Appendix 1.1

Enforcement Notice and VoGC Officer's Report (1st September 2021)

Enforcement Notice

IMPORTANT - THIS COMMUNICATION AFFECTS YOUR PROPERTY

OPERATIONAL DEVELOPMENT AND MATERIAL CHANGE OF USE

ENFORCEMENT NOTICE

The Town and Country Planning Act 1990 (as amended) – Section 172

ISSUED BY THE VALE OF GLAMORGAN COUNCIL
COUNCIL REFERENCE ENF/2020/0230/M (A)

1. **THIS NOTICE** is issued by the Council because it appears to them that there has been a breach of planning control under Section 171A(1)(a) of the Town and Country Planning Act 1990 at the Land described below. They consider that it is expedient to issue this Notice having regard to the provisions of the development plan and all other material planning considerations. The Annex at the end of the notice contains important and additional information.

2. **THE LAND TO WHICH THIS NOTICE RELATES**

Land at Barry Biomass, Woodham Road, Barry in the Vale of Glamorgan ("the Land"), shown edged red on the plan appended hereto ("the Plan").

3. **THE BREACH OF PLANNING CONTROL ALLEGED**

3.1 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;

and

3.2 Without planning permission, the material change of use of that part of the Land edged blue on the Plan from unused land having a nil use to the storage of containers and as a vehicle turning space in association with the use of the wood fired renewable energy plant on that part of the Land edged green on the Plan.

4. **REASONS FOR ISSUING THIS NOTICE**

It appears to the Council that the above breach of planning control has occurred in respect of 3.1 (construction of the renewable energy plant) within the last four years and in respect of 3.2 (extension of land to the north) within the last ten years.

The site is located within the wider coastal area of Barry Docks, to the north-east of existing industrial units on Woodham Road and was previously occupied by a container storage and refurbishment operation. Planning permission was granted for the redevelopment of the site to provide a wood fuelled renewable energy plant under outline planning permission 2015/00031/OUT. Despite a significant level of local opposition, the outline permission was approved as it was concluded that the proposal would represent a sustainable renewable energy proposal which would comply with national and local planning policies, whilst also satisfactorily protecting the interests of local residential and visual amenity and highway safety. In order to ensure that the development was acceptable, a number of planning conditions were imposed which were designed to control both the construction and the future operation of the facility. These included measures to control issues such as air quality, waste management, the control of dust within the site and locality, light spillage, noise mitigation, deliveries and open storage and without such controls, it was considered that the development would have been unacceptable. A reserved matters application was approved for the approval of the landscaping of the development (2016/00187/RES) and the pre-commencement conditions for the scheme have been discharged.

Whilst the Council has investigated a number of complaints that have been received regarding the site since 2016, which initially related to construction issues including noise, dust, hours of construction and air quality, the investigation of more recent complaints has identified a number of discrepancies between the consented scheme and that which had been built including 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. Despite protracted correspondence with the developer and their initial acceptance of the differences with the scheme that had been approved, the existing development has failed to be regularised, which could affect the Council's ability to take enforcement action in the future if the unauthorised development were to become lawful.

It is considered the retention and operation of the plant without the ability to take enforcement action in the future could have a significant and irreversible adverse impact on the local environment and affect residential amenity and highway safety. The unauthorised development is therefore considered to conflict with strategic policies SP1 (Delivering the Strategy) and SP8 (Sustainable Waste Management), and the wider principles of managing new development set out in policies MD1 (Location of New Development), MD2 (Design of New Development), MD7 (Environmental Protection), MD16 (Protection of Existing Employment Sites and Premises), MD19 (Low Carbon and Renewable Energy Generation) and MD20 (Assessment of Waste Management Proposals). These breaches are also considered to conflict with the principles of sustainable development set out in PPW Edition 11 (2021), , Technical Advice Note 11 (Noise), Technical Advice Note 18 (Transport) and Technical Advice Note 21 (Waste) and Technical Advice Note 23 (Economic Development).

It is considered that the decision complies with the Council's well-being objectives and the sustainable development principle in accordance with the requirements of the Well Being of Future Generations (Wales) Act 2015.

