ITEMS RECEIVED AFTER THE PRODUCTION OF THE REPORT
FOR THE PLANNING COMMITTEE
TO BE HELD ON 27 APRIL, 2023

Page	Application	Location	Item No.	Description
ENFORCEMENT				
P.28		Land and buildings at Barry Biomass, Woodham Road, Barry	**1.**	**Representations from DIAG (Docks Incinerator Action Group)**
			2.	**Representations from Friends of the Earth Barry and Vale**

MATTERS ARISING FOR COMMITTEE

COMMITTEE DATE : 27 APRIL 2023

Application No.:ENF/2020/0230/M	**Case Officer: Sarah Feist**
Location: Land and buildings at Barry Biomass, Davies Road, Woodham Road, Barry	

From: DIAG

Summary of Comments:

DIAG have made representations and the main points are summarised as follows:

(complete copy of the representations is appended)

- Public speaking should be allowed at Planning Committee in respect of this matter
- The development should be described as an 'incinerator' rather than a 'wood fired renewable energy plant' or similar. Planning Department are in a 'rabbit hole'.
- The development falls within Schedule 1 of the EIA Regulations and consequently the 2015 planning application should have been accompanied by an EIA.
- Planning permission should not have been granted in the absence of an EIA.
- The Planning Committee are being asked to support a planning permission that is not lawful.
- There is not case law which demonstrates how such a matter should be remedied.
- Reference is made to extracts from the appellant's legal representative's letter to PEDW, PEDW's letter to the Vale of Glamorgan Council and The Vale's response to PEDW.
- The extracts appear to suggest that there is collusion between the Council and the appellant (noting reference to collusion in the introductory section of the representations).
- Council's should ensure that environmental statements should be subject to review by people with sufficient expertise.
- The matter should be deferred from Planning Committee.

Officer Response:

It is not considered that the specific definition of the constructed development is fundamental to the purpose and subject matter of the committee report. DIAG's concerns in this respect are noted but the merit or otherwise of the matters proposed in the report is not determined by what a party considers to be the most appropriate definition of the development.

The matter of EIA is also not considered to be a determining factor on the subject matter of the report. The legal advice received by officers is that the absence of an EIA does not mean in turn that the planning permission cannot be implemented. Advice has been sought

from Counsel to confirm this position for Members' benefit. Any further advice received in this regard will be conveyed to members at the Committee meeting.

It should also be noted that any suggestions of collusion are refuted by the Council and the following extract of the Council's letter to PEDW should be noted by members, and remains relevant to the case:

It is considered important to highlight that the appellant's statements regarding the determination of these applications is entirely based on their opinion and not on any discussions with the LPA. There has not been any indication that a favourable approach may be taken and the LPA has advised that there is no guarantee that any retrospective application will be successful in securing the regularisation of the unauthorised development.

It is possible that the *breaches of planning control on the site could be regularised by applications for retrospective planning permission*. That statement (from PEDW's letter to the Vale) does not infer collusion but rather it notes only that there is a procedure available which could in principle result in the breaches being regularised, if that development found to be acceptable and if approved.

Action required: Members to note.

Representations to Planning Committee on 27 April 2023

On behalf of DIAG and others

We should be grateful that the Planning Officers have insisted upon us making written representations as this allows us to deal with our representations in the sort of detail the item deserves. Committee members will immediately realise that we could not have done justice to the situation if we had been limited to an oral 3 minutes.

We propose to deal with the following matters on behalf of the public:

- The decision to prevent public speaking
- The Rabbit Hole Principle
- Possible criminal and regulatory issues
- Reasons why this committee might decide to defer consideration
- Possible image of collusion

Planning Officers imposed a narrow meaning on the phrase 'planning application'.

The Guide to Public Speaking at Planning Committee has wide remit but then purports to deal with a subset of the work carried out by that Committee. The Guide does not purport to limit the ability for the public to speak at a meeting, it merely deals with one aspect of the committee's work without even hinting that the public cannot speak on other matters of more general importance.

The discussions on the incinerator may refer to the Enforcement Notice but those proceedings include a claim for planning permission. It is therefore something that is properly referred to as a planning application as well as an enforcement notice. Those matters are indivisible. We will not deal with anything that the Planning Department is unaware of. The public wants these matters to be considered fully and openly. This remains an issue of high public interest.

The Rabbit Hole referred to is the one that the Planning Department was lead down as long ago as 2008. It is stuck down there. It uses language like 'wood fired renewable energy plant' which is where the speculators went on wrongly describing the project. The speculators never used the word incinerator/incineration. This is important as acceptance of the fact that this facility uses incineration is an acceptance that the Planning Department made a mistake which was 'encouraged' by the speculators. We would urge the committee to break away from the terminology insisted upon by everybody on the side of the incinerator. It is not accurate terminology and is designed to mislead.

We suspect quite strongly that members of this committee know we are discussing a facility that is accurately called an incinerator. We would hope the Planning Department will agree it is an incinerator; we hope they agree an error was made when it was determined the project was not Schedule I development requiring an EIA before the LPA could proceed to consider planning permission. We should be worried that being an incinerator and important errors having occurred is not anywhere in the LPA's handling of the current problems.

Even at this late and crucial stage your papers do not mention incinerator/incineration. There may be thought to be a problem if your Planning Department, your Legal Department, the Barrister they instructed all agree there have never been mistakes when dealing with the project.

All members of this committee probably have concerns about that claim. It is not fair for the members of the committee and is certainly not fair on the residents and future generations of Barry if the advice to committee is based on the belief no errors have occurred. We do not take the line that criticism is required. We simply want to see the correct decisions taken, the strongest support for the council's position outlined, the best defence of the public's health for residents and future generations.

