

Indaver Rivenhall IWMF DCO

Planning Act 2008

Infrastructure Planning (Applications: Prescribed Forms and Procedure)

Regulations 2009

**Draft Development Consent Order [PINS Ref:
EN0101038]**

Explanatory Memorandum to the Draft Development Consent Order

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Indaver Rivenhall Ltd

Leading the field in
sustainable waste
management.



EXPLANATORY MEMORANDUM
THE RIVENHALL GENERATING STATION EXTENSION ORDER 202[]

1. INTRODUCTION

- 1.1 Indaver Rivenhall Limited (the “undertaker”) has made an application (the “Application”) to the Secretary of State for a development consent order to authorise an extension to an energy from waste generating station at Rivenhall in Essex, with the effect that, once extended, the generating station will have a gross installed capacity of over 50MW. The extension would comprise of internal works to plant at the generating station.
- 1.2 This Memorandum explains the purpose and effect of each Article of, and Schedule to, the Order. This is as required by regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.
- 1.3 As specified in the Planning Inspectorate’s Advice Note Fifteen (Drafting Development Consent Orders), this Memorandum sets out:
- 1.3.1 the source of the provision (whether it be a previously made development consent order, or a novel provision);
 - 1.3.2 the section or schedule of the Planning Act 2008 (the “2008 Act”) under which it is made;
 - 1.3.3 why it is relevant to the proposed development; and
 - 1.3.4 why the undertaker considers it to be important to the delivery of the proposed development.
- 1.4 This Memorandum should be read alongside the draft Rivenhall Generating Station Extension Order (“Order”) and the various documents submitted in respect of the Application.

2. THE PURPOSE OF THE ORDER

The Existing Generating Station

- 2.1 The undertaker has consent under the Town and Country Planning Act 1990 (the “TCPA 1990”) for an integrated waste management facility in Rivenhall (“Rivenhall IWMF”) in Essex. The relevant planning permission was granted in 2016 (Ref ESS/34/BTE, 26 February 2016), (“2016 Permission”).
- 2.0 The full description of development in the 2016 Permission is set out below:



"Integrated Waste Management Facility comprising: Anaerobic Digestion Plant treating mixed organic waste, producing biogas converted to electricity through biogas generators; Materials Recovery Facility for mixed dry recyclable waste to recover materials e.g. paper, plastic, metals; Mechanical Biological Treatment facility for the treatment of residual municipal and residual commercial and industrial wastes to produce a solid recovered fuel; De-inking and Pulping Paper Recycling Facility to reclaim paper; Combined Heat and Power Plant (CHP) utilising solid recovered fuel to produce electricity, heat and steam; extraction of minerals to enable buildings to be partially sunken below ground level within the resulting void; visitor/education centre; extension to existing access road; provision of offices and vehicle parking; and associated engineering works and storage tanks."

- 2.1 The development under the 2016 Permission includes permission for the development of a generating station (i.e. the authorised Combined Heat and Power Plant (CHP) utilising solid recovered fuel to produce electricity, heat and steam).
- 2.2 Unlike some generating station permissions granted by local planning authorities, the description of development in the 2016 Permission does not specify that the electrical output of the generating station must be less than 50MW. However, as a matter of law, to construct a new generating station above this threshold requires a development consent order, and so the description of the consented development should be interpreted as if that capacity limit had been included.
- 2.3 The 2016 Permission has been lawfully implemented and development of the site pursuant to the 2016 Permission is ongoing.

The extension authorised by the Order

- 2.4 The authorised development is an extension to the existing generating station which will result in a gross installed generating capacity exceeding 50MW. It is not known what stage the project will have reached by the time the Order is made. Therefore, consent is sought for two alternative works:

Work No.1 – an extension to the existing generating station comprising mechanical modifications to the actuated steam turbine inlet control valves to allow steam capacity to be increased, with the effect that the extended generating station will have a gross installed generating capacity of over 50MW; and

Work No.2 – an extension to the existing generating station comprising the installation and commissioning of unrestricted actuated steam turbine inlet control valves with a capacity of over 50MW, with the effect that the extended generating station will have a gross installed generating capacity of over 50MW.