5. WHAT YOU ARE REQUIRED TO DO

(i) Permanently cease the operation of the renewable energy plant, including the carrying out of any performance testing.

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

(iii) Permanently cease the use of that part of the Land edged blue on the Plan for the storage of containers and the parking and manoeuvring of vehicles in association with the renewable energy plant.

(iv) Permanently remove the containers and vehicles from that part of the Land edged blue on the Plan resulting from the cessation of the use identified in step (iii) above.

(v) Following the taking of steps (ii) and (iv) above, restore the Land to its former condition prior to the commencement of development.

6. TIME FOR COMPLIANCE

Step (i) - One day beginning with the day on which this notice takes effect.

Steps (ii), (iii) and (iv) - Six months beginning with the day on which this notice takes effect.

Step (v) - Nine months beginning with the day on which this notice takes effect.

7. WHEN THIS NOTICE TAKES EFFECT

This Notice takes effect on the 17th October 2021, unless an appeal is made against it before that date.

Dated: 17th September 2021

Signed: [redacted]

Head of Legal and Democratic Services
The Council's Authorised Officer

On behalf of: Vale of Glamorgan Council
Civic Offices
Holton Road
Barry
Vale of Glamorgan
CF63 4RU

ANNEX

YOUR RIGHT OF APPEAL

You can appeal against this Notice, but an appeal can only be made by giving written notice of the appeal to the Welsh Ministers before the date specified in the enforcement notice as the date on which it is to take effect or by sending such notice to the Welsh Ministers in a properly addressed, pre-paid letter posted to them at such time that, in the ordinary course of post, it would be delivered to them before that date; or, where electronic communications are used to send such notice to the Welsh Ministers, by sending the notice to them at such time that, in the ordinary course of transmission, it would be delivered to the Welsh Ministers before that date.

PLEASE NOTE: the date on which the notice takes effect is 17th October 2021

Written notice of any appeal must specify the grounds on which the appeal is brought under section 174 of the Town and Country Planning Act 1990 (as amended).

Should you wish to appeal under ground (a) of section 174 of the 1990 Act, the fee payable under regulation 10 of the Town and Country Planning (Fees for Applications, Deemed Applications and Site Visits) (Wales) Regulations 2015 (As Amended) for the deemed application for planning permission for the development alleged to be in breach of planning control in the enforcement notice is £36,800 (which is twice the amount of the fee of £460 per 75 sqm of floorspace, which in this case is 2,936 sqm - the original floorspace - 2,497 sqm plus the floorspace of the additional structures – 439 sqm).

When making an appeal you must send to the Welsh Ministers, either when giving notice of appeal or before the Notice comes into effect, a full statement of case comprised of the following:

(i) a statement in writing specifying the grounds of the appeal, stating the facts on which the appeal is based and containing full particulars of the case the appellant proposes to put forward in relation to the appeal; and

(ii) copies of any supporting documents the appellant proposes to refer to or put forward in evidence.

A copy of this Enforcement Notice has been served on the following recipients:

The Company Secretary
Biomass UK No.2 Limited
St Helen's
1 Undershaft
London
EC39 3DQ

The Company Secretary
Sunrise Renewables (Barry) Ltd,
Wakefield House,
67 Bewsey Street,
Warrington
WA2 7JQ

Aviva Company Secretarial Services Limited
St Helen's
1 Undershaft
London
EC3P 3DQ

Charles William Grant Herriott
St Helen's
1 Undershaft
London
EC3P 3DQ

Ian Shervell
St Helen's
1 Undershaft
London
EC3P 3DQ

The Company Secretary
Power Consulting (Midlands) Limited
Ascension House
Ground Floor
Crown Square
First Avenue
Burton-On-Trent
DE14 2WW

Richard John Frearson
Ascension House
Ground Floor
Crown Square
First Avenue
Burton-On-Trent
DE14 2WW

Samantha Marie Douglas
Ascension House
Ground Floor
Crown Square
First Avenue
Burton-On-Trent
DE14 2WW

Sandra Jane Frearson
Ascension House
Ground Floor
Crown Square

First Avenue
Burton-On-Trent
DE14 2W

The Company Secretary
Sol Environment Limited
10 The Lees
Malvern
Worcestershire
WR14 3HT