Then this committee needs to ask itself how it can carry out its function at all never mind properly if the Planning Department is stuck down their particular Rabbit Hole albeit lead there by the speculators etc. If the committee knows this is an incinerator and that errors were made then the committee will hopefully find a way to ensure the advice it received is based on the real world situation.

The recommendation before the Committee includes a paragraph that supports the grant of planning permission in July 2015 by requiring the Appellant to carry out the development in accordance with the details and plans approved under the planning permission 2015/00031/OUT.

The officer's advice is potentially advice for councillors to take part in and help conceal the transactions which have made it possible for the developer to evade the obligations of the EIA Regulations. We hope that our input allows the officers to understand how the recommendation is perceived.

Even at this late stage it's difficult to find the planning officers agreeing that the development is EIA schedule I and that it has been throughout the period since it all began in 2008. The Climate Change Minister fully acknowledged this in her letter to DIAG of July 2021. The advice given by officers fails to deal with the implications of this. The Minister explained:

> *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.*

The Minister clearly took the best advice she could before coming out with such a clear appraisal of the position. It should be enough for the LPA to move away from the terminology used by the speculators and everybody else involved for the incinerator and to renew its position while setting out the pressure the officers were put under by not only the speculators but also the Welsh Government. The position can be explained.

The EIA regulations include at regulation 3 the very clear restriction against proceeding with an application for planning permission in the circumstances that subsisted in July 2015 (as well as in 2008-2010).

> *3. The relevant planning authority, the Secretary of State or an inspector must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development.*

Counsellors will be well aware that the Climate Change Minister's appraisal on the question of EIA means that either the officers were lead into error or the Climate Change Minister is wrong. Full council has previously passed a motion calling for an EIA which tends to support the view that counsellors are alert to the issue and doing what it can to square the circle.

Put bluntly, the problem that the council has is that it is being advised by a department that made errors, the department has refused to acknowledge it's errors and is therefore bound to repeat them, the planning department appears to be supported by the council's Law Offices as well as independent Barrister. Can there be any doubt that they are all in error. There is no way that the officers could not have been lead into error and at the same time the Climate Change Minister be correct. Councillors should not follow advice they know to be wrong. Councillors cannot afford to be seen to reward the bad behaviour of the Appellant etc.

If the officers were to give full and accurate advice to the council this would include dealing with the implications of the lack of EIA before the planning committee in July 2015 when the planning department caused the committee to purport to grant planning permission in direct breach of the embargo in regulation 3 (set out above).

The recommended second paragraph on page 40 of the report to committee is a clear assertion that the planning officers refuse to acknowledge the errors that have been made. The recommendation is tantamount to a claim that the permission granted in 2015 is lawful.

The implication is that this committee is being asked to support a purported grant of planning permission notwithstanding there was no EIA, and EIA was required. Reg 3 removed the ability for the Committee to proceed to grant planning permission. We ask whether it should be assumed that Planning officers continue to give unlawful advice.

We have tried to find an authority demonstrating how such a matter should be remedied. We failed to find a similar case. We asked a very experienced planning Barrister if he knew of such a case. He did not. His view was that it's unlikely there would be such a case as it's always obvious when a planning application is EIA Regulations Schedule I.

This does mean that the implications of the purported grant of planning permission is untested. However, as the speculators and others must have known the obvious this might be of relevance in determining the impact. Also the Welsh Government is bound by sincere cooperation to resolve the matter and we urge consideration of the details set out in Appendix 1.

We set out at Appendix 1 some of our research into the situation. Although we cannot say categorically how the authorities would respond to the situation that we now have to face we would suggest that these are matters that your planning officers and law officers should have dealt with by now. The point has been raised with your planning department although not in the same detail.

Before leaving the subject it may be helpful for us to point out that we believe Brexit is irrelevant for this matter. We are talking about UK law. We are also talking about a situation that arose pre Brexit.

Having been invited to set out our representations in writing and having taken the opportunity to do so at length it might be that we have raised matters that have not been discussed with committee previously. We accept we are mere members of the public with no expertise in environmental matters and the experts will have considered these matters for themselves some time ago. We have not had the advantage of seeing how the details have been rejected as irrelevant.

The next point we would have discussed relates to how this present discussion has come about. The documents we refer to in this section are contained in Appendix 2.

We stress that we do not know for sure that we have all the relevant documentation. We are dependant on others to release information and sometimes we have to press hard for it.

At present it looks as if the owners of the incinerator are still seeking to control the processes and the terminology. It is about time this stopped.

Matters seem to have started with the letter on behalf of the Appellant sent by Ashurst solicitors to PEDW on the 22 February 2023. This letter clearly demonstrates, we say, that the Appellant would like to avoid the increased scrutiny that a Public Inquiry would bring to the issues. Hence the issuing of further applications for planning permission 'as built'. A device to enhance the prospects of the incinerator and nothing more.

Committee will notice that the letter makes the point:

> *We noted in our letter that discussions between the Council and the Appellant were ongoing and there was a realistic prospect of a course of action being taken that may resolve the issues in dispute.*

In case that is not clear enough the letter also includes:

> *the Council does not object to the grant of planning permission for the on-site development pursuant to ground (a)...*

And another part that we will deal with later is:

> *no concerns with the ES have been raised by the Council*

Committee might agree that there are parts of the Ashurst letter that are 'surprising' and it is no wonder that it is a shock to members of the public.

The next letter is dated 28 February 2023 sent by PEDW to Vale officers.

