5 (continued)	<p>Aside from the principle of the article there are a number of practical concerns with the drafting.</p> <p>Article 5(1) says that the undertaker must not carry out any part of the authorised development which is comprised in the SHBEC planning permission until notice has been served under paragraph (2).</p> <p>Article 5(3) says that the undertaker may exercise any other powers under the order other than those comprised in the SHBEC planning permission prior to or following service of a notice under paragraph</p>	<p>Point 1 (Article 5(1) and (3)): Article 5(1) has been simplified by removing "which is comprised in the SHBEC planning permission". The restriction prior to serving the notice therefore applies to all works under the DCO. There is then no need to identify in the DCO what is comprised in the SHBEC planning permission.</p> <p>Point 2 (Article 5(5)): the Applicant is drafting the requirements so that they match the conditions on the planning permission, as far as possible. In some</p>

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		<p>(2).</p> <p>The SHBEC planning permission is defined in Article 2 by reference to the permission. However, it is not clear which parts of the authorised development are comprised in the permission. This needs to be clear on the face of the DCO. If this is unclear it will not be possible to know whether the undertaker is in compliance with Article 5 when undertaking works authorised by the DCO.</p> <p>Article 5 (5) says that where details, plans or other matters have been approved or agreed by the LPA pursuant to a condition of the SHBC planning permission in column (1) of Schedule 3, they are deemed to have been approved for the purpose of the corresponding requirement in column (2) of Schedule 3. It is not clear from the DCO or the EM whether the conditions and requirements are identical. This will need to be clearly explained for this provision to be examined. If there are any differences, the acceptability of deeming discharge of the requirements will need to be justified. The EM should in any event explain in detail why this provision is necessary and how it will work in practice. For example, the DCO will apparently authorise "additional works" to the planning permission; how can the discharge of a condition for the planning permission, which does not include these "additional works" be acceptable to discharge a corresponding requirement?</p> <p>The Applicant should also consider whether the drafting of this Article and Schedule 3 will need amending during examination if the Applicant reaches a position where they are discharging conditions of the planning permission. For example, will there be any need for a corresponding requirement if the condition is already discharged to the Local Authority's satisfaction?</p> <p>The Applicant should seek the views of the relevant Local Authority</p>	<p>instances the wording is being updated so that it is appropriate within a SI, but not so as to change the meaning or operation of the relevant matter.</p> <p>In some cases matters currently combined within a condition are shown in separate requirements, providing additional clarity or an appropriate degree of additional control, for example in relation to foul water drainage.</p> <p>The deemed discharge process takes account of these matters. For instance condition 7 has been split between three requirements, and this is shown in Schedule 3 to the DCO. The latter lists that condition three times in the left hand column, and in each case specifies that the deemed discharge applies "So far as relating to [<i>specified topic</i>]", with the corresponding requirement on that topic then listed in the right hand column. This ensures that Article 5(5) would only operate to deem approval of the relevant requirement to the extent that the details approved pursuant to condition 7 included the relevant topic.</p> <p>The intention is not to apply the deemed discharge process to any part of the 'additional works' (which as noted would not be appropriate).</p> <p>The location, elevations of and external materials for the DCO additional works cannot (legally) be discharged under the planning permission, since they are not within its scope, being required for an over 50MW generating station. It will therefore be</p>

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		on this provision.	<p>necessary for the Applicant to apply to the LPA pursuant to the requirements, to have those details approved. The Applicant has reviewed the draft requirements and has established, taking into account the scope and location of the additional works, that they would only definitely require additional approvals under requirements 5 and 6 (both relating to appearance and design matters). In other words, the Applicant would need to discharge details of the additional works under those requirements. Article 5 does not remove or avoid the need to make applications for approval of those details, since any discharge under the conditions can only relate to the Consented Development as noted above.</p> <p>If the Applicant does need to diverge from the details approved pursuant to planning conditions (after the DCO switchover), then it would need to make an application to the local authority for that, pursuant to the relevant requirement with new details. That is no different to what a developer may do under a planning permission (in effect re-discharging the relevant item, with the new details).</p> <p>The LA has seen the form of Article 5 previously (in December 2019). It did not have substantive comments on the operation of it. The LA did note that it would be useful to have a mechanism to record the position in relation to the DCO and requirements. The Applicant has added an obligation on the undertaker to issue a 'requirements discharge schedule', in Article 5(6), to record the position at that</p>

