

Meeting of:	Cabinet
Date of Meeting:	Monday, 27 September 2021
Relevant Scrutiny Committee:	Environment and Regeneration
Report Title:	Barry Biomass Independent Review Report
Purpose of Report:	To report to Cabinet the Barry Biomass Independent Review Report obtained further to the resolution of Council on 26 February 2020.
Report Owner:	Cabinet Member for Legal, Regulatory and Planning Services
Responsible Officer:	Debbie Marles, Monitoring Officer / Head of Legal and Democratic Services
Elected Member and Officer Consultation:	Operational Manager (Legal Services) Lawyer - Legal Division
Policy Framework:	This is a matter for Executive decision by Cabinet.
<p>Executive Summary:</p> <ul style="list-style-type: none"> • This report relates to a resolution of Council on 26 February 2020 concerning the Barry Biomass Plant which called for “an Independent Review of the Vale of Glamorgan Council’s determination of all planning applications related to the Barry Incinerator”. • An independent barrister specialising in Planning and Environmental Law, Annabel Graham Paul was appointed by the Monitoring Officer/Head of Legal and Democratic Services on behalf of the Council to undertake the independent review. • Attached at Appendix 1 is the Independent Review Report with the findings summarised in paragraphs 2.2 – 2.6 of this Cabinet report, together with additional information provided at paragraph 2.7 in respect of linked matters arising post February 2020. • The Independent Reviewer’s observations are also set out at paragraphs 2.7.9 and 2.7.10 in respect of Welsh Government’s interim decision dated 29 July 2021. 	

Recommendations

1. That Cabinet considers and notes the Independent Review Report attached at Appendix 1 to this report.
2. That this report be referred to the Scrutiny Committee (Environment and Regeneration) and Planning Committee for consideration.

Reasons for Recommendations

1. To present to Cabinet the conclusions of the Independent Review.
2. To ensure appropriate scrutiny and noting of the Independent Review.

1. Background

- 1.1 As at February 2020 the Council's Planning Committee had determined three planning applications relating to the Barry Port Biomass Plant: 2015/00031/OUT ("outline permission"); 2015/00031/1/CD ("conditions discharge"); 2016/00187/RES ("reserve matters permission"). Following a resolution of Council at its meeting on 26 February 2020, an independent Barrister, Annabel Graham Paul of Francis Taylor Buildings, Inner Temple, London was appointed by the Monitoring Officer/Head of Legal and Democratic Services to undertake the independent review of the Council's determination of the planning applications (Minute Number C704(2) refers).
- 1.2 Ms Graham Paul ("the Reviewer") was instructed to provide an independent review of the planning files for the three planning determinations referred to above, the purpose of which is to inform Members as to any procedural impropriety on the part of Council officers or any other matters where she may consider the officers have erred.

2. Key Issues for Consideration

- 2.1 The Reviewer's report dated 10 June 2021 is attached at Appendix 1 for Cabinet's consideration. Having considered a large bundle of documents consisting of letters, emails, reports and other written notes and materials, the Reviewer's conclusions are summarised below:
- 2.2 Environmental Impact Assessment - it is concluded that the Council/Officer's acting under delegated authority, did not act unlawfully in finding that no EIA was required for the outline permission. Paragraphs 7 to 16 of Appendix 1 sets out in detail the pertinent facts in the context of this matter, and the considerations which applied. The Reviewer concludes (noting that the starting point is that the question of whether an EIA is required or not in any particular case is one of judgement for the Council as decision maker) that in considering whether the judgement was properly reached, having regard to the legal

requirements in the Directive and Regulations, that in considering the documentation, there is no doubt that the screening lawfully took place, and proper judgement was exercised by the Council/ Officers, acting under delegated authority. In conclusion, the Reviewer finds that the Council/Officers (acting under delegated authority) acted lawfully in finding that no EIA was required, however, it would have been better practice to consider the environmental effects in more detail in relation to this particular scheme, rather than placing such reliance on the fact of a previous negative screening opinion for the 2008 scheme.

2.3 Whether the development ought to have been identified as a Development of National Significance ("DNS") - the Reviewer concludes that she has not seen any reference to consideration of the issue of whether the development ought to have been so identified, however, the Reviewer notes that the outline application was made in 2010, and the DNS regime did not come into force in Wales until March 2016, therefore the Reviewer concludes that this was not an issue to consider at the time.

2.4 Lack of progress in relation to outstanding issues - in respect of any lack of progress in resolving outstanding issues, including an apparent breach of the lighting condition, the need to regularise the site boundary, and an unauthorised fire water tank (which was ultimately removed but its concrete base remained), the Reviewer notes the position of Officers was that, whilst the plant was not fully operational, it was appropriate to work with the developer to seek compliance with the conditions that had been approved in 2015 under the approval the Reviewer was asked to review, rather than taking immediate enforcement action. The Reviewer concludes that in her view it was perfectly proper for Officers to seek resolution of these outstanding issues with the developer directly rather than proceeding immediately to enforcement action. However, the Reviewer highlights the expediency test when considering enforcement, this being a discretionary measure, and accepts not seeing within the documentation evidence of a pro-active as opposed to a reactive response on resolving outstanding issues. The Reviewer nevertheless concludes that given that the site is multi-faceted and complex, this was nevertheless an appropriate case for working with the developer rather than proceeding to enforcement during 2020, noting that some issues do appear to have been resolved, for example regarding the water tank.

2.5 The Reviewer concludes that she finds no evidence from the documents reviewed of any maladministration or bias, or any other evidence of Officers seeking to bury things or cover things up. Neither has the Reviewer found any evidence that gives her cause for any concern that Officers have acted negligently or unprofessionally.

2.6 The Reviewer further concludes that there is no evidence of illegality or maladministration in the process of dealing with the applications referred to.

2.7 In the context of paragraph 2.2 – 2.6 above the following additional information is relevant:

2.7.1 The purpose of the Review Report deals solely with the planning applications relating to the Barry Incinerator up until February 2020.

- 2.7.2 The Council has investigated several complaints that have been received regarding the site since 2016, when the construction of the Biomass facility commenced and initially these related to construction issues including noise, dust, hours of construction and air quality which had been conditioned under the outline application 2015/00031/OUT. It became apparent following detailed investigations, that there were several discrepancies between the consented scheme and that which had been built. These include differences between the approved layout and elevation plans, the provision of additional structures, plant and equipment and the extension of the site to the north.
- 2.7.3 The Planning Enforcement Team has been in correspondence with the applicant and developer over this period with the aim of trying to regularise these discrepancies. Following the receipt of legal advice, the Council wrote to the developer in January 2021, confirming that a Section 73A application should be submitted to regularise the whole development, however the developer has continued to dispute this position.
- 2.7.4 On 12th May 2021, the developer submitted a retrospective Section 73A application for a fire water tank that has been re-constructed without permission (2021/00695/FUL), however no further non-material amendment(s) ("NMA") or Section 73A applications have been received for the remaining structures which therefore remain unauthorised.
- 2.7.5 The developer has also recently recommenced performance testing and given the ongoing concerns over the failure to regularise the development, authorisation for enforcement action was sought on 1 September 2021 from the Council's Planning Committee. It was considered expedient to take action at that stage to prevent the possibly unauthorised development from becoming fully operational and potentially lawful. It is therefore considered that such action was expedient in order to protect the Council's position in relation to any further enforcement action that may be required to control the development through the imposition of the necessary conditions and thereby safeguard residential amenity and public safety in the future.