This letter confirms that the Public Inquiry is postponed. No new date is given. It appears to believe that there are reasons to suppose matters may be settled. We note the part that says;

> *Based on its submissions it appears that the Local Planning Authority's position is that the breaches of planning control on the site could be regularised by applications for retrospective planning permissions and non-material changes.*

This appears to have been the Inspector's view based on the Ashurst letter and the papers submitted by the Council or on the Council's behalf. In other words the Inspector understands the position to be that the Council remains supportive of the purported planning permission from July 2015 notwithstanding the avoidance of Regulation 3 and

no EIA. We question whether the Committee agrees with that view as interpreted by the Inspector.

The PEDW letter also claims:

> *The main parties have provided their positions on the appeal in their statements of case and a signed Statement of Common Ground. In summary, the Local Planning Authority and Appellant have stated that the 2015 planning permission remains extant and that the principle of the development (a wood-fired renewable energy plant) on the appeal site is agreed.*

We do not believe your officers have distanced themselves from that assertion. Your officers therefore appear to have confirmed on behalf of the LPA they are of the view that the 2015 permission is still in existence. The council continues to deny the errors and the implications of Regulation 3 that might confirm the Council had no power to grant planning permission when it purported to do so.

The next letters are responses from the planning department dated 14 March and 31 March 2023.

The first letter contains the paragraph:

> *It is considered important to highlight that the appellant's statements regarding the determination of these applications is entirely based on their opinion and not on any discussions with the LPA. There has not been any indication that a favourable approach may be taken and the LPA has advised that there is no guarantee that any retrospective application will be successful in securing the regularisation of the unauthorised development.*

This paragraph does not sit well with the assertions made in the letter from Ashurst but surprisingly the officers do not take the matter further. (see later, our letter to PEDW)

We point out that the planning department did not consider it was important to correct the assessment that the 2015 permission remains extant.

The final document in Appendix 2 is the DIAG letter to PEDW. It was unfortunate that PEDW did not put any of the correspondence on their register until we asked about this. It is also very unfortunate that we were not advised that the Public Inquiry was postponed. We are grateful that your planning department advised us of the postponement when it became to clear them that we did not know.

The claims found in the Ashurst letter and the PEDW letter should be bottomed out for the benefit of the public, the planning department and the LPA. Ashurst would not have made the claim without material and this committee might feel it should have the benefit of the basis for the Ashurst assertions. We invite the committee to support that part of our letter to PEDW.

One further matter that we need to raise in found in the EIA Regulations at regulation 4(5);

> (5) The relevant planning authority or the Secretary of State must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement.

We refer the committee to the observation by the Inspector found in the PEDW letter in Appendix 2 that the LPA has no concerns with the ES. The committee might like to consider whether this is due to lack of sufficient expertise or could it possibly be correct?

When considering this matter the committee might pose the question 'why would anybody take a chance of such an investigation if they were sure their ES would pass muster?' This should give at least some level of concern that there is no adverse comment from the LPA on the ES filed.

As a last point we ask the committee to consider whether the present discussion should be deferred as the landscape is changed and may not be adequately represented in the report you have. It is clear that the Appellant is not at all keen on having its ES fully investigated in a Public Inquiry and the LPA should not allow itself to be bullied into following their lead. There is so much more to the present position than might be clear at first blush. A subcommittee could be formed to take evidence from members of the public. We would cooperate fully and we are sure there are others who would welcome the opportunity.

We acknowledge that some of the points we have dealt with might be said are irrelevant to the issue before the committee. We put them forward as indicators that there may be something wrong and steps need to be taken to ensure the responses to PEDW are in accordance with Councillors' wishes on this matter.

All issues must be relevant to the present debate as the question posed by the Inspector is not restrictive and this might be an opportunity to set out a clearer position for the LPA.

We apologise for the length of our representation but we had prepared for a 3 minute dialogue and had to change at very short notice. We may have wanted to say more but the time limits prevent this.

Appendix 1

Possible impacts of the failure to comply with the EIA Regulations

Although BREXIT has happened, the UK still maintains environmental law including the EIA Regulations with the current iteration of the Regulations found at The Town and Country Planning (Environmental Impact Assessment) (Wales) Regulations 2017[1] (the Regs). To better understand the implications of the Regs and what the Regs were meant to achieve it is essential to consider the relevant EU Directives that were transposed into UK law.

The relevant Directives include:

- Directive 85/337/EEC[2] (the 1985 Directive);
- Directive 2000/76/EC[3] (the 2000 Directive);
- Directive 2011/92/EU[4] (the 2011 Directive);
- Directive 2014/52/EU[5] (the 2014 Directive).

For a directive to take effect at national level, Member States must adopt a law to transpose it. The national measure must achieve the objectives set by the directive.

Article 4(3) of the Treaty on European Union defines[6] the EU legal principle of "sincere cooperation":

> *Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.*
>
> *The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.*

This gives further background to the way in which the UK transposed the Directives. The Member States were required to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The Principle of Effectiveness in European Law (the Principle) will be of considerable assistance in understanding what sincere cooperation requires.

Reliance on the Principle seems to imply that if a person (or group of people) acts in a way that avoids the obligations that arise for a Schedule I development it cannot be intended that the only sanction is that they are required at some later date to comply with

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[11] https://www.legislation.gov.uk/wsi/2017/567/contents
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31985L0337&from=EN
[3] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0076&from=EN
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0092&from=EN
[5] https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0052&rid=1
[6] https://www.legislation.gov.uk/eut/teu/article/4

the EIA Regulations. That process would seem to encourage poor behaviour instead of dissuading people from taking chances that affect local health and the environment.