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			<p>point in time. The Applicant has also specified that the undertaker's notice (pursuant to paragraph (2)) must be added to the planning register – this ensures that the notice forms part of the public record.</p> <p>The Applicant has continued discussions with the LA on these provisions. At a recent meeting the above proposals were discussed in outline and the LA confirmed they were acceptable in principle. The Applicant has since issued a copy of the updated Draft DCO to the LA (on 2 March 2020) and a meeting with their planning and legal officers to discuss the drafting of the DCO is scheduled for 9 March.</p>
9.	Articles 10, 11, 12 and 13	<p>In the absence of any Compulsory Acquisition and Temporary Possession the Applicant should explain how they will exercise these powers over private and public streets and highways.</p> <p>The EM says that paragraphs (4) and (5) "mirror the defence in section 58 of the Highways Act 1980". The Applicant should explain why it is necessary to include this in the DCO.</p>	<p><b>CA / TP</b> - all the land included in the Order limits is either owned by a sister company within the Applicant's group, or is public highway. The EM has been updated to reflect this position (see paragraph [3.3.2]).</p> <p><b>S58 HA 1980</b> – the Applicant will update the EM in relation to this.</p>
10.	Article 15	The Applicant should consider whether the definition of 'public sewer' and 'drain' be should be included in Article 2.	The Applicant will consider this and update it if necessary in the DCO submitted with the application.
11.	Article 23	The Applicant should explain why it is necessary to ensure that the land will be operational land in the circumstances of this particular NSIP.	This will be included in the EM submitted with the DCO application.
12.	Article 27	Article 27(2) contains a deemed approval procedure for applications other than those made under the requirements. It would be helpful if	This will be included in the EM submitted with the

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		the EM explained which applications this applied to and whether the consenting authorities are happy with this provision.	DCO application.
13.	Schedule 1	<p><b>Work 2</b></p> <p>The DCO provides for either (a) (an underground or over ground electrical connection) OR (b) (an underground gas supply pipeline). This appears to be a drafting error. If it is not, the Applicant needs to explain this further.</p> <p>In relation to (a) the Applicant should explain when a decision will be made on whether the electrical connection will be underground or above ground. The Applicant should ensure that both connections have been adequately assessed in the ES.</p> <p>In relation to (b) the Applicant should explain when a decision will be made on whether the gas supply will be to the National Grid distribution network or a local distribution network. The Applicant should ensure that both connections have been adequately assessed in the ES.</p> <p><b>Further Development</b></p> <p>The Applicant should consider drafting which ensures that all further development (a) - (j) falls within the scope of works assessed in the ES.</p>	<p><b>Work 2</b></p> <p>The “or” has been removed from the end of Work No. 2 paragraph (a), which was an error.</p> <p>The relevant points are addressed in the Grid Connection Statement and Gas Connection Statement, both of which will be submitted with the DCO application.</p> <p>The ES considers the electrical and gas connections in their potential forms, and assesses the worst case option where relevant. To the extent that connections are also to be progressed by third parties (connections beyond the site boundary), these are assessed as part of the cumulative chapter.</p> <p><b>Further Development</b></p> <p>The ES (in the Proposed Development chapter) describes the works which are specifically considered and assessed, and that includes Work Nos. 1 to 5 and the development described in paragraphs (a) to (j) at the end of Schedule 1. There is therefore no need for the wording at the very end of Schedule 1 (after “(ii)”) to be applied to paragraphs (a) to (j).</p>
14.	Schedule 2	<b>Interpretation - requirement 1</b>	<b>Interpretation - requirement 1</b>