- 2.5 Defining the capacity of a generating station as "over 50MW", rather than setting a cap on capacity, is preceded by two recent solar DCOS: The Little Crow Solar Park Order 2022, and The Cleve Hill Solar Park Order 2020. That approach recognises that the level of electrical output of a power station does not affect its environmental impacts.
- 2.6 Both works would be carried out inside the generating station, which will in all other respects have been constructed (and potentially, have commenced operating at a capacity below 50MW) pursuant to the TCPA permission. The Order would not authorise any physical works outside of the building constructed pursuant to the TCPA permission.
- 2.7 If the existing generating station has been completed and has commenced operations (at a capacity below 50MW) by the time the Order is made, then Work No. 1 will be carried out by



the undertaker, to increase the electrical output by mechanical modifications to the existing generating station as built.

- 2.8 If the existing generating station has not been completed or commenced operations by the time the Order is made, then Work No 2 will be carried out, to install unrestricted actuated steam turbine inlet control valves which will enable capacity in excess of 50MW from the outset of electricity generation.

The development authorised

- 2.9 Section 31 of the 2008 Act provides that a DCO is required for "development to the extent that the development is or forms part of a nationally significant infrastructure project".

- 2.10 "Development" is defined in section 32 of the 2008 Act as having the same meaning as in the TCPA 1990 (subject to some caveats that are not applicable to the authorised development). Under section 55(1) of the TCPA 1990 "development" means "the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land". The physical extension works to the existing generating station (Works No 1 and 2, see above) are "engineering operations" and therefore the authorised development constitutes "development" within the meaning of the 2008 Act.

The Nationally Significant Infrastructure Project ("NSIP")

- 2.11 Section 14(1)(a) of the 2008 Act provides that "the construction or extension of a generating station" constitutes a "nationally significant infrastructure project", and section 15 goes on to provide that the construction or extension is within section 14(1)(a) only if "its capacity is more than 50 megawatts".
- 2.12 The term "extension" in relation to a "generating station" is defined in section 235 of the 2008 Act by reference to its meaning in section 36(9) of the Electricity Act 1989. That definition is worded non-exhaustively as "includes the use by the person operating the station of any land or areas of waters (wherever situated) for a purpose directly related to the generation of electricity by that station and 'extend' shall be construed accordingly".
- 2.13 The use of the term "extend" has not been considered by the courts in the context of the 2008 Act or the Electricity Act 1989. However, there is judicial authority dealing with the point in the context of section 11 of the Electricity (Supply) Act 1919, which established that a capacity upgrade would in itself constitute the "extension" of a generating station, in the form of Attorney General v Ealing Corporation [1924] 2 Ch 545. In that case, the question was considered as to whether the replacement of the existing generating plant with smaller but higher-capacity plant counted as the "extension" of a generating station for the purpose of section 11. Romer J found that the answer: "Depends on whether section 11 of the Act merely prohibits an extension in size, or whether it also prohibits an extension of capacity" and stated that in his opinion "it prohibits both". He went on to state that: "It is not, perhaps, the most appropriate way of describing such an increase to call it an extension of the plant. But a person who extends the capacity of his plant may not inaccurately be said to extend his plant and, in my opinion, the prohibition in s11 of the Act against extending the plant used for generating electricity covers an extension of the plant's capacity".
- 2.14 Given the importance of the capacity threshold in section 14(1)(a) of the 2008 Act to determining which acts of development fall within the DCO regime, we consider that increases in capacity must be interpreted as falling within the meaning of an "extension" to a generating station and therefore require development consent where the capacity would be increased over the 50MW threshold.
- 2.15 The power to include consent to operate the extended generating station at a capacity of greater than 50MW in the Order is provided under section 120(3) of the 2008 Act (qualified by section 140 which states that "An order granting development consent may include



provision authorising the operation of a generating station only if the development to which the order relates is or includes the construction or extension of the generating station") (see commentary on Article 4 below).