The Principle seems to address the point as it includes[7]:

> *As far as directives are concerned, the principle of effectiveness translates into the Member States' obligation, under Art 4(3) TEU/10 EC, 'to take all measures to guarantee the application and effectiveness of Community law', in particular to ensure 'that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive' (ECJ Case 68/88 – Commission v Greece [1989] ECR 2965 paras 23 ff).*

The case of 68/88[8] at paragraph 4 of the case declaration advises:

> *(4) By failing to institute criminal or disciplinary proceedings against the persons who took part in and helped conceal the transactions which made it possible to evade the abovementioned agricultural levies the Hellenic Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty*

The Principle, as described in the case of 68/88, would seem to explain how enforcement of Directives is dealt with in member States. It also gives assistance to show what may be needed by way of sincere cooperation.

From at least the time of the 2000 Directive those dealing with similar plants to the one under discussion will have been aware of the definition at Article 3 paragraph 4 that included:

> *4. 'incineration plant' means any stationary or mobile technical unit and equipment dedicated to the thermal treatment of wastes with or without recovery of the combustion heat generated.* ***This includes the incineration by oxidation of waste as well as other thermal treatment processes such as pyrolysis, gasification or plasma processes in so far as the substances resulting from the treatment are subsequently incinerated****. (our emphasis)*

The 2000 Directive at paragraph 34 of the preamble requires:

> *Member States should lay down rules on penalties applicable to infringements of the provisions of this Directive and ensure that they are implemented; those penalties should be effective, proportionate and dissuasive*

The Regs do not contain the processes for criminal and disciplinary proceedings (see the case of 68/88 above) to deal with those persons who took part in and helped conceal the nature of the transactions which made it possible to evade the EIA pre planning decision. That does not mean there is no such process. The UK will have been bound to have in place sufficient provisions so as to comply with it obligations pursuant to section 2(2).

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[7] https://max-eup2012.mpipriv.de/index.php/Principle_of_Effectiveness#:~:text=As%20far%20as%20directives%20are%20concerned%2C%20the%20principle,Commission%20v%20Greece%20ECR%202965%20paras%2023%20ff%29

[8] https://curia.europa.eu/juris/showPdf.jsf;jsessionid=4653FA1A27FC4AA2268984039DCFE456?text=&docid=95954&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2738416

The UK will already have sufficient processes in place such as with the Fraud Act, professional obligations, misconduct in a public office, Proceeds of Crime Act…

The present case could require:

- An investigation into the developers and those experts who took part in and helped conceal the nature of the transactions in relation to both applications for planning permission;
- Any investors and others involved knowing the true nature of the project but continued to support by action or inaction;

The need to take dissuasive action is essential to encourage better conduct going forward. Dissuasive action should not include simply making the speculator carry out what was needed originally but avoided by them.

Appendix 2

Our ref: CKR\30010765.1000-062-625
Your ref: CAS-01341-N2Q5B8; CAS-01476-M1N1C0
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22 February 2023

Planning & Environment Decisions Wales
Crown Buildings
Cathays Park
Cardiff CF10 3NQ

c/o: Phil Thompson
Casework Lead

email: PEDW.casework@gov.wales

Dear Mr Thompson

Town and Country Planning Act 1990 (the "1990 Act")

Town and Country Planning (Referred Applications and Appeals Procedure)(Wales) Regulations 2017 (the "2017 Regulations")

Appeals by Biomass UK No.2 Limited (Refs CAS-01341-N2Q5B8 & CAS-01476-M1N1C0)

Site: Land at Barry Biomass, Woodham Road, Vale of Glamorgan CF63 4JE

We refer to emails received from PEDW's scheduling officer on 15 February and 20 February 2022.

We write on behalf of the Appellant to provide an update to PEDW on a number of planning matters so as to assist the Inspector as he reviews the appeal representations and contemplates potential inquiry topics.

Preliminary Statement of Common Ground

In our letter dated 12 December 2022, we drew attention to the Preliminary Statement of Common Ground ("**SoCG**") agreed between the Appellant and Vale of Glamorgan Council (the "**Council**").

The SoCG confirmed that there is no dispute between the Council and the Appellant about the principle of a wood fired renewable energy plant at the site, and through its Statement of Case, the Council explained that its main concern is "regularisation" of the on-site development.

We noted in our letter that discussions between the Council and the Appellant were ongoing and there was a realistic prospect of a course of action being taken that may resolve the issues in dispute.

Planning Applications Submitted

Significant progress has been made by the Appellant to resolve matters since our previous letter.

The Appellant outlined in its Further Representations that three applications have been submitted to the Council. If approved, the applications would "regularise" the on-site development and theoretically obviate the need for both enforcement action and appeal proceedings. It should be noted that these applications are in line with the suggestions contained in the Council's 2021 committee report which sought authorisation for enforcement action and, if approved, should address the Council's concerns about "regularisation".

The Inspector might find it helpful to understand more about the applications.

Three applications have been submitted as follows:

Ref.	Key Dates	Legal Basis TCPA 1990	Description of Development
2015/00031/1/NMA	Valid: 11.01.2023 Target: 08.02.2023	section 96A	Addition of: 1. lean-to structure adjacent to FRB; 2. emergency diesel generator tank; and 3. fire kiosk.
2023/00033/FUL	Valid: 24.01.2023 Target: 16.05.2023	section 73A(2)(a)	Retrospective planning permission for external storage, vehicle turning and vehicle layover and perimeter fencing for use in association with adjacent renewable energy plant.
2023/00032/FUL	Valid: 27.01.2023 Target: 19.05.2023	section 73A(2)(c)	Retrospective planning permission for development comprising a wood fired renewable energy plant and associated structures without complying with Condition 5 (Drawings) attached to planning permission 2015/00031/OUT.

The two section 73A applications are supported by the same Environmental Statement ("**ES**") that has been submitted to PEDW for the ground (a) appeal. Statutory consultees and members of the public have therefore already had 90 days to review this document and will now have a further period of time to comment as part of the planning application process.