The Planning Enforcement Notice was subsequently served on the developer on 17th September 2021 and takes effect from the 17th October 2021 unless an appeal against the Enforcement Notice is received before that date. Please see below link for a copy of the Enforcement Notice and accompanying plan:

<http://vogonline.planning-register.co.uk/EnfRecord.aspx?AppNo=ENF/2020/0230/M>

- 2.7.6 Alongside the ongoing investigations, a separate but related issue has been raised in relation to whether an Environmental Impact Assessment (EIA) was required for the development undertaken at the Biomass site. As noted above at the time the outline application 2015/00031/OUT was under consideration, the Council screened the proposed development and concluded that an EIA was not required. The Welsh Government also undertook an assessment and concluded that a screening direction and EIA was not required.
- 2.7.7 Notwithstanding its previous opinion, in February 2018 Welsh Government advised it was considering whether the development had been correctly screened and since that time has been considering its position about the need or otherwise for an EIA to be undertaken.
- 2.7.8 Welsh Government issued an interim decision dated 29th July 2021 (see Appendix 2) which has concluded that the development approved under the 2015 outline planning permission was a Schedule 1 development and should have been subject to an EIA.
- 2.7.9 For the purposes of this report the Council has referred the Welsh Government interim decision to the Reviewer, who has confirmed "This does not change my advice, specifically para 16 where I said: "16. In my view, the reasoning of the officers that the biomass plant does not incinerate waste and thus does not fall within Schedule 1 appears sound (without being a technical expert on waste or energy recovery plants). I have not seen any evidence to indicate the contrary and the Council's views are consistent with those of the Welsh Government in respect of the earlier scheme which used the same technology. I also note that the Welsh Government reiterated the view that the development was Schedule 2 development in July 2015 in correspondence between the late Carl Sargeant, then Minister of Natural Resources and Planning and Clarke Kiernan Solicitors." The Reviewer has stated that this of itself demonstrates that Planning Officers did not act unreasonably at the time and maintains that there is no evidence of maladministration on the part of officers.
- 2.7.10 Going forward, Welsh Government has made clear that an Environmental Survey has been submitted so Members can be reassured that the environmental effects will now be fully considered. Welsh Government has also decided it is not necessary to serve a discontinuance notice as they do not consider - on the basis of the information seen so far - that there are likely significant environmental effects identified. Therefore, whether the development should or should not have had an EIA historically is in the Reviewer's opinion academic at this point in time, since the full environmental impacts are being considered.

- 2.7.11 It has also been concluded as part of Welsh Government's interim decision that because of the environmental assessment work already undertaken, the plant is not likely to have significant effects on the environment (during the four months while the EIA process is carried out) and it would not therefore be expedient for the Welsh Government to order discontinuance of the use of the plant. It has also been confirmed that applications made under Section 73 of the Town and Country Planning Act 1990 (applications to develop land without complying with previous conditions) should be assessed as a change to the main development, however any application would need to assess whether the development as changed would have a significant adverse effect on the environment. It has also been confirmed that the Welsh Government's next steps are to undertake public consultation on the environmental statement provided by the developer.
- 2.7.12 Welsh Government has confirmed that this decision does not relate to the planning merits of the continued use of the plant but relates only to the issue of suspending operations whilst an EIA is undertaken. Whilst the conclusions reached are considered to have potential implications on the Council's determination of any further application seeking to regularise a change to the existing development, it is not considered that the Welsh Government's interim decision should affect the Council's decision in respect of enforcement action (as resolved by Planning Committee on 1 September 2021), the purpose of which would be to secure control over the long-term operation of the plant in the interest of public safety and amenity.

3. How do proposals evidence the Five Ways of Working and contribute to our Well-being Objectives?

- 3.1 Long Term** - The Independent Report assesses the processes of the planning department and provides suggestions for the improvement of decision making, particularly in relation to matters requiring Environmental Impact Assessment screening.
- 3.2 Prevention** - The Independent Report relates to specific decisions and proposed improvements in decision making which will benefit consideration of planning applications and therefore the economy, built and natural environment as well as the social and cultural well-being of the Vale of Glamorgan.
- 3.3 Integration** - The Independent Report relates directly to the making of planning decisions which contribute to the Council's Well Being objectives.
- 3.4 Collaboration** - The Independent Review was instigated by Members of the Council following comments from the public.

4. Resources and Legal Considerations

Financial

- 4.1 The preparation of the Independent Review has been undertaken by an external legal expert the cost of which is met from central funds.

Employment

- 4.2 There are no employment implications arising from this report.

Legal (Including Equalities)

- 4.3 This report informs Members of the Independent Review of the Vale of Glamorgan Council's determination of all planning applications relating to the Barry Biomass Plant in line with Minute Number C704(2) of the 26 February 2020 Council Meeting.
- 4.4 There are no direct legal implications arising from this report.

5. Background Papers

Minute No. C704(2) of the Council Meeting dated 26 February 2020:

https://www.valeofglamorgan.gov.uk/Documents/_Committee%20Reports/Council/2020/20-02-26/Minutes.pdf

Links to relevant Planning Applications:

2015/00031/OUT - <http://vogonline.planning-register.co.uk/PlaRecord.aspx?AppNo=2015/00031/OUT>

2015/00031/1/CD - <http://vogonline.planning-register.co.uk/PlaRecord.aspx?AppNo=2015/00031/1/CD>

2016/00187/RES - <http://vogonline.planning-register.co.uk/PlaRecord.aspx?AppNo=2016/00187/RES>

**INDEPENDENT REVIEW OF DETERMINATION OF PLANNING PERMISSIONS
IN RESPECT OF:**

BARRY PORT BIOMASS PLANT, DAVID DAVIES ROAD, BARRY

REPORT

Introduction

1. I am instructed to provide an independent review of the planning files for three planning determinations by the Vale of Glamorgan Council ('the Council) relating to the Barry Port Biomass Plant:
 - (i) 2015/00031/OUT ("outline permission")
 - (ii) 2015/00031/1/CD ("conditions discharge")
 - (iii) 2016/00187/RES ("reserve matters permission").

2. The purpose of the review is to inform Members as to any procedural impropriety on the part of Council officers or any other matters where I consider the officers have fallen into error. The instruction derives from a resolution of the Full Council dated 26 February 2020. In introducing the Motion, Cllr Bailey stressed that he considered that it was a mistake that no Environmental Impact Assessment was required for the biomass development and stated: "it was now time for the Council to install transparency and provide public confidence in the Council's planning processes."

3. My instructions ask me to consider, in particular:
 - (i) Whether the development should have had an Environmental Impact Assessment (EIA);
 - (ii) Whether the development should have been identified as a Development of National Significance;
 - (iii) Whether there has been a lack of progress in resolving outstanding issues;
 - (iv) Whether there has been "a degree of creative collusion or cover-up".