Heidi Butler
Sol Environment Limited
10 The Lees
Malvern
Worcestershire
WR14 3HT

Steve Butler
Sol Environment Limited
10 The Lees
Malvern
Worcestershire
WR14 3HT

PLEASE NOTE

If you are in any doubt as to what this Notice requires you to do you should immediately contact Sarah Feist, Principal Planner Appeals and Enforcement, who is based in Development Services of the Vale of Glamorgan Council, Dock Offices, Subway Road, Barry, CF63 4RT, and whose telephone number is 01446 704690.

If you need any independent advice about this Notice you are advised to contact a lawyer, planning consultant or other professional advisor specialising in planning matters.

Please note the following relevant extracts of the Town and Country Planning Act 1990 (as amended):

171A. Expressions used in connection with enforcement.

(1) For the purposes of this Act:

(a) carrying out development without the required planning permission; or
(b) failing to comply with any condition or limitation subject to which planning permission has been granted,

constitutes a breach of planning control.

(2) For the purposes of this Act—

(a) the issue of an enforcement notice (defined in section 172); or
(aa) the issue of an enforcement warning notice (defined in section 173ZA); or
(b) the service of a breach of condition notice (defined in section 187A),

constitutes taking enforcement action.

(3) In this Part *"planning permission"* includes permission under Part III of the 1947 Act, of the 1962 Act or of the 1971 Act.

171B. Time limits.

(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(2A) There is no restriction on when enforcement action may be taken in relation to a breach of planning control in respect of relevant demolition (within the meaning of section 196D).

(3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4) The preceding subsections do not prevent:

(a) the service of a breach of condition notice in respect of any breach of planning control if an enforcement notice in respect of the breach is in effect; or
(b) taking further enforcement action in respect of any breach of planning control if, during the period of four years ending with that action being taken, the local planning authority have taken or purported to take enforcement action in respect of that breach.

172. Issue of enforcement notice.

(1) The local planning authority may issue a notice (in this Act referred to as an *"enforcement notice"*) where it appears to them:

(a) that there has been a breach of planning control; and
(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.

(2) A copy of an enforcement notice shall be served:

(a) on the owner and on the occupier of the land to which it relates; and
(b) on any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.

(3) The service of the notice shall take place:

(a) not more than twenty-eight days after its date of issue; and
(b) not less than twenty-eight days before the date specified in it as the date on which it is to take effect.

172A. Assurance as regards prosecution for person served with notice

(1) When, or at any time after, an enforcement notice is served on a person, the local planning authority may give the person a letter:

(a) explaining that, once the enforcement notice had been issued, the authority was required to serve the notice on the person,

(b) giving the person one of the following assurances:

(i) that, in the circumstances as they appear to the authority, the person is not at risk of being prosecuted under section 179 in connection with the enforcement notice, or
(ii) that, in the circumstances as they appear to the authority, the person is not at risk of being prosecuted under section 179 in connection with the matters relating to the enforcement notice that are specified in the letter,

(c) explaining, where the person is given the assurance under paragraph (b)(ii), the respects in which the person is at risk of being prosecuted under section 179 in connection with the enforcement notice, and

(d) stating that, if the authority subsequently wishes to withdraw the assurance in full or part, the authority will first give the person a letter specifying a future time for the withdrawal that will allow the person a reasonable opportunity to take any steps necessary to avoid any risk of prosecution that is to cease to be covered by the assurance.

(2) At any time after a person has under subsection (1) been given a letter containing an assurance, the local planning authority may give the person a letter withdrawing the assurance (so far as not previously withdrawn) in full or part from a time specified in the letter.

(3) The time specified in a letter given under subsection (2) to a person must be such as will give the person a reasonable opportunity to take any steps necessary to avoid any risk of prosecution that is to cease to be covered by the assurance.

(4) Withdrawal under subsection (2) of an assurance given under subsection (1) does not withdraw the assurance so far as relating to

prosecution on account of there being a time before the withdrawal when steps had not been taken or an activity had not ceased.