The Appellant is working constructively with the Council and is hopeful that positive determinations can be made in advance of the inquiry opening. However, it is noted that the target determination dates for the two s.73A applications coincide with the inquiry's opening week.

Observations the Appellant wishes to draw to the Inspector's attention

A number observations can be made in relation to the present planning position:

1. the 2015 Permission remains extant;

2. there is no dispute between the Council and the Appellant as to the principle of a wood-fired renewable energy plant on the appeal site (see paragraph 2.2 of the SoCG);

3. the Council does not object to the grant of planning permission for the on-site development pursuant to ground (a) subject to there being no outstanding issues raised by consultees in respect of the ES and the imposition of appropriate planning conditions (see paragraph 6.14 of the Council's Statement of Case and its Further Representations);

4. the ES demonstrates that there are no significant adverse effects that cannot be mitigated through appropriately worded planning conditions;

5. no concerns with the ES have been raised by the Council or other statutory consultees, including Natural Resources Wales, Public Health Wales and the Health & Safety Executive. Where material concerns have been raised by third parties, these have been responded to by the Appellant and are not considered to affect the validity or conclusions of the ES (see the Appellant's Further Representations);

6. the Council is in receipt of applications that, if approved, would "regularise" the on-site development and provide an opportunity for appropriate planning conditions to be imposed. Positive determinations should obviate the need for a continuation of the enforcement action and appeal proceedings;

7. the Council's own case is for "regularisation" rather than removal of the on-site development (see paragraphs 6.2, 6.5, 6.23, 6.25, 6.27 and 7.1 of the Council's Statement of Case);

8. as per paragraph 2.3 of the SoCG, the principle of development is agreed and therefore the Council and Appellant agree that the inquiry does not need to reconsider the principle of the existence of a wood fired renewable energy plant and that the extent of the evidence to be considered can be reduced proportionately to reflect the matters which are in dispute.

Conclusion

The appeal proceedings are now underway. The Appellant remains optimistic that the significant resource that all sides will be required to expend to participate meaningfully at the inquiry can be avoided through the positive determination of the applications currently before the Council.

In the meantime, the Appellant intends to prepare for the inquiry in accordance with the current timetable. As the Inspector is yet to publish his list of inquiry topics, we would be grateful if PEDW could please provide a copy of this letter to the Inspector so that the observations made may inform the topics potentially under consideration.

We would also be grateful if inquiry topics could be published at the earliest possible opportunity. The resulting certainty as to the issues that will need to be addressed in evidence would benefit all participants in the appeal process. The Appellant's view is that the extent of evidence should be proportionate to the issues in dispute, which as set out above, is relatively narrow.

No Pre-Inquiry Meeting has yet been arranged and it is not yet known whether the Inspector requires one or not. We are of the view that a PIM would be helpful in ensuring that the inquiry is conducted efficiently and effectively by helping to achieve clarity on the issues to be addressed and the sequencing of evidence. If the Inspector and the Council are in agreement, then it would be preferable for this to take place sooner rather than later so as not to delay or adversely impact on the preparation of evidence by the 18 April deadline. We have copied the Council to this letter should it wish to provide its views on the points raised and in the hope that the parties can reach agreement on the matters to be addressed in evidence.

If you have any questions or wish to discuss this letter in more detail then please do not hesitate to contact us.

Yours sincerely,

Charlie Reid

Copy to: James Docherty – Vale of Glamorgan Council

Sarah Feist – Vale of Glamorgan Council

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Ein Cyf / Our Ref: CAS-01341-N2Q5B8
CAS-01476-M1N1C0

Ebost / email: PEDW.casework@gov.wales

Dyddiad / Date: 28 February 2023

TO: Vale of Glamorgan Council

Cc: Mr C Reid, Ashurst.

Via Email

Town and Country Planning Act 1990
Appeals by: Biomass UK No.2 Limited
Appeal site: Land at Barry Biomass, Woodham Road, Vale of Glamorgan, CF63 4JE

I write in connection with the above enforcement appeal on behalf of the Inspector. The appeal relates to an Enforcement Notice (EN) issued by the Local Planning Authority. The Inspector will prepare a report and recommendation on this appeal (and a related planning appeal) for the consideration of the Welsh Ministers.

Prior to arranging a Pre-Inquiry Meeting, it is considered appropriate to raise an important matter regarding the EN which has emerged since the appeal was lodged. The comments of the Local Planning Authority and the Appellant will be sought to inform the Inspector's consideration of the running of the Inquiry, as set out below.

The main parties have provided their positions on the appeal in their statements of case and a signed Statement of Common Ground. In summary, the Local Planning Authority and Appellant have stated that the 2015 planning permission remains extant and that the principle of the development (a wood-fired renewable energy plant) on the appeal site is agreed.

Based on its submissions it appears that the Local Planning Authority's position is that the breaches of planning control on the site could be regularised by applications for retrospective planning permissions and non-material changes. Indeed, the appellant has recently submitted a letter (dated 22 February 2023) providing information on 3 applications before the Local Planning Authority that seek to regularise the development. The appellant states that these applications are in line with the suggestions contained in the Council's

2021 committee report which sought authorisation for enforcement action.

Such a position does not appear to align with the breach of planning control in paragraph 3.1 of the EN, which is:

Without planning permission, the carrying out of operational development comprising the construction of a wood fired renewable energy plant together with associated structures on that part of the Land edged green on the Plan.

Paragraph 3.2 is not relevant to this matter.

Section 5 is entitled What You Are Required To Do, and requirement 5 (ii) is:

Permanently remove the renewable energy plant including all buildings, plant and associated equipment from the Land.