4. I have been provided with a large bundle of documents consisting of letters, emails, reports and other written notes and materials. I understand these are the complete planning files for the applications. Much of that material will already have been in the public domain, but not all of it. The Council should note that the material I have reviewed cannot represent the full thinking behind every decision, since discussions clearly have taken place verbally in meetings and on the telephone. These discussions do not appear to be recorded. Thus, my analysis is necessarily dependent on a patchwork of evidence. The presumption of regularity should be applied. That is, even where the existence of a state of facts cannot be proved with the passage of time, a public authority should be presumed to have acted lawfully and in accordance with their duty (Calder Gravel Ltd v. Kirklees MBC [1990] PLR 26).
5. Whilst I understand that the purpose of the review is to install transparency and provide public confidence, Members should note that, should I find that any errors have occurred, there is very little, if anything, that can be done about it now. Any planning permission is valid and of full effect unless and until it is quashed by a Court (even if errors with its granting become subsequently apparent) (Smith v East Elloe RDC [1956] 1 All ER 855). The time for any challenge to these permissions has long passed and a Court would not extend time now the development is built and operational. Furthermore, the power to revoke a planning permission in s. 97 of the Town and Country Planning Act 1990 cannot be utilized where (as here) the building operations are complete. This review is therefore for information purposes only and to ensure that any lessons can be learned for the future.
6. It is not proportionate for me to set out in detail all of the material that I have reviewed. I consider it more useful to address directly the particular issues of concern which Members and those Instructing have identified with the decision-making process.

Environmental Impact Assessment

7. The background to the outline application is that a previous permission was granted on appeal for a similar development (the erection of a new industrial building and installation of 9MW fuelled renewable energy plant) on 2 July 2010 (Ref: 2008/01203/FUL). A number of variation applications to that permission were submitted and withdrawn and it was decided that a new planning application was required due to the increase in building size and stack. This was the 2010 outline planning permission which I am asked to review. The application site and proposed use was consistent with the 2008 application.

8. It is clear that in considering the 2010 application, officers had firmly in mind this history and the decision-making that had gone on before. This is perfectly proper and the extant planning permission (and fallback) will have been a material consideration which officers should have had regard to. However, officers must consider each individual application afresh and are not bound by previous decisions if they consider matters should be decided differently.
9. In the context of EIA screening, the 2008 application was screened by both the Council and the (then) Welsh Assembly Government who were satisfied that, although it was development which could require an EIA (being Schedule 2 development), it did not need one since there were no likely significant environmental effects. The Welsh Ministers also reconsidered this issue in the context of the appeal against the Council's refusal in 2010. The Inspector in the appeal decision noted this and stated that he did not consider it necessary to make a judgement regarding the need for an EIA. It was also the case that the (then) Environment Agency Wales had been consulted and their view was also that no EIA was required. In any event, the developer had submitted an Environmental Statement voluntarily which had been considered.
10. I note that the original screening decisions treated the development as falling within the description in para 10 of Schedule 1 of the Town and Country Planning (Environmental Impact Assessment) Regulations 1999¹. However, on appeal, the Welsh Ministers formed the view that the description in para 11(b) of Sch 2² of the 1999 Regulations was more appropriate. EIA was not required having regard to the factors in Schedule 3.
11. When it came to the submission of the outline planning permission, a number of parties, including Barry Town Council, Friends of the Earth, Leanne Wood AC etc. objected and asked the Council to reassess the need for EIA. In my view, the Council was bound to assess afresh (and not simply reassess) the need for an EIA since this was a new development and not part of the same project as the 2008 application.
12. The first question to consider was what type of development it was. The outline application was for a wood fired renewable energy plant. There was some debate in May 2015 with a representative from Friends of the Earth as to whether it should, in fact, be treated as a Sch 1

¹ Waste disposal installations for the incineration or chemical treatment (as defined in Annex I to Directive 2008/98/EC under heading D9), of non-hazardous waste with a capacity exceeding 100 tonnes per day.

² Installations for the disposal of waste (unless included in Schedule 1) where the disposal is by incineration, or the area of the development exceeds 0.5 ha, or the installation is to be sited within 100m of any controlled waters.

development, Category 10. It appears that NRW's views had been sought by Friends of the Earth and they had left it for the Council to decide but suggested that it may well be Schedule 1. The consequence - were it to be classed as Schedule 1 development – is that EIA would be mandatory irrespective of the environmental effects. I have not seen a response to Friends of the Earth's letter on this point although the Schedule 1 / Schedule 2 issue came up again.

13. Later, in July 2017, this issue again arose with Clarke Kiernon Solicitors raising the question of how the incinerator plant was approved without an EIA and noting that Vale of Glamorgan Councillors had been writing in the local press that the plant is an energy project / gasification plant that did not need an EIA as it is not an incinerator, contrary to NRW's permitting position. Clarke Kiernon also suggested that it should have been treated as a Schedule 1 development since the 100 tonnes per day limit is exceeded.
14. Ultimately, the question of which category of development the scheme falls into is one of law for the Court and no challenge was ever made to the Council's determination on this point. The officers' view was that the development was not Schedule 1 development. It fell within Schedule 2 para 11(b). The Planning Officer specifically sought the views of the Welsh Government on this on 4 June 2015 and expressed the view that the Council did not consider it was an incinerator plant because: "The application outlines that the technological process does not incinerate the wood waste but "boils off" the synthetic gas". The Welsh Government responded the following day stating that they were unable to provide a formal decision but noted that the Council's conclusion was similar to the conclusion of the Welsh Government's screening direction for the previous permission: 2008/01203/FUL.
15. The Planning Officer also reiterated the view to Friends of the Earth that the proposal is an energy recovery plant and not a waste disposal, therefore, it would be a Schedule 2 and not a Schedule 1 development.
16. In my view, the reasoning of the officers that the biomass plant does not incinerate waste and thus does not fall within Schedule 1 appears sound (without being a technical expert on waste or energy recovery plants). I have not seen any evidence to indicate the contrary and the Council's views are consistent with those of the Welsh Government in respect of the earlier scheme which used the same technology. I also note that the Welsh Government reiterated the view that the development was Schedule 2 development in July 2015 in correspondence between the late Carl Sargeant, then Minister of Natural Resources and Planning and Clarke Kiernan Solicitors.

17. I turn then to the screening of environmental effects in the context of this being properly considered a Schedule 2 development, since it exceeds the 0.5ha site area in column 2 of the table in Schedule 2 (being 0.77ha).
18. The starting point is that the question of whether an EIA is required or not in any particular case is one of judgement for the Council as decision-maker. It is not for me to provide a 'yes' or 'no' answer as to whether one should have been required; but simply to consider whether the judgement was properly reached.
19. The legal requirements in the Directive and Regulations are that the Council must, in answering the question, have regard to the criteria in Schedule 3 of the 1999 Regulations. These include the size of the development, the cumulation with other developments and the environmental sensitivity of the geographical areas likely to be affected.
20. I note that in a letter to Friends of the Earth (C1541), the Planning Officer states that NRW have been consulted on the matter of an EIA and they have been in discussion with the Council. I have not seen in the documents NRW's consultation invitation or response. I can therefore only assume that this consultation did take place, as it should have.
21. From the papers, the information I have on the screening process consists of some handwritten notes and a checklist from the officer (which appear to be incomplete) and a screening opinion authored by the Planning Officer and signed off by his supervisor. It is clear that a screening decision was taken and the criteria listed in Schedule 3 of the Regulations were considered. It is noted that the site is not in a sensitive area. It is an industrial location.
22. I note that a large degree of reliance is placed in the screening opinion on the 2008 application. In particular, in the conclusion, it is stated that a screening opinion was issued in 2008 and the changes to the development are not significant to alter the opinion on the need for EIA. In deciding that there are no significant environmental effects, the officer relies on matters where there has been no change from the previous application. It is also noted that the previous screening consulted CCW (now NRW). There is no mention of any re-consultation of NRW in the context of screening the 2010 outline planning permission. As set out above, subsequently, officers state that NRW were consulted, but I can find no record of this.
23. Overall, I have no doubt that screening lawfully took place and, as a matter of judgement, officers concluded that the environmental effects were not significant and so no EIA was required. In my view, they were entitled to take into account the previous conclusions on this

in the 2008 screening. However, the reliance placed on that previous screening is very heavy and it may have been preferable to have assessed the environmental effects of this scheme individually in more detail afresh. It is also not clear if, or to what extent, the views of consultees were gathered and taken into account in the context of the outline permission screening. It does appear that officers were of the view that, because there had been a previous negative screening opinion for a very similar development on the same site, it was essentially an administrative exercise. I have seen a detailed report on the environmental effects that accompanied the previous 2008 screening exercise in the papers, but no similar level of detail in the context of the 2010 application.