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		<p>"anticipated date of the development coming into operation" - this is an uncertain definition and the Applicant should explain why it is necessary.</p> <p><b>Approved details - requirement 3 and tailpieces in other requirements</b></p> <p>Requirement 3(2) provides that any approval given by the Local Authority to details submitted in accordance with a requirement, includes amendments subsequently approved by the Authority. In consideration of this it is difficult to see why the tailpieces - "<i>unless otherwise approved by the LPA</i>", included in various requirements, are necessary. The Applicant should consider removing the tailpieces.</p> <p>If the Applicant retains any they must provide an explanation and justification for each tailpiece. It would also be helpful to explain their interaction with requirement 3(2).</p> <p>The Applicant should consider PINS AN 15 on DCO drafting, section 17, in relation to tailpieces.</p>	<p>This wording is taken from the equivalent condition on the planning permission, and is therefore wording which the LA is content with.</p> <p>The comment is noted and the Applicant will seek to agree alternative wording with the LA that provides certainty while preserving an appropriate trigger.</p> <p><b>Approved details - requirement 3 and tailpieces in other requirements</b></p> <p>The Applicant will consider requirement 3 and interaction with the tailpieces included in other requirements, and address this point in the updated DCO and EM submitted with the Application.</p>
15.	Schedule 2	<i>[Additional comment provided by the Applicant]</i>	<p>The Applicant has added a new paragraph 35 to Schedule 2, to enable steps taken before the DCO comes into force to 'count' for the purposes of discharging or otherwise dealing with requirements. This could be an important tool in this scenario where construction will be ongoing before the DCO is granted, and will enable the Applicant and LA to best manage the submission and approval of details, and the construction programme.</p>



## Explanatory Memorandum (EM)

Q No.	Article (A) / Requirement (R)	Comment/Question	EPWM Response
1.	General	The title in the header of the EM is "Statement of Community Consultation". The Applicant should correct this prior to the submission of the application.	This has been amended.
2.	General	More explanation is required in the EM regarding the interaction between the existing planning permission and the application for development consent. The Applicant should ensure that they submit a copy of the existing planning permission with any application for development consent and explain the differences between what is sought in the DCO application and what has already been consented by the Local Authority.	See responses above and updates to the DCO / EM – the latter will be reviewed further prior to submission of the application.  A copy of the planning permission will be appended to the Planning Statement submitted with the DCO application.
3.	General	The EM explains that the Applicant already has the benefit of full planning permission for a 49.9MW Energy from Waste power station which they intend to progress. Development Consent is being sought for the same development as the Applicant has been able to identify potential opportunities to improve its efficiency.  However, it is not entirely clear how the two will interact.  The EM explains that the Applicant intends to commence construction work pursuant to the planning permission in early 2020 and construction should take about 3 years. The intention is for additional works (for which consent is sought in the DCO) to be constructed after this (EM para 1.5.10).  This should be fully explained when the application is submitted.	See responses above and updates to the DCO / EM – the latter will be reviewed further prior to submission of the application.

## Land Plans

Q No.	Plan Ref	Question / Comments	EPWM Response
1.		There is an area excluded at the top of the red line boundary on all plans which is not clarified. The lower one states what it is.	This is assumed to relate to the two areas within the Order limits which are excluded from it. One is an AGI and the other a sub-station, both operated by third parties. Any works within these areas would be carried out by the relevant operator, pursuant to their own powers and not under the DCO. Labels have been added to plans to more clearly mark these areas.
-	-	-	As the Applicant is now to provide a BoR (see below), the Land Plan has been updated to split it into 'plots'.

<b>Work Plans</b>			
Q No.	Plan Ref	Question / Comments	EPWM Response
1.		Due to the overlaps on plans, limits of deviations are hard to see. The Applicant should give consideration as to how these could be better displayed.	The Work Plans have been split into different sheets, with the overlay now operating as a key plan.
2.		The administration block and construction laydown and welfare areas are very similar in colour. The Applicant is advised to alternative colouring schemes.	The colours have been made clearer.
3.		The overlap between Works No 2, 3 and 5 makes the plan quite appear cluttered. The Applicant should consider producing an additional sheet showing the overlaps between 2 and 3 and 2 and 5 (separately).	See item 1 above.
4.		The Applicant should consider whether the private roads marked on the Access and Rights of Way Plan need to be included on the works plans.	There is no requirement in APFP Regulation 5(2)(j) for the work plans to show existing private roads, and there are no specific works to existing private roads proposed as part of the authorised development.

Work Plans			
Q No.	Plan Ref	Question / Comments	EPWM Response
			The Applicant does not consider that the work plans need to be updated.
5.		It appears that the access road to the south west of the site has been excluded from the plan. The Applicant should consider whether it needs to be added.	This is assumed to refer to the bellmouth entrance to the site from Hobson Way. The Order limits correspond with the edge of the adopted highway.
6.		<i>There is an area excluded at the top of the red line boundary on all plans which is not clarified. The Applicant should ensure that this is explained.</i>	See earlier comment.