In this case it is important that the allegation accurately describes the breach of planning control, not least given that it defines the basis of the deemed planning application that falls to be considered under the ground (a) appeal. It also has a significant bearing on the requirements of the EN and the associated appeal on ground (f).

The Inspector therefore invites the Local Planning Authority's comments on the implications of its stated position on the nature of the breach of planning control (as set out in its submissions) on the description of the allegation in the EN. It should consider whether the allegation is a sufficiently precise description, if not how it might be corrected, and whether such correction would give rise to injustice to any party. Comment is also invited on any consequential effect on the scope of requirement 5 (ii). It may be necessary to seek legal advice and a period of 15 working days will be afforded for your comments. On receipt of the Local Planning Authority's response a similar period will be afforded to the appellant to comment.

This process will mean that the scheduled Inquiry in May 2023 will need to be postponed. A new deadline will be set for the submission of Written Statements of Evidence once a new date for the Inquiry has been confirmed.

Once the responses of the parties are received and considered, PEDW will make the necessary arrangements for a Pre-Inquiry Meeting, which may provide an opportunity to consider this matter in the context of how the Inquiry will proceed.

It is noted that the Appellant considers that the current applications may be viewed favourably by the Local Planning Authority. Whilst this is of course a matter for the Local Planning Authority, any indication of timescales for the determination of those applications in context of the re-scheduling of the public Inquiry would be helpful.

As noted above the Local Planning Authority should provide its comments on the above by **21 March 2023**.

Yours sincerely

P Thompson

Mr Phil Thompson

Arweinydd Gwaith Achos | Casework Lead
Penderfyniadau Cynllunio ac Amgylchedd Cymru | Planning and Environment Decisions Wales
Llywodraeth Cymru | Welsh Government

Date/Dyddiad: 14th March 2023
Ask for/Gofynwch am: Sarah Feist
Telephone/Rhif ffon: 01446 704690
Your Ref/Eich Cyf:
My Ref/Cyf: CAS-01341-N2Q5B8
e-mail/e-bost: sjfeist@valeofglamorgan.gov.uk

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Sent by email: pedw.casework@gov.wales

Dear Mr Thompson,

Town and Country Planning Act 1990
Appeals by: Biomass UK No.2 Limited
Appeal site: Land at Barry Biomass, Woodham Road, Barry, CF63 4JE

I refer to your letter dated 28th February 2023 relating to the above appeal, in particular inviting the LPA's comments on its description of the allegation and consequential requirements set out in the Enforcement Notice (EN).

The LPA are currently seeking further legal advice on this matter, however hope to be able to provide its comments by the 21st of March 2023 deadline provided.

In the meantime, it is noted that the penultimate paragraph of the letter from PEDW dated 28th February 2023 states that: *'the Appellant considers that the current applications may be viewed favourably by the Local Planning Authority.'*

It is considered important to highlight that the appellant's statements regarding the determination of these applications is entirely based on their opinion and not on any discussions with the LPA. There has not been any indication that a favourable approach may be taken and the LPA has advised that there is no guarantee that any retrospective application will be successful in securing the regularisation of the unauthorised development.

It is noted that the Inquiry scheduled for May 2023 has been postponed and a new date will be confirmed in due course.

In respect of timescale for determining the current applications, I can advise that the 90 day public consultation for the applications will end by 25th May 2023, however I am not in a position to confirm how soon after that, the applications would be reported to the Planning Committee .

I trust this clarifies the current position, however if you have any further queries regarding this matter, please do not hesitate to contact me.

Yours sincerely,

S.J. Feist

Sarah Feist
Principal Planner Appeals and Enforcement.

Date/Dyddiad: 31st March 2023
Ask for/Gofynwch am: Sarah Feist
Telephone/Rhif ffon: 01446 704690
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VALE of GLAMORGAN
BRO MORGANNWG

Sent by email: pedw.casework@gov.wales

Dear Mr Thompson,

Town and Country Planning Act 1990
Appeals by: Biomass UK No.2 Limited
Appeal site: Land at Barry Biomass, Woodham Road, Barry, CF63 4JE

I refer to your letter dated 28th February 2023 relating to the above appeal and the LPA's recent request that the deadline was extended until 31st March 2023 to enable appropriate legal advice to be sought.

The LPA has now received legal advice and is giving further consideration to the nature of the breach set out in the EN. At the time authorisation was previously given by the Planning Committee in September 2021 for an EN to be issued, it had not been confirmed by the appellant what, if any, elements had been constructed in accordance with the 2015 application which would have constituted the implementation of that permission. As a result, the LPA considered it had no alternative but to take enforcement action against the development as a whole. The appellant has subsequently provided further information to clarify how the 2015 consent was commenced, however given the specific remit of the enforcement action that was authorised, it is considered that this matter would need to be reported back to the Planning Committee before further comments on any potential amendments to the notice could be provided. It is therefore proposed that a report setting out the current position is reported the next available Planning Committee on 26th April 2023 and that a further response, confirming the LPA's position, would be provided shortly after.

In respect of the timescale for determining the current applications, the LPA's previous response of 14th March 2023 confirmed that the 90 day public consultation for the applications will end by 25th May 2023. Although I am unable to confirm at this stage, to which Planning Committee these applications will be reported, the next available Committee dates would be 22nd June 2023 and 20th July 2023.

Yours sincerely,

S.J. Feist

Sarah Feist
Principal Planner Appeals and Enforcement.