24. I also note that EIA screening is not a finite exercise. EIA is process, not an outcome, and if further information comes to light, then the Council is entitled to re-screen the development and change its mind. Clearly, a number of objectors, including Friends of the Earth and Barry Town Council, were objecting on the basis that the development was not subject to an EIA. The Planning Officer wrote to ██████████ of Friends of the Earth on 25 June 2015 that the need for an EIA was considered prior to the application being submitted and that this had been noted on the file with a screening sheet that has been used by the Council for many years. He says that, having spoken to his line manager, he has double checked the EIA screening form carried out and then filled out the EIA screening proforma and exported it to the website. Whilst it is clear that the planning officer therefore reviewed that screening had taken place in 2010, he did not re-screen or consider any other environmental effects. In such circumstances, and where new environmental effects are being argued to be significant, it would be prudent for the Council to re-visit the screening exercise afresh, if there are concerns that not all environmental effects may have been considered. This does not seem to have happened. Had it done so, the outcome may well have been the same, but it would have reassured objectors that all environmental effects had been fully considered.

25. In conclusion, I do not consider that officers acted unlawfully in finding that no EIA was required for the outline permission. However, it would have been better practice to consider the environmental effects in more detail in relation to this particular scheme, rather than placing such reliance on the fact of a previous negative screening opinion for the 2008 scheme.

26. Screening is not relevant to the other applications I have been asked to review.

Whether the Development Ought to have been Identified as a Development of National Significance

27. I have not seen any reference to consideration of this issue. However, the outline application was made in 2010. The DNS regime did not come into force in Wales until March 2016. It is therefore no surprise that this was not an issue to consider at the time.

Lack of Progress in Resolving Outstanding Issues

28. From early 2020, concerns began to be raised with the Council regarding various pieces of unauthorised development at the site and failure to comply with conditions. These included an apparent breach of the lighting condition, the need to regularise the site boundary, and an unauthorised fire water tank (which was ultimately removed but its concrete base remained).

29. The position of officers was that, whilst the plant was not fully operational, it was appropriate to work with the developer to seek compliance with the conditions that had been approved in 2015 under the approval I am asked to review rather than taking immediate enforcement action. As set out in a draft letter dated 17 March 2020 to a member of the public, the Council would of course reconsider expediency if the applicant failed to make submissions or seek to regularise the as-built development.

30. I consider it was perfectly proper for officers to seek resolution of these outstanding issues with the developer directly rather than proceeding immediately to enforcement action. However, whilst enforcement is discretionary and subject to an expediency test, the Welsh Government have also stressed that it should be timely to be effective (see letter from the Chief Planner of the Welsh Government to local authorities dated 17 October 2018³).

31. In my view, given that the site is multi-faceted and complex, this was an appropriate case for working with the developer rather than proceeding to enforcement during 2020 and some issues do appear to have been resolved (e.g. the water tank). There is no issue as yet of any immunity arising for any of the unlawful works. However, I accept that I have not seen from the documents any clear evidence of officers putting real pressure on the developer to resolve outstanding issues. There could, for example, have been the issuing of a formal Enforcement Warning Notice to seek to ensure that regularisation took place in a timely manner. In my view, officers could be said to have been reactive rather than pro-active on resolving outstanding issues.

³ <https://gov.wales/sites/default/files/publications/2018-11/timely-use-of-enforcement-powers.pdf>

Whether there has been a Degree of Creation Collusion or ‘Cover-Up’

32. I have not seen any evidence from the documents I have reviewed of any maladministration or bias, or any other evidence of officers seeking to bury things or cover things up. As I set out in the introduction, the evidence I have reviewed is necessarily a ‘patch-work’ of the decision-making process and there is no way of ascertaining what may or may not have been said during verbal conversations. However, there is nothing that I have seen that gives me any concern that officers have acted negligently or unprofessionally.

Conclusion

33. I trust the above is useful providing reassurance to the Council that there has been no illegality or maladministration in my view in the process of dealing with the above applications. There are some areas where improvements could have been made, in particular more rigorous assessment of all environmental effects afresh in the context of the 2010 application and more forceful warnings to the developer in the context of enforcement. However, these matters do not appear likely to have made any real difference to the ultimate position as to where the development is now.

34. If any questions arise from the above review or if I can be of further assistance to either those instructing or to Members, please do get in touch.

ANNABEL GRAHAM PAUL

**Francis Taylor Building
Inner Temple
EC4Y 7BY**

10 June 2021



Ein cyf/Our ref MA/LW/2256/21

[REDACTED]
Docks Incinerator Action Group

29 July 2021

Dear [REDACTED]

1. In 2017 you asked the Welsh Government, on behalf of the Docks Incinerator Action Group (DIAG), for the need for Environmental Impact Assessment (EIA) to be reviewed in relation to the development by Biomass No.2 UK Ltd. at Barry Dock in the Vale of Glamorgan
2. Since then, DIAG have raised many points about the need for Environmental Impact Assessment (EIA) in general and about specific aspects of this case. I have considered all the representations made, which have informed my consideration of this case below.

The development

3. Outline planning permission for a wood-fired renewable energy plant was granted by Vale of Glamorgan Council on 31 July 2015 (reference number 2015/00031/OUT).
4. Planning application (reference number 2017/01080/FUL) was subsequently made under section 73 of the Town and Country Planning Act 1990 ("the 1990 Act"). This was an application to vary a condition attached to planning permission 2015/00031/OUT enabling the addition of a fire water tank and relocation of parking.

The requirement for EIA

5. The EIA Regulations transpose European Directive 2011/92/EU, as amended in 2014 by Directive 2014/52/EU ("the EIA Directive") on the assessment of the effects of certain public and private projects on the environment in relation to town and country planning.
6. The EIA Directive requires an EIA to be carried out before consent is given to development likely to have significant effects on the environment by virtue, inter alia, of its nature, size or location.

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

7. The projects to which the EIA Directive applies are set out in Schedules 1 and 2 to the EIA Regulations. Development which falls within a project description set out in Schedule 1 to the EIA Regulations always requires EIA. Development which falls within a description in Schedule 2 only requires EIA if it is likely to have significant effects on the environment. The expression "likely to have significant effects on the environment" connotes something more than a bare possibility, though any serious possibility will suffice.