3. PROVISIONS OF THE ORDER

Part 1 – Preliminary

Article 1 (Citation and commencement)

3.1 This provides for the commencement and citation of the Order.

Article 2 (Interpretation)

3.2 The purpose of Article 2 is to define various terms used in the Order. Particular definitions to note include:

3.2.1 "authorised development" which encompasses the works described in Schedule 1 (Authorised Development), being Works No. 1 and 2 described above. To enhance the definition, reference is also made to illustrative plans of those works (certified by the Secretary of State);

3.2.2 "commence" is defined as "beginning to carry out any material operation, as defined in section 155 of the 2008 Act (when development begins), forming part, or carried out for the purposes, of the authorised development". No carve outs from this definition have been included;

3.2.3 "existing generating station" is defined as "the generating station authorised by the TCPA permission which is being constructed within the area shown edged red on the plan entitled 'Existing Generation Station Plan' certified as such by the Secretary of State". A plan is provided in order to show the existing generating station's location, in the context of the wider site to which the TCPA permission relates;

3.2.4 "extended generating station" is defined as "the existing generating station as modified by the carrying out of the authorised development";

3.2.5 "group company" is defined as "in relation to the undertaker, the undertaker, any subsidiary or subsidiary undertaking or any holding company or parent undertaking from time to time of the undertaker, and any subsidiary or subsidiary undertaking from time to time of a holding company or parent undertaking of the undertaker";

3.2.6 "Order limits" are defined as "the limits shown on the works plans within which the authorised development may be carried out." The approach taken has been to draw the Order limits around the whole footprint of the existing generating station, on the basis that (i) it is not yet known exactly where Work No.s 1 and 2 will be situated within the as-yet-not-built generating station; and (ii) it seemed more appropriate to show the Order limits as the whole of the area on which the extended generation will be situated, given that the Order is authorising the increased output from the generating station as a whole. For the same reason the "work plans" define the whole footprint of the generating station as being the area within which the authorised development may be carried out;

3.2.7 "relevant planning authority" is defined as "Essex County Council and its statutory successors as waste planning authority within the meaning of the 1990 Act", as Essex County Council is the authority responsible for the TCPA permission, which



(as explained below, Article 6) will continue to govern the construction and operation of the extended generating station;

- 3.2.8 "TCPA permission" is defined as meaning the 2016 Permission "and any other variations thereto whether granted before or after the date of this Order (which shall include for the avoidance of doubt any variations pursuant to Section 73 of the 1990 Act)." This definition is used in Article 6 to ensure that the existing planning permission, and any variations to it approved by Essex County Council, continue to govern the extended generating station's construction and operation.

Part 2 – Principal Powers

Article 3 (Development consent etc. granted by the Order)

- 3.3 This Article grants development consent for the authorised development to be carried out within the Order limits, subject to the other provisions of the Order. Some versions of this article in other Orders refer expressly to the requirements, however this is unnecessary since the requirements *are* provisions of the Order. The power for this Article is provided for under section 115(1) of the 2008 Act.

Article 4 (Authorisation of the operation of the extended generating station)

- 3.4 Article 4 provides that, once constructed, the undertaker has the authorisation to operate the extended generating station at a capacity of over 50MW.
- 3.5 This Article has been inserted to authorise the operation of the extended facility at a capacity of over 50MW. The qualification in section 140 of the 2008 Act does not prevent authorisation of operation of the generating station, as the Order is also authorising its "extension". The power for this Article is provided under section 120(3) of the 2008 Act which authorises making provision relating to matters ancillary to the authorised development. Section 120(4) provides that provision may be made under subsection 120(3) for or relating to any of the matters listed in Part 1 of Schedule 5. Paragraph 5 of Schedule 5 to the 2008 Act includes within the list of matters "The operation of a generating station".
- 3.6 Similar Articles have been included in other generation DCOs including Article 6 of the North London Heat and Power Generating Station Order 2017, and Article 7 of the Sizewell C (Nuclear Generating Station) Order 2022. A similar Article is included as Article 4 of the draft Slough Multifuel Extension Order.

Article 5 (Maintenance of the authorised development)

- 3.7 This Article provides, for the avoidance of doubt, that the undertaker has the power to maintain the authorised development at any time, except to the extent any other provisions in the Order provide otherwise.
- 3.8 This Article has been inserted for the avoidance of doubt and in accordance with section 120(3) of the 2008 Act, and is also a matter specifically identified in paragraph 5 of Schedule 5 to the 2008 Act, which relates to the operation of the generating station.
- 3.9 Similar Articles have been included in other generation DCOs including Article 5 of the North London Heat and Power Generating Station Order 2017, and Article 6 of the Sizewell C (Nuclear Generating Station) Order 2022. A similar Article is included as Article 5 of the draft Slough Multifuel Extension Order.