DIAG

DOCKS INCINERATOR ACTION GROUP

24 April 2023

Planning & Environment Decisions Wales
Crown Buildings
Cathays Park
Cardiff
CF10 3NQ

FAO: Phil Thompson
Casework Lead
Planning and Environment Decisions Wales

email: PEDW.casework@gov.wales

Dear Mr Thompson

Town and Country Planning Act 1990 (the "1990 Act") Town and Country Planning (Environmental Impact Assessment)(Wales) Regulations 2017 (the "EIA Regulations")
Enforcement Notice: ENF/2020/0230/M issued by Vale of Glamorgan Council Appellant: Biomass UK No.2 Limited Appeal Site: Land at Barry Biomass, Woodham Road, Vale of Glamorgan CF63 4JE

We are hoping you can assist us with explaining to people precisely what the current position is and how we arrived here.

You are already aware that we had no notice of any application to adjourn the Public Enquiry.

It is clear from the Ashurst letter to you dated 22 February 2023 that the solicitors excluded us and anybody else that might be thought of as 'the public' from their application. The description "Public Inquiry" does not seem to have the same meaning to them as it will have to others.

We were not notified that an adjournment was being considered. We did not receive any notice that the adjournment had been ordered.

This is unfortunate and puts us in some difficulty explaining to people how and why this happened bearing in mind the history of this project and the complaints, for good reason, that the public has with regard to the way authorities and others have dealt with matters.

[redacted]

When we wrote to you on the 13 April 2023 you will recall the letter was rejected on the basis that it was a late response notwithstanding it dealt with a matter of law.

Members of the public are asking us about the apparent difference in the way PEDW dealt with a response on behalf of the Appellant with the way our letter was rejected out of hand.

Turning to the letter from Ashurst it seems clear that they were making a response on factual matters. Their letter has been accepted by PEDW and acted upon without any possibility of the public having the opportunity to respond. To our knowledge the letter from Ashurst was only added to the PEDW registry in the last few days.

The letter advising the postponement of the Public Inquiry was only added to the PEDW registry after we raised concerns. The letter was added in a way that claims it was advertised as early as the 28 February.

The letter from Ashurst to PEDW gives the impression to the public it is the last step in long line for this project attempting to avoid effective public participation. It demonstrates an imperative to avoid the Public Inquiry where the public can bring out the many defects in the case being put forward by the Appellant.

The public is the only participant prepared to acknowledge the errors made along the way. The public is the only active participant prepared to use the word 'incinerator' which, we have pointed out, is just one indicator that representations made the LPA need to be tested as well as the representations by others. This has been explained fully and you will be aware of the points without our repeating them here.

The letter from Ashurst makes it clear that they want to avoid the Public Inquiry. The reference to cost is an insult. The Appellant has helped in no small way to bring about the present position. They are part of a group with hundreds of billions of pounds at their disposal. We, the public, have nothing. The cost to them is something less that a drop in the ocean. The claimed concern about costs by Aviva must be a sham, a mere distraction, a loose peg on which to hang a decision. One view of the letter is that it is paying a compliment to the Public Inquiry process. It needs to be avoided due to the increased scrutiny. It will ensure scrutiny that has been sorely missing for the project.

The letter from Ashurst has been well crafted so as to give a clear message that the LPA is (at the least) moving towards the grant of permission.

The letter from the LPA dated 14 April 2023 includes the passage:

> *It is considered important to highlight that the appellant's statements regarding the determination of these applications is entirely based on their opinion and not on any discussions with the LPA. There has not been any indication that a favourable approach may be taken and the LPA has advised that there is no guarantee that any retrospective application will be successful in securing the regularisation of the unauthorised development.*

Once you strip out the optimism referenced in the Ashurst letter (that is denied by the LPA) there is little if any reason to have delayed the Public Inquiry.

We would like to suggest that the difference between the formal positions for Aviva and the LPA is such that PEDW might like to find out where the truth lies. If misinformation is being given then knowing the source might be important.

A formal request to Ashurst for the basis of their claim at optimism for a grant of planning permission could be forthcoming quite quickly. According to them there must be notes of meetings that can be forwarded to PEDW and which should be shared. This will allow the LPA to understand if an officer has gone beyond their remit or hopefully might go some way to convincing the public that there is not some secret negotiation between those parties to achieve a result that avoids the full inquiry anticipated.

We have been asked to point out that we were looking forward to a Public Inquiry where questions could be asked and answers given. For the present the image is that a Public Inquiry is not wanted by the Appellant who will use all its resources to avoid the prospect.

We hope that the history of the decision for the adjournment will add rather than detract from the public's optimism about the independence and objectivity of the process.

We hope to hear from you at the earliest opportunity.

Sincerely

Paul Robertson Dennis Clarke

Paul Robertson Dennis Clarke

(Chair, DIAG (Vice Chair DIAG)

MATTERS ARISING FOR COMMITTEE

COMMITTEE DATE : 27 APRIL 2023

Application No. ENF/2020/0230/M	**Case Officer: Sarah Feist**
Location: Land and buildings at Barry Biomass, David Davies Road, Woodham Road, Barry	

From: Barry and Vale Friends of the Earth

Summary of Comments:

FoE have made representations and the main points are summarised as follows:

(complete copy of the representations is appended)

- Public speaking should be allowed at Planning Committee in respect of this matter
- The matter should be deferred from Planning Committee until 'officers produce an assessment and report that comply with EIA status'.
- The recommendation to committee is not a modification of the existing Enforcement Notice requirement, but rather it is to replace it with an opposite requirement.
- The development as constructed has inadequate stormwater capacity, is contrary to TAN 15, and in not acceptable in respect of drainage or noise.
- It fails to meet requirements on Flood consequences and Waste Planning
- The preliminary statement of common ground (SoCG) is wrong and the Council should not be committed to the planning decisions of 2010 and 2015
- The Planning Committee cannot lawfully be bound by the SoCG
- The 2015 permission is not extant due to the absence of EIA
- There is no planning waste assessment and no regional need for the development.
- The reversal of the Enforcement Notice as the officers propose makes the EN unreasonable

Officer Response:

There is presently an EIA that accompanies the un-determined planning applications. This matter is not considered to affect the merit of considering the report that has been prepared. The report does not propose a replacement remedy to the breach, rather it proposes that the notice should include an additional option. The matters relating to stormwater, flood risk, waste policy, noise and drainage are not pertinent to the subject of

the report, which is what the appropriate description of breach and remedy are. i.e. those are matters relevant to the assessment of the current planning applications.