Access and Right of Way Plans			
Q No.	Plan Ref	Question / Comments	EPWM Response
1.		The public and private maintenance of access appears to be confusing. It is unclear why the public maintenance of access would be inside the red line boundary. The Applicant should ensure that this is explained.	<p>The Order limits cover the area within which works are to take place, as part of the authorised development. The Order limits include areas which are currently public highway and areas which are not.</p> <p>The areas to be maintained publicly are the same as at present.</p>
2.		The Applicant has not explained why the letter A is included. The Applicant should ensure that this is explained.	The key has been updated to cross refer to the Schedules to the DCO (where the letters are used to identify the works).
3.		In the south west corner there appears to be an access road but no maintenance has been assigned to it. The Applicant should ensure that this is explained.	This is an existing entrance. No works are proposed here and there is no proposed change to maintenance arrangements.

Access and Right of Way Plans			
Q No.	Plan Ref	Question / Comments	EPWM Response
4.		On the Works Plan there is a second access marked on South Marsh Road that is not highlighted on the Access and Rights of Way Plan. The Applicant should ensure that this is explained.	The ARoW Plan has been updated to include the second access. The relevant streets schedules to the DCO will be updated prior to submission to refer to point B as required.
5.		There is an area excluded at the top of the red line boundary on all plans which is not clarified. The Applicant should ensure that this is explained.	See earlier comment.

Compulsory Acquisition and Temporary Possession			
Q No.	Plan Ref	Question / Comments	EPWM Response
1.	Cover Letter	<p>The Applicant's covering letter says:</p> <p>EPWM is not intending to submit a statement of reasons, funding statement or book of reference, as the DCO does not contain any powers of compulsory acquisition (or temporary possession). In order to assist the Planning Inspectorate at the acceptance stage EPWM will provide a land ownership schedule, specifying every person with a land interest within the Order limits and the nature of their interest. EPWM considers that this approach is consistent with the requirements of the Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009.</p> <p>There is no clear explanation in the documents setting out how the Applicant intends to undertake the works in the DCO without obtaining any CA or TP Powers. This needs to be explained.</p> <p><b>BoR</b></p> <p>The highlighted parts of Regulation 7 of the Infrastructure Planning</p>	<p>The EM will be updated to explain how the Applicant is able to implement the authorised development without any CA or TP powers.</p> <p><b>BoR</b></p> <p>The Applicant will provide a BoR with the DCO application.</p>

## Compulsory Acquisition and Temporary Possession

Q No.	Plan Ref	Question / Comments	EPWM Response
		<p>(Applications: Prescribed Forms and Procedure) Regulations 2009 may require a BoR to be submitted.</p> <p>Regulation 5(d) requires the submission of a BoR “where applicable”.</p> <p>Regulation 7(1) defines a BoR as a book in five parts together with any relevant parts which:</p> <p>Part 1 contains the names and addresses for service for each person within categories 1 and 2 set out in section 57 of the Planning Act 2008 for land:</p> <ul style="list-style-type: none"> <li>• which it is proposed to be subject to powers of CA,</li> <li>• <b>rights to use land</b> including the right to attach brackets or other equipment to buildings or</li> <li>• rights to carry out protective work to buildings.</li> </ul> <p>Part 2 contains the names and addresses of <b>each person within category 3</b>.</p> <p>Part 3 contains the <b>names of all those entitled to enjoy easements or other private rights over land which it is proposed shall be extinguished suspended or interfered with</b>.</p> <p>Part 4 contains any Crown interests.</p> <p>Part 5 contains any special category land.</p> <p>Category 3 is defined in s.57(4) as a person whom the Applicant thinks that, if the order were to be made and fully implemented, the person would or might be entitled to make a relevant claim. Even if</p>	

## Compulsory Acquisition and Temporary Possession

Q No.	Plan Ref	Question / Comments	EPWM Response
		<p>the Applicant does not intend to seek any CA or TP powers there may still be people within category 3 who need to be included within part 2 of a BoR. If the Applicant does not think that there are any category 3 people, they should explain their reasons for this conclusion.</p> <p>Article 19 of the DCO enables the undertaker to extinguish or suspend rights, or remove or reposition apparatus, belonging to statutory undertakers. The relevant statutory undertakers should be detailed in part 3 of a BoR.</p> <p>If the Applicant identifies any category 3 persons these must be included in the BoR along with the statutory undertakers whose rights are to be extinguished.</p> <p>If the Applicant does not submit a BoR they should explain their reasons for this by reference to the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009. The Applicant should also ensure that all references to the BoR are removed from the DCO and EM.</p>	