Article 6 (Compliance with the TCPA permission and requirements)

- 3.10 Article 6 provides that the carrying out of the "authorised development" (i.e. Work No 1 and 2) and the operation of the extended generating station are governed by the TCPA permission as if both the extension and its operation had been authorised by the TCPA permission. The purpose of this is to ensure that Essex County Council can continue to control the development of the generating station, as part of the wider Rivenhall IWMF development, holistically. The article makes clear that any details, plans or other matters approved by Essex County Council pursuant to the TCPA permission, either before or after the making of the Order, will apply accordingly. In the event that the TCPA permission is varied in future, through any s73 application under the 1990 Act or non-material amendment, that varied permission would continue to govern the construction of the generating station as a whole and its operation.
- 3.11 Due to the very limited nature of Work No 1 and 2, and the fact that the operation of the generating station at a higher output will not cause any additional environmental effects, there is not considered to be a need for any additional environmental controls beyond those provided for by the TCPA permission.
- 3.12 However, in addition to the conditions of the TCPA permission, article 6 requires the undertaker to comply with the two requirements in Schedule 2:
- 3.12.1 The requirement to only implement either Work No 1 or Work No 2; and
- 3.12.2 The requirement to commence development (of Work No 1 or Work No 2) within 5 years of the making of the Order.
- 3.13 Article 6 also provides that the carrying out of the authorised development and the operation of the extended generating station pursuant to the Order will not prevent the continued implementation of the TCPA permission. This provision is included for the avoidance of doubt only, to ensure that no argument can be made pursuant to the *Hillside case* that implementation of the Order renders the TCPA permission incapable of further lawful implementation. Since the Order works are not incompatible with the TCPA permission, the *Hillside case* is unlikely to be relevant in any event.
- 3.14 The wording of this article is not directly preceded by any Orders which have to date been made under the 2008 Act, however the draft Slough Multifuel Extension Order adopts substantively the same approach: Schedule 2 (Requirements) of the draft Slough Multifuel Extension Order lists all of the conditions in the relevant planning permission which the undertaker is obliged to comply with during the construction, operation and decommissioning of the extension works which are being authorised by the DCO, and deems all relevant definitions used in the planning permission to apply to the DCO works as if they included the extension works authorised by the DCO (see Schedule 2, Part 1, paragraph (2)). Mandating that the TCPA permission governs the authorised development and its operation is within the remit of section 120(3) of the 2008 Act as "relating to, or to matters ancillary to, the development for which consent is granted", as is clarifying the relationship between the Order and the TCPA permission. The imposition of requirements in Schedule 2 is authorised by virtue of sections 120(1) and (2) of the 2008 Act.

Article 7 (Benefit of the Order)

- 3.15 The "undertaker" is defined in Article 2 as Indaver Rivenhall Limited or any person who has the benefit of the order in accordance with Article 7 and Article 8. Article 7 provides that subject to Article 8 (consent to transfer the benefit of the order), the provisions of the Order conferring powers on Indaver Rivenhall Limited have effect solely for the benefit of Indaver Rivenhall Limited. This Article overrides section 156(1) of the 2008 Act (as permitted by



156(2) of the 2008 Act) which limits the benefit of the Order to anyone with an interest in the land. Due to the nature of the authorised development, it is entirely appropriate that the powers under the Order are only exercised by the undertaker and not any other person with an interest in the Order limits (unless provided under Article 8).

- 3.16 Precedent for this Article can be found in Article 7 of the North London Heat and Power Generating Station Order 2017 and Article 6 of the Wrexham Gas Fired Generating Station Order 2017. A similar Article is also included as Article 6 of the draft Slough Multifuel Extension Order.