The minded to direct letter

8. Prior to its withdrawal, planning application 2017/01080/FUL was before Vale of Glamorgan Council for determination when consideration began as to whether the application should be subject to EIA.
9. On 14 February 2018, the developer of the plant was informed the Welsh Ministers were minded to direct EIA is required for the application. The developer responded to the letter and the response was made public in response to a freedom of information request, which can be found here [FOI release: Biomass Ltd Correspondence | GOV.WALES](#).
10. An application made under section 73 of the 1990 Act is an application for planning permission and under domestic law, a new planning permission is issued. The 'minded to' letter was issued on the basis a new planning permission equates to a development consent as defined in the EIA Directive. The screening consideration contained in the letter therefore started from the position of the whole development (the subject of the new planning permission) needing to be considered when determining whether EIA is required. The minded to letter set out why it was considered the plant fell within project category 10 set out in Schedule 1.
11. Following the representations made by the developer and DIAG, I have reconsidered whether the approach set out in paragraph 10 is correct and concluded section 73 applications should be considered as changes or extensions to projects, despite successful applications resulting in a new planning permission.

EIA status of the outline planning application

12. Both Schedule 1 and Schedule 2 to the EIA Regulations have project categories relating to changes or extensions to projects. The relevant project category of a section 73 application therefore depends on the project category of the original project. My reconsideration of the section 73 application and consequential consideration of the outline planning permission has led me to question whether EIA was properly considered at this earlier stage.
13. The Vale of Glamorgan Council decided EIA was not required in relation to planning application 2015/00031/OUT when it was determined on 31 July 2015. Welsh Government policy is not to review local planning authority planning decisions. However, even though the United Kingdom has left the European Union, the Welsh Ministers have a duty of sincere co-operation to ensure compliance with European law and it is for this reason I have looked again at whether EIA should have been undertaken.
14. Planning application 2015/00031/OUT sought outline planning permission for a wood-fired renewable energy plant. Vale of Glamorgan Council considered the development fell within project category 11(b), installations for the disposal of waste, in Schedule 2 to then current EIA Regulations (the Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 1999) ("the 1999 EIA Regulations"). Their

analysis concluded there were no likely significant effects on the environment and consequently EIA was not required.

15. I consider the correct approach to whether EIA was required for the outline application is to start from the basis the application was a change or extension to an existing project. This is because an earlier planning permission remained extant at the time of the application. Planning permission 2008/01203/FUL for the erection of new industrial building and installation of a 9MW renewable energy plant was granted on appeal on 2 July 2010 (“the 2010 permission”). This permission was valid until July 2015 and the subsequent application was submitted in January 2015 and validated in February 2015. The extant permission was for a gasification plant using pyrolysis to create syngas. The outline planning application sought to change the gasification technology to the use of a fluidised bed but was otherwise for the same project, despite changes to the site layout and elevations.

The 2010 Permission

16. During the consideration of the application, a number of screening directions were issued by the Welsh Ministers culminating in a letter of 23 December 2009. Paragraph 4 of the letter identifies uncertainty about how pyrolysis should be considered in the context of EIA. While the letter concluded EIA was not required, the appeal process which granted the 2010 permission was nevertheless accompanied by an Environmental Statement, which was taken into account in the decision.
17. Having looked again at relevant project categories, I am now of the view the proposed development set out in the 2010 permission should have been more appropriately considered as falling within category 10 of Schedule 1 to the 1999 EIA Regulations. This is because the proposal amounted to waste disposal using either incineration or chemical treatment with a capacity over the relevant threshold.
18. Category 10 of Schedule 1 to the 1999 EIA Regulations comprised:
“waste disposal installations for the incineration or chemical treatment (as defined in Annex IIA to Council Directive 75/442/EEC* under heading D9) of non-hazardous waste with a capacity exceeding 100 tonnes per day.”

*(now Annex I to Directive 2008/98/EC of the European Parliament and the Council)

Waste disposal

19. The wood processed by the plant would have been waste wood. For the purposes of EIA, waste disposal includes the recovery of waste, as explained in advice on project category 10, contained in the European Commission’s publication, “Interpretation of definitions of project categories of annex I and II of the EIA Directive”. As the development would have sought to recover energy from waste through gasification, I consider this recovery process to be ‘waste disposal’.

Incineration or chemical treatment

20. With respect to the type of waste treatment, I consider pyrolysis falls within the ambit of either incineration or chemical treatment as referred to in the project category. If pyrolysis is not incineration then I am clear it would be caught by the chemical treatment element of the project category. Annex II of Directive 75/442/EEC (and now Annex I of Directive 2008/98/EC) defines chemical treatment under heading D9 as:

'Physico-chemical treatment not specified elsewhere in this Annex which results in final compounds or mixtures which are discarded by means of any of the operations numbered D 1 to D 12 (e.g. evaporation, drying, calcination, etc.)'

21. The treatment of waste wood through gasification via pyrolysis is partial oxidisation and in this case, the resultant compound, syngas, is subsequently incinerated to recover energy. This means the characteristics of this development fell within the project description in paragraph 10 of Schedule 1 to the 1999 EIA Regulations whether the process is either incineration or physico-chemical treatment.

Capacity

22. The other aspect of the project description is the volume of waste treated. The Planning Permission restricted the amount of feedstock to 72,000 dry tonnes of wood waste per year. Based on operations over 365 days a year, this would represent a 'minimum' daily capacity of an average of 197 tonnes a day. This is well in excess of the threshold of 100 tonnes described in the project category.

2015 Outline Permission

23. Having established the outline planning application was for a change to a consented development (see paragraph 15), I have had to consider whether the 2015 application falls within the project category 21 set out Schedule 1 to the 1999 EIA Regulations. It states:
 21. Any change to or extension of development listed in this Schedule where such a change or extension itself meets the thresholds, if any, or description of development set out in this Schedule.
24. The fluidised bed process is waste treatment and the new plant to be installed in place of the pyrolysis technology would have a capacity in excess of 100 tonnes a day. It therefore falls within the description of project category 10 (waste disposal installations for the incineration or chemical treatment of non-hazardous waste) and also exceeds the capacity of that category. For this reason I consider the outline planning application was for a Schedule 1 project and therefore would have required EIA.

Duty of sincere co-operation

25. Even though the UK has left the European Union, the terms of the Withdrawal Agreement mean the Welsh Ministers have a continuing duty of sincere co-operation which requires them to exercise any powers available to them under domestic law to prevent the plant coming into operation until EIA has been carried out, if taking such measures is lawful and proportionate.
26. The period for challenging the grant of planning permission through the Courts of England and Wales has long expired. Therefore the relevant power available to the Welsh Ministers is the making of a discontinuance order under sections 102 and 104 of the 1990 Act.
27. The Welsh Ministers have been considering whether to use a discontinuance order to require EIA. The developer, however, has volunteered to prepare an environmental statement. The production of a statement is a first step in the EIA process set out in

the EIA Regulations. This would normally be followed by public consultation, which is what was proposed in the Welsh Government written statement of May 2019.

