



South Humber Bank Energy Centre

Section 51 Advice – draft Application Documents submitted by EP Waste Management Limited for the Planning Inspectorate (“the Inspectorate”) review

This advice relates solely to matters raised upon the Inspectorate’s review of the draft application documents submitted in December 2019 by EP Waste Management Limited (“the Applicant”), and not the merits of the proposal. The advice given is without prejudice to the acceptance or otherwise of the eventual application.

Abbreviations Used	
PA2008	Planning Act 2008
BoR	Book of Reference
DCO	Development Consent Order
EM	Explanatory Memorandum
EPWM	E P Waste Management Limited
ExA	Examining Authority
NSIP	Nationally Significant Infrastructure Project
SHBEC	South Humber Bank Energy Centre

General Drafting points

1. The Applicant should ensure that when the Development Consent Order (DCO) is finalised all internal references and legal footnotes are checked, that the drafting follows best practice in Advice Note (AN) 13 and 15 and any guidance on statutory instrument drafting.
2. Notwithstanding that drafting precedent has been set by previous DCOs, whether or not a particular provision in the DCO application is appropriate will be for the Examining Authority (ExA) to consider and examine, taking account of the facts of the particular application and having regard to any views expressed by the relevant authorities and interested parties.
3. Where drafting precedent has been set by previous DCOs the Applicant must fully justify why it is relevant to this particular DCO application.



4. The Applicant should avoid using words such as “may” because of ambiguity over whether they are an imperative or a statement of future intention. If the Applicant considers that the word should be used then full justification for its inclusion must be provided.
5. The Applicant must undertake a comprehensive review of the drafting and content of the DCO and Explanatory Memorandum (EM) prior to the submission of the application.

Development Consent Order (DCO)		
Q No.	Article (A)/ Requirement (R)	Comment/Question
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.
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.
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.
4.	General	The application DCO and any subsequent versions submitted to the examination: <ul style="list-style-type: none"> • 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. • 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.
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.



Development Consent Order (DCO)		
Q No.	Article (A)/ Requirement (R)	Comment/Question
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.
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 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>
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 (2).</p>



Development Consent Order (DCO)		
Q No.	Article (A)/ Requirement (R)	Comment/Question
		<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 on this provision.</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>
10.	Article 15	The Applicant should consider whether the definition of ‘public sewer’ and ‘drain’ be should be included in Article 2.



Development Consent Order (DCO)		
Q No.	Article (A)/ Requirement (R)	Comment/Question
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.
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 the EM explained which applications this applied to and whether the consenting authorities are happy with this provision.
13.	Schedule 1	<p>Work 2</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>Further Development</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>
14.	Schedule 2	<p>Interpretation – requirement 1</p> <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>Approved details - requirement 3 and tailpieces in other requirements</p>



Development Consent Order (DCO)		
Q No.	Article (A)/ Requirement (R)	Comment/Question
		<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>

Explanatory Memorandum (EM)		
Q No.	Paragraph	Question/comment
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.
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.



Explanatory Memorandum (EM)		
Q No.	Paragraph	Question/comment
3.	General	<p>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.</p> <p>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).</p> <p>This should be fully explained when the application is submitted.</p>

Land Plans		
Q No.	Plan Ref	Question/Comments
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.

Works Plans		
Q No.	Plan Ref	Question/Comments
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.
2.		The administration block and construction laydown and welfare areas are very similar in colour. The Applicant is advised to alternative colouring schemes.
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).



Works Plans		
Q No.	Plan Ref	Question/Comments
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.
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.
6.		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.

Access and Rights of Way Plans		
Q No.	Plan Ref	Question/Comments
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.
2.		The Applicant has not explained why the letter A is included. The Applicant should ensure that this is explained.
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.
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.
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.

Compulsory Acquisition and Temporary Possession	
Document	Question/comment
Cover Letter	The Applicant's covering letter says:



Compulsory Acquisition and Temporary Possession	
Document	Question/comment
	<p><i>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.</i></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><u>BoR</u></p> <p>The highlighted parts of Regulation 7 of the Infrastructure Planning (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 plans 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"> • <i>which it is proposed to be subject to powers of CA,</i> • rights to use land <i>including the right to attach brackets or other equipment to buildings or</i> • <i>rights to carry out protective work to buildings.</i> <p>Part 2 contains the names and addresses of each person within category 3.</p>



Compulsory Acquisition and Temporary Possession	
Document	Question/comment
	<p>Part 3 contains the 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.</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 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>