The SoCG does not say that he development as constructed is acceptable but rather it only refers to the principle of **a** wood fired renewable energy plant (not the specific plant constructed).

The matter of EIA is also not considered to be a determining factor on the subject matter of the report. The legal advice received by officers is that the absence of an EIA does not mean in turn that the planning permission cannot be implemented.

Further confirmation has been sought from Counsel for Members' benefit. Any further advice received in this regard will be conveyed to members at the Committee meeting.

Action required: Members to note.

DATE 25 April 2023

For 27 April Planning Cttee via e-mail

Barry Biomass Incinerator

We object strongly that officers have rejected our request to speak on a key planning issue in which Environmental Impact Assessment is a planning requirement that they have ignored.

The officers appear to have difficulty in accepting this plant is a waste incinerator and that it required EIA in 2015 to give it more critical scrutiny that they gave it then. They appear to deny that changes in policy and information mean the fresh decision in 2023 could be different. This is unlawful; all material points have to be considered.

Since the submission to PEDW and the VoG include Env Statements under the EIA (Wales) Regs 2017, all related planning decisions come under those Regs., including Reg. 3 which forbids them unless the environmental information and conclusions from it are taken into account. If the officers dispute this, they needed to provide argument in their Report.

We ask that the item be deferred until the officers produce an assessment and report that comply with EIA status.

The recommendation is not modified wording of the Enforcement Notice re dismantling the plant as the Inspector asks, but to replace it by the opposite – completing the old plans, even though that plant could not function.

It specifies ignoring the EIA and constructing a plant, which cannot be operated (Firewater and FPMP requirements), has inadequate stormwater capacity, is contrary to TAN15 (development and flood-risk). It depends on all undischarged Conditions being met, despite SRS objection over noise disturbance at the new housing and non-compliance on drainage. It fails to meet requirements on Flood consequences and Waste planning. As the Vale Council has responsibility for these planning matters, its officers' reliance on responses from statutory consultees is a dereliction of duties.

The 'preliminary' SoCG says wrongly that the Council is committed to the planning decisions of 2010 and 2015 – wrong because they have to take into all material factors and this Council could reach a different conclusion because of policy and factual changes (including the building of nearby homes). It's also wrong as an EIA could – and is likely to - come up with fresh conclusions.

Once the officers admit it's a waste incinerator and it's a flood-risk site, it's ruled out in TAN-15 (Development and Flood-risk). Clearly the officers know that, for they have lied to the Inspector on "no flood risk" and omitted TAN 15 from their list (s.36).

Having received the ES, the VoG comes under the EIA Regs which make it unlawful to make the "preliminary" SoCG decision – that the 2010 and 2015 non-EIA consents are "extant" before reporting under EIA Reg 25(1) on the Env Information. Therefore the Planning Committee cannot lawfully be bound by the SoCG, but instead should inform the inspector it's not agreed.

Claim the 2015 consent is "extant" (made by Aviva-Biomass)

The officers write after "further legal advice" that "the 2015 consent is extant and that it was implemented". How strange when the arguments since 2017 have been over implementing something

different on a somewhat different site, that required fresh planning applications. That "legal advice" has to be disclosed to the Committee. It's unlikely the EIA unlawfulness was taken into account.

> As determined by the Welsh Govt. (29 July 2021 letter to DIAG) and agreed by the VoG in 2019/20, EIA had been necessary in 2015; an unlawful 2015 decision is not "extant" but "null and void".
>
> There was no Flood Consequences Assessment, which had to conclude the site was unsuitable for a waste incinerator, that being highly vulnerable development under TAN21.
>
> The 'consent' is not "extant" without discharge of the Drainage Condition 13. The drainage water tanks were built to provide firewater and sprinkler water. They had far too little capacity for stormwater too.
>
> Noise was considered relative to the old housing locations. With the new closer housing well underway, the current assessment by SRS says the noise disturbance is excessive.

Failure to meet the Vale's Waste Planning Duties and the "sustainable development principle (s.38)

The officers have failed to require the prescribed WPA (waste planning assessment under TAN21); that made in 2015 is far outdated and not resubmitted. That would show there's no regional need for a waste wood incinerator as the Margam plant takes all the regional waste wood and more -some of what Margam burns is recyclable into board by Kronospan. Permitting a new incinerator burning recyclable waste wood is quite contrary to the Council's *sustainable development* duty

Unreasonable behaviour (s.47)

The failure of Council officers to refer to the essential role of EIA "could constitute unreasonable behaviour and may have a bearing on the matter of costs being sought in connection with the current appeal". It is solidly backed by the Welsh Minister and arguably renders the 2010 and 2015 decisions void. Under the requirement for genuine enforcement of EIA law, the Council has a duty to make the case. Omitting any mention of EIA repeats the error in 2010 when the officers refused to support FoE's no-EIA objection at the public inquiry. Finding the officers' objections to be trivial and unreasonable, the Inspector in 2010 levied full costs against them.

The reversal of the Enforcement Notice as the officers propose makes the EN unreasonable in the first place. It gives Aviva-Biomass good reason for extracting costs - not just of preparing for the Inquiry, but also the loss of income during the enforced delay.

……

Friends of the Earth Barry&Vale

[redacted]