28. While construction of the plant is complete, commercial operation has not yet commenced. With operation likely to soon commence and EIA not yet undertaken, I must consider whether to formally prevent full operation of the plant while EIA is conducted, to fulfil the duty of sincere co-operation. This decision is without prejudice to the future decision required after consultation on the environmental statement, to consider the implications of any likely significant effects on the environment identified and what action is required as a result. For this current decision I have therefore considered whether the making of a discontinuance order to prevent operations while EIA is undertaken is lawful and, if it is, whether doing so represents a proportionate response.
29. Section 104 of the 1990 Act provides the Welsh Ministers with the power to make a discontinuance order under section 102 if it appears to them that it is expedient that such an order be made. The Welsh Ministers in Planning Policy Wales state:
 - a. the use of the power can only be justified in exceptional circumstances, and
 - b. the Welsh Ministers will generally use this power only if the original decision is judged to be grossly wrong, so that damage would be done to the wider public interest.
30. It is in the public interest for decisions to be taken in accordance with the law. The EIA Regulations require planning decisions to take into account the environmental information about the likely significant effects of the development on the environment. A lack of environmental information harms the ability of the public to participate fully in decision making. It also prevents the decision maker determining an application in the full knowledge of the likely environmental effects and potentially gives rise to a missed opportunity to apply mitigation to those developments which do proceed.

Environmental Impacts

31. The wider public interest would be damaged if significant effects on the environment were occurring without EIA having been properly undertaken. The occurrence of significant environmental effects would be a very important factor which would weigh in favour of taking action when considering whether it is expedient to suspend operations.
32. The plant is currently mothballed but is physically capable of full operation after a short recommission programme. The longer it takes to consult on the environmental statement, the more likely full operations will commence and the full environmental impacts associated with this will occur. I await with an open mind the possibility of likely significant effects being identified by consultees through the consultation process. In the meantime, for the limited purpose of considering the expediency of formal suspension, I have considered the predicted effects set out in the environmental information submitted with the outline application 2015/00031/OUT, the information submitted with the environmental permitting application and the subsequent analysis by Natural Resources Wales. I have also considered reports compiled for Barry Town Council.
33. I also take into account the environmental statement submitted voluntarily by the developer in September 2019 in preparation for the consultation exercise and the subsequent analysis of that information by WSP on behalf of the Welsh Ministers which identified a number of gaps in the information. I also take into account the

replacement environmental statement voluntarily submitted by the developer in April 2021, which seeks to address the identified gaps although I keep in mind this is yet to be subject to consultation, which will take place in September.

34. My analysis focuses on those environmental effects which have the potential to be significant during the period while the EIA is undertaken. I anticipate the remaining EIA process will take four months.

Air quality

35. Air quality has been a particularly contentious issue. I note your disagreement with the modelling work undertaken by the developer.
36. Submitted with the outline planning application 2015/00031/OUT was a Stack Height Assessment prepared by Stopford Energy and Environment which concluded a 43 m stack was appropriate for a negligible Annual Mean Nitrogen Dioxide Concentration.
37. A further air quality assessment was prepared by Entran Ltd. This used detailed air quality modelling to predict the effects associated with stack emissions from the site. For the proposed stack height, maximum off-site process concentrations are predicted to be well within the relevant air quality standards for all pollutants considered. The significance of the effects were assessed as negligible for human health.
38. The predicted process contributions are also predicted by Entran to be negligible compared with the critical levels and critical loads at nearby statutory sensitive habitat sites. The only issue identified by the work was a potentially significant impact for nutrient nitrogen deposition predicted at ancient woodland adjacent at Hayes Lane.
39. The report by Entran must be viewed with considerable caution given the diameter of the flue used for the modelling work, which WSP points out was increased to 2.75 metres when the proposed stack height was increased to 43 metres. The work was also used, however, for the application for an Environmental Permit for the site. The issue of flue diameter was the subject of correspondence between Natural Resources Wales (NRW) and the developer. In determining the Permit Application, NRW had been satisfied through the dialogue with the developer that the report's conclusions remained valid. NRW were therefore not concerned about the predicted deposition for the Hayes Lane site and I agree with their view, given the predicted process contribution from the plant.
40. A review of the Permit Application documents was undertaken by Capita plc for Barry Town Council. Capita raised a number of issues and comments during the review process resulting in revised information being submitted, particularly in relation to the fire prevention plan (fire is considered in paragraphs 49 to 52 below). Capita's comments in relation to air quality included issues about consistency between the original information and revised work submitted by the applicant. I am not aware these specific queries were subsequently explained by the applicant but the issues raised were taken into account by NRW when determining the Environmental Permit.
41. For the Environmental Permit application, NRW considered the assessment of the baseline situation and dispersion modelling of the predicted emissions. The assessment work identifies a wide range of pollutants which are likely to be emitted by the plant. However, NRW's assessment of the work concluded the emissions from the plant would not cause concentrations of pollutants which would harm human beings or the wider environment and I agree. While NRW have warned the company about breaching their permit during commissioning, air quality objectives were not exceeded.

Monitoring of air quality during commissioning work does not show any exceedances of the limits stated in the environmental permit. I am satisfied the evidence shows that there will be no significant effects on the environment while an EIA is carried out.

Climate change

42. The gasification process results in emissions which have a greater than local effect. Whilst the voluntary environmental statement does not address this issue, it was looked at in detail during the environmental permitting process and we are satisfied with the adequacy of the information provided. The applicant for the permit submitted calculations of the plant's Global Warming Potential (GWP) using the methodology set out in horizontal guidance issued or endorsed by NRW. The net GWP is derived from the following elements.
43. On the debit side
- CO₂ emissions from the burning of the waste;
 - CO₂ emissions from burning auxiliary or supplementary fuels;
 - CO₂ emissions associated with electrical energy used;
 - N₂O from the de-NO_x process.
44. On the credit side;
- CO₂ saved from the export of electricity to the public supply by displacement of burning of virgin fuels.
45. NRW were content with the applicant's assessment which showed their preferred option Best Available Technology for the installation in terms of GWP. The H1 methodology calculates the GWP as -32,644 (tonnes CO₂ equivalent per annum). I currently have no reason to disagree with NRW's conclusion the proposal represents Best Available Technology and conclude the impact on climate change is not significant.

Drainage

46. The plant design keeps surface water and foul sewer discharges separate. Any hazardous chemicals accumulating in the air emissions abatement plant will be removed from site as solids. NRW noted, during its determination of the Environmental Permit, foul sewer discharges will consist of process effluent in the form of boiler blowdown and water treatment plant discharges. I agree with their assessment that the environmental risk associated with the release of process effluent to sewer is not significant, since there is no aqueous effluent associated with any of the air abatement plant.
47. Concern has been expressed that the public sewer flows directly into Barry Dock. I am aware of overflow arrangements for the combined surface water and foul sewer in the area and ongoing investigation into additional discharges from a combined sewer outfall into the dock beyond the level permitted. However, I am satisfied, while there are short term issues for Dwr Cymru Welsh Water to resolve in respect of the sewerage system, they are of a nature which the biomass plant will not make worse. Dwr Cymru Welsh Water did not object to the application and still have the responsibility to consent trade waste effluent in a responsible manner, ensuring there is sufficient capacity to properly treat the volume of effluent produced.
48. Pollution resulting from the use of water to tackle fires at the plant has been raised as a concern. The design of the plant has measures to contain fire water. This leads me to the conclusion the risk of contaminated water spillage is low, not only because the

risk of fire is low but the low risk of the mitigation measures failing lowers the risk of pollution even further. I recognise a spill would be devastating for the Dock ecosystem if it did occur but the lasting effect of a spill would be limited, affecting the dock in the first instance, a contained setting with no priority habitats. I therefore do not consider it is likely that significant environmental effects will occur whilst EIA is undertaken.