Article 8 (Consent to transfer benefit of the Order)

- 3.17 Article 8 anticipates that there may be circumstances where the undertaker seeks to transfer its rights and powers to another party. This Article enables the rights and powers under the Order to be transferred to another body.
- 3.18 Article 8(1) provides that the consent of the Secretary of State is required to transfer to another person or body the benefit of the Order and related statutory rights. This is to ensure that any transferee or lessee is deemed appropriate and qualified by the Secretary of State to take control of the authorised development under the Order. Article 8(4) provides that such consent is not required where the transferee or lessee is the holder of an electricity licence under section 6 of the 1989 Act, or a Group Company (i.e. a related company to Indaver Rivenhall Limited). In such circumstances, the Secretary of State must be notified in the manner provided for in Articles 8(5) and (6). The exemption relating to a holder of an electricity licence is justified on the basis that, in considering whether to grant a generating licence under the 1989 Act, the Secretary of State will have established the fitness of the licence holder and its suitability to take the benefit of the Order. The Group Company exemption is justified on the basis that it may be expedient for the Indaver Group to reallocate its assets to another company within the Group for business reasons in the future.
- 3.19 Articles 8(2) and (3) secure the operation of the transfer of the benefit and make it clear that the transferee or lessee will be subject to the same restrictions, liabilities and obligations under the Order as the undertaker, and that the transferred benefit shall not be enforceable against the undertaker.
- 3.20 Similar Articles have been included in other generation DCOs including Article 9 of the Riverside Energy Park Order 2020, Article 5 of the Cleve Hill Solar Park Order 2020 and Article 8 of the North London Heat and Power Generating Station Order 2017. A similar Article is also included as Article 7 of the draft Slough Multifuel Extension Order.

Part 3 – Miscellaneous and general

Article 9 (Certification of plans and documents, etc.)

- 3.21 Article 9 requires the undertaker to submit copies of specific plans and documents to the Secretary of State to be certified as true copies following the making of the Order. This Article provides that any plans and documents that are certified under this Article can be used as evidence in any proceedings.
- 3.22 This Article is necessary to provide a procedure through which documents referred to in the Order can be verified so that they can be relied upon. A similar approach has been taken in other generation DCOs, for example, Article 40 of the Riverside Energy Park Order 2020 and



Article 33 of the North London Heat and Power Generating Station Order 2017. A similar Article is also included as Article 10 of the draft Slough Multifuel Extension Order.

Article 10 (Arbitration)

- 3.23 Article 10 makes provision for differences and disputes arising under any provision of the Order, unless otherwise agreed between the parties to the dispute or a matter for which the consent or approval of the Secretary of State is required, to be determined by arbitration. It enables agreement to be reached between the parties as to whom to appoint as the arbitrator or, failing agreement, for the arbitrator to be appointed by the Secretary of State.
- 3.24 This Article is necessary to provide a means for the resolution of disputes. Precedent for this approach can be found in other generation DCOs such as Article 42 of the Thurrock Flexible Generation Plant Development Consent Order 2022 and Article 34 of the North London Heat and Power Generating Station Order 2017. A similar Article is also included as Article 11 of the draft Slough Multifuel Extension Order.

Article 11 (Service of notices)

- 3.25 Article 11 sets out the manner in which notices or other documents required or authorised to be served for the purposes of the Order are to be served. In particular, it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.
- 3.26 This Article is necessary as the service of notice provisions under sections 229 and 230 of the 2008 Act would not apply to notices served under a DCO. Precedent for this Article can be found in other recent DCOs, such as Article 41 of the Riverside Energy Park Order 2020 and Article 45 of the M42 Junction 6 Development Consent Order 2020. A similar Article is also included as Article 12 of the draft Slough Multifuel Extension Order.

Schedules

- 3.29 Schedules 1 and 2 are summarised below.

Schedule 1 – Authorised Development

- 3.27 Schedule 1 describes the authorised development by reference to the works plan. A summary of the authorised development is contained in section 2.5 of this Memorandum.

Schedule 2 – Requirements

- 3.28 As explained earlier in this Memorandum, consent has been granted under the TCPA 1990 for the existing generating station, and the authorised development comprises an extension of the existing generating station. The TCPA permission which authorises the existing generating station will remain extant and will be supplemented (as opposed to superseded) by the Order.
- 3.29 The only requirements deemed to be needed in addition to the TCPA permission conditions are:
- 3.29.1 The requirement to only implement either Work No 1 or Work No 2; and
 - 3.29.2 The requirement to commence development (of Work No 1 or Work No 2) within 5 years of the making of the Order.