Fire

49. I note a particular concern has been the risk of fire, because of the air quality and risk of surface water pollution. NRW as part of the Environmental Permitting process considered fire prevention and response, in consultation with the South Wales Fire and Rescue Service. The work undertaken by Capita for Barry Town Council also considered this issue.
50. The Fire Prevention Plan submitted by the applicants was revised a number of times, however, NRW were content with the final detail provided for the Environmental Permit.
51. The impacts of fire such as water pollution are discussed in paragraph 48. A fire would be directly hazardous to staff and fire fighters. The smoke and emissions would be hazardous to nearby residents and others. However, the risk of these hazards occurring are low.
52. While a fire at the plant would have adverse environmental effects, the availability of fire fighting and containment systems mean those effects will be temporary and contained so my current view is those effects are not significant for the environment, including human health.

Flooding

53. The site, given its coastal location, is at risk of tidal flooding. While the margins of the dock, including David Davies Road, have a 1 in 1000 chance of flooding in any year, the latest NRW flood maps show the site to have a lower flood risk. While the risk of flooding is likely to increase with global warming I am not persuaded the risk is significant for the period while EIA is being undertaken.
54. Given the low risk of flooding I have not considered the flood consequences in great detail, other than to note, the release of hazardous materials in the event of a flood would be limited given their containerised storage. If the level of sea inundation was such as to threaten the plant, the devastation across the South Wales coast would be huge and the effect this particular plant would have on the long term outlook for ecosystems would be by comparison minimal.

Traffic

55. A Transport Statement submitted with the outline planning application considered the number of heavy goods vehicle (HGV) movements associated with the delivery of feedstock and the removal of ash. The number of vehicle movements associated with staff are not significant, however I note a travel plan is intended to influence the mode of trips to the site. The delivery of feedstock by ship will reduce HGV movements but, given the uncertainty of deliveries using this method, I have considered the worst case scenario to understand the likely impacts of traffic movements.
56. The main potential impacts of traffic are from the noise and air emissions, including those emissions resulting from congestion. The numbers of vehicles likely to be

generated by the development were calculated from the maximum throughput of feedstock permitted to be used (72,000 dry tonnes a year). The amount of ash to be removed each year was estimated to be 2,200 tonnes. Assumptions have been used on the load capacity of HGVs which affect the number of vehicle movements and discussion of possible routes through Barry were given consideration. Traffic count data used to inform the outline planning permission was up to 2013. Traffic data up to 2016 indicates traffic levels were broadly similar.

57. None of the predicted traffic figures have significant implications for congestion of the Barry highway network. My main concern is the effect of increased HGV numbers on people living and working in close proximity to the main HGV routes to the site, particularly the A4055 Cardiff Road. However, set against the baseline traffic flows projected forward, the additional effects from traffic connected with the site do not appear to be significant.

Visual impact

58. The site is set within an industrial landscape, a legacy of its former docks use. When viewed from the residential areas on the ridge overlooking the docks, the height of the building makes it a prominent feature among the surrounding industrial buildings and lorry parks. The dominance of the large building and chimney stack has negatively affected the view for residents living above.
59. I agree with WSP, given its large scale, I would expect more thorough assessment of the plant's visual impact to be included within an environmental statement, something the April 2021 statement has sought to address. As the plant buildings are complete, any suspension of operations which fall short of removing any structures, will not mitigate visual impacts and the effect on the landscape. The EIA process will consider the impact so I consider it premature to arrive at a conclusion on this issue and I do not consider this is an issue which makes it expedient to suspend operations.

Waste

60. Two aspects of waste arise with this project. The incoming waste stream to be used as a fuel and the ash produced as part of the gasification process. Air emissions are dealt with in paragraphs 355 to 411 above.
61. The waste wood being delivered to site will have already been processed so it can be used in the gasification process. The prior processing of the waste stream will have environmental effects, however I do not consider they are relevant to the decision before me. I note your concern about wood chip storage elsewhere on the Docks estate. While specific contracts may have been entered into to supply the plant, the plant is not constrained, other than by these specific commercial arrangements, in where it can source wood chip. I do not consider the existence of this plant is therefore directly causing environmental effects elsewhere and any indirect effects are possible to control through other planning or environmental permitting controls in their own right. The operations elsewhere are sufficiently detached so as not to form part of the same project.
62. The gasification process will produce waste ash from the bottom of the fluidised bed vessel and residue from the air pollution control system cleaning the flue gas produced. The ash is collected and stored in two sealed containers, minimising the risk of dust escaping to the atmosphere. Natural Resources Wales is of the view this process represents best available technology. The ash will be taken off site for disposal.

63. The developer has made varying claims about the percentage of ash produced compared to feedstock. The Waste Planning Assessment accompanying the outline planning condition estimates 8% residual ash, while more recently it is projected at 2.8% non-hazardous ash and 1.8% hazardous material. The ability to reuse the non-hazardous ash means the environmental impacts are limited mainly to its transportation. The production of fly ash containing hazardous material has the potential for significant effects. Its handling in sealed containers means the risks on-site are minimal. It does however require the need for land to be given over to the disposal of hazardous waste and there is a risk for environmental pollution and harm to human health. The destination is not fixed however, so any licensed tipping site could be used. It is difficult to quantify the effects when the tip site is unknown. The main risk will be pollution of watercourses and hazardous dust but as outlined in respect of the source of the feedstock, the effects are indirect and are controlled independently of this project.

Noise

64. Vale of Glamorgan Council has ongoing concerns about this issue. They consider the assessment work undertaken by the developer has not fully kept to the British Standard, such as not considering highly impulsive and low frequency noise, something confirmed by the work of WSP.
65. The revised noise assessment undertaken by the developer was checked by modelling undertaken by NRW. Their analysis included consideration of whether highly impulsive, low frequency and other issues raised by the Council had reasonably been addressed. Their conclusions were there are no likely significant effects from noise and vibration. I agree with NRW's view and conclude significant effects are unlikely while the EIA is undertaken.

Economic and Social Costs

66. There are economic and social costs weighing against suspending operations while EIA is undertaken, a period estimated to be 4 months.
67. If activity at the plant is suspended, thereby delaying the plant becoming fully operational while EIA is undertaken, the time taken to prepare an environmental statement will cost the developer a loss of earnings and the wider economy will not benefit from the permanent employment offered by the plant.
68. Suspending activity would affect the developer's contracts with its suppliers putting the jobs they created to supply the plant at risk of redundancy. The making of an order under section 102 would enable a claim for compensation to be made to the Local Planning Authority in respect of any relevant damage (see section 115 of the 1990 Act). While the developer's costs would be recoverable from the authority, this may take some time, and ultimately the cost would be borne by Local Government or Welsh Government budgets which are under particular strain at this time.
69. The developer was asked for an estimate of the costs it would incur due to a suspension of operations for four months while EIA was undertaken. In addition the Welsh Government arranged for an independent estimate of costs. I have considered these in coming to my decision.
70. The outline planning application notes up to 14 people would be directly employed at the plant. This is a modest addition to employment numbers in Barry but will be

supplemented by jobs in the supply chain. Preventing the plant operating would stop the realisation of this economic benefit in the short term.

Development Plan

71. Section 102 of the 1990 Act requires regard to be given to the development plan when considering whether it is expedient to make an order. Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise. The relevant development plan is the Vale of Glamorgan Local Development Plan, which was adopted on 28 June 2017. The proposals map indicates the site is subject to Policy MD16 Existing Employment Sites and Policy SP9(4) Sand and Gravel Wharf Safeguarding. While various policies in the plan support development of the site, others seek to protect surrounding receptors from environmental damage.
72. The decision I am taking does not relate to the full planning merits of its continued use but relates to suspending operations while EIA is undertaken. The Local Development Plan does not provide significant direction on such an issue.
73. Other material considerations include national planning policies in Planning Policy Wales and Future Wales, which I have considered. I have taken account of our policy to base planning decisions on the most appropriate level of information. I also note Planning Policy Wales requires exposure to pollution to be minimised and reduced as far as possible. The specific policy on discontinuance orders and how that has been considered is set out above from paragraph 28 onwards.

Conclusions

74. I conclude the development comprised in the 2015 outline planning permission is Schedule 1 development and should have been subject to EIA. This follows my conclusion the application for planning permission represented a change to an existing Schedule 1 project (the 2010 planning permission). The outline planning application sought to change the gasification technology to the use of a fluidised bed but was otherwise for the same project, despite changes to the site layout and elevations.
75. The duty of sincere co-operation under European law requires the Welsh Ministers to exercise any powers available to them under domestic law to prevent the plant coming into operation, or suspend operations, until EIA has been carried out, if taking such measures is lawful and proportionate.
76. I have considered whether it is expedient to make an order under section 102 of the 1990 Act to require use of the site for a wood fired renewable energy plant to be discontinued until an environmental statement has been submitted to and considered by the Welsh Ministers.
77. In deciding whether it is expedient the main issues have been whether any significant environmental effects are occurring or likely to occur while the EIA process is undertaken and whether the benefits of suspension outweigh the costs of doing so.
78. The benefit of suspending operations while undertaking EIA is such suspension would more closely align with the intention of the law. The intention being that the possibility of significant effects occurring does not arise until after EIA has been completed

(because the works with the potential to give rise to such effects do not commence until after EIA).

79. In this case extensive environmental assessment work has already been undertaken. This work provides evidence that there are no likely significant effects on the environment, other than the visual impact which would not be mitigated by a section 102 order. Also, while public engagement in respect of the outline planning application was not particularly extensive, ample opportunities to comment on environmental information have since been provided in connection with consideration of the Environmental Permit by NRW. I have taken account of the relevant points raised by those representations in my decision today. My view on environmental impacts is solely for the purpose of deciding whether to suspend operations while EIA is undertaken. I remain open to the possibility new information may come to light as a result of the forthcoming public consultation exercise.
80. The costs associated with a suspension of operations includes the loss of earnings of the developer during the anticipated four months while use of the site is discontinued (which would likely be paid through government compensation) and the economic disbenefits caused by a delay in the creation of permanent jobs at the site.
81. These costs are currently reduced while the plant is not operating commercially but will increase.
82. I have considered how the Well-being of Future Generations (Wales) Act 2015 must be applied to this decision, including the five ways of working.
83. I have taken into account that the current decision whether or not the plant is suspended during the EIA process will not prejudice the final decision about the future of the plant, which will take account of long term effects.
84. The development of the plant has the potential for tension between the Welsh Government's well-being objectives related to economic development and environmental protection. In deciding whether to suspend operations I have had regard to the continued operation of the plant, which has economic benefits, in a way which mitigates environmental impacts.
85. I have considered that this is an interim decision in an ongoing process that will involve public engagement through an EIA process and that engagement will help to inform a final decision on the long term future of the plant. I have given regard to the many representations submitted to the Vale of Glamorgan Council, to NRW and directly to the Welsh Ministers during the period I have been considering this case. I have drawn on the evidence of a range of organisations involved, including Barry Town Council, Public Health Wales and your group DIAG.
86. The decision has considered the potential for environmental impacts and the requirement promoted through the Act to prevent problems getting worse.
87. In making this decision I have considered the Welsh Government's well-being objectives and the effect of this decision on those objectives.
88. On the basis of the evidence before me I believe that not suspending the plant during the EIA period has a limited positive effect on the objective to build an economy based on the principles of fair work, sustainability and the industries and services of the future. Also, a limited positive effect is anticipated on the objective to build a stronger

greener economy as we make maximum progress towards decarbonisation. I note what NRW have said about the Global Warming Potential of the plant and that it displaces the burning of virgin fuel from the process of electricity generation. My consideration of these issues contributes to the objective of embedding our response to the climate and nature emergency in everything we do.

89. I recognise that the wellbeing of those living close to the plant may be negatively affected by their worries and concerns. However, the evidence before me shows that the continued operation of the plant during the EIA process will not have an adverse effect on the health of the public. I consider therefore that my decision may have a limited negative effect on the objective of making our cities, towns and villages even better places in which to live and work. I also note however, that the public will be in a position to voice those concerns during the EIA process and these will be fully considered in any final decision made in relation to the plant.
90. I consider the decision has a neutral effect on the other well-being objectives as the evidence shows it would not significantly affect them either way.
91. I have also considered the negative consequences of suspending operations while EIA is undertaken including the economic harm caused to the local area and the impact on public resources of any compensation payable.
92. I have considered whether, having regard to the Welsh Minister's wellbeing duty, it would be reasonable to take a different decision. I note the only alternative decision would be to suspend the plant while the EIA process is carried out and consider that a suspension decision would negatively impact on the objective to support people and businesses to drive prosperity. Consequently, I consider that the decision not to suspend while an EIA is undertaken is a reasonable step in meeting the Welsh Ministers' well-being objectives.
93. I note in particular that this is an interim decision in an ongoing assessment of the plant's environmental impact. The evidence before me shows that the plant is not likely to have significant effects on the environment while an EIA process carried out and I have concluded the benefits of suspending operations while undertaking EIA do not outweigh the costs. This leads me to conclude it is not expedient to order discontinuance of the use of the plant while EIA is undertaken.

Screening of the section 73 application

94. In paragraph 111 above I concluded section 73 applications should be treated as a change or extension to a project. Therefore the development proposed in planning application 2017/01080/FUL, the addition of a water tank and parking, would have been a change to the consented project. While the 'minded to direct' letter was correct to identify the project as a Schedule 1 project, I have reconsidered the matter and concluded the development set out in planning application 2017/01080/FUL would have been a change to a Schedule 1 project, but the change in itself does not meet the description of development set out in paragraph 10. The change is therefore not Schedule 1 development.
95. The relevant project category in the table in Schedule 2 would be 13(a). The corresponding threshold in column 2 of the table is whether the development as changed or extended may have significant adverse effects on the environment.
96. As the section 73 application has been withdrawn I do not intend to consider the need for EIA in relation to the application.

Next Steps

97. In relation to the outline planning permission, I intend to undertake public consultation on the environmental statement provided by the developer.
98. I have sent a copy of this correspondence to the Local Planning Authority, the Vale of Glamorgan Council and the applicant in relation to planning application 2017/01080/FUL via their agent Power Consulting Midlands Ltd.

Yours sincerely

A handwritten signature in blue ink that reads "Julie James". The signature is written in a cursive, flowing style.

Julie James AS/MS
Y Gweinidog Newid Hinsawdd
Minister for Climate Change