(5) An assurance given under subsection (1) (so far as not withdrawn under subsection (2)) is binding on any person with power to prosecute an offence under section 179.

173. Contents and effect of notice.

(1) An enforcement notice shall state:

(a) the matters which appear to the local planning authority to constitute the breach of planning control; and
(b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.

(2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are:

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
(b) remedying any injury to amenity which has been caused by the breach.

(5) An enforcement notice may, for example, require:

(a) the alteration or removal of any buildings or works;
(b) the carrying out of any building or other operations;
(c) any activity on the land not to be carried on except to the extent specified in the notice; or
(d) the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides.

(6) Where an enforcement notice is issued in respect of a breach of planning control consisting of demolition of a building, the notice may require the construction of a building (in this section referred to as a *“replacement building”*) which, subject to subsection (7), is as similar as possible to the demolished building.

(7) A replacement building:

(a) must comply with any requirement imposed by any enactment applicable to the construction of buildings;

(b) may differ from the demolished building in any respect which, if the demolished building had been altered in that respect, would not have constituted a breach of planning control;
(c) must comply with any regulations made for the purposes of this subsection (including regulations modifying paragraphs (a) and (b)).

(8) An enforcement notice shall specify the date on which it is to take effect and, subject to sections 175(4) and 289(4A), shall take effect on that date.

(9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities; and, where different periods apply to different steps or activities, references in this Part to the period for compliance with an enforcement notice, in relation to any step or activity, are to the period at the end of which the step is required to have been taken or the activity is required to have ceased.

(10) An enforcement notice shall specify such additional matters as may be prescribed, and regulations may require every copy of an enforcement notice served under section 172 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 174.

(11) Where:

(a) an enforcement notice in respect of any breach of planning control could have required any buildings or works to be removed or any activity to cease, but does not do so; and
(b) all the requirements of the notice have been complied with,

then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

(12) Where:

(a) an enforcement notice requires the construction of a replacement building; and
(b) all the requirements of the notice with respect to that construction have been complied with,

planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of that construction.

173ZA. Enforcement warning notice: Wales

(1) This section applies where it appears to the local planning authority that:

(a) there has been a breach of planning control in respect of any land in Wales, and

(b) there is a reasonable prospect that, if an application for planning permission in respect of the development concerned were made, planning permission would be granted.

(2) The authority may issue a notice under this section (an “enforcement warning notice”).

(3) A copy of an enforcement warning notice is to be served:

(a) on the owner and the occupier of the land to which the notice relates, and
(b) on any other person having an interest in the land, being an interest that, in the opinion of the authority, would be materially affected by the taking of any further enforcement action.

(4) The notice must:

(a) state the matters that appear to the authority to constitute the breach of planning control, and
(b) state that, unless an application for planning permission is made within a period specified in the notice, further enforcement action may be taken.

(5) The issue of an enforcement warning notice does not affect any other power exercisable in respect of any breach of planning control.

173A. Variation and withdrawal of enforcement notices.

(1) The local planning authority may—

(a) withdraw an enforcement notice issued by them; or
(b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).

(2) The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.

(3) The local planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were re-issued, be served with a copy of it.

(4) The withdrawal of an enforcement notice does not affect the power of the local planning authority to issue a further enforcement notice.

174. Appeal against enforcement notice.

(1) A person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice, whether or not a copy of it has been served on him.

(2) An appeal may be brought on any of the following grounds:

(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;
(b) that those matters have not occurred;
(c) that those matters (if they occurred) do not constitute a breach of planning control;
(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters;
(e) that copies of the enforcement notice were not served as required by section 172;
(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;
(g) that any period specified in the notice in accordance with section 173(9) falls short of what should reasonably be allowed.

(2A) An appeal may not be brought on the ground specified in subsection (2)(a) if:

(a) the land to which the enforcement notice relates is in England, and
(b) the enforcement notice was issued at a time:
(i) after the making of a related application for planning permission, but
(ii) before the end of the period applicable under section 78(2) in the case of that application.

(2B) An application for planning permission for the development of any land is, for the purposes of subsection (2A), related to an enforcement notice if granting planning permission for the development would involve granting planning permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control.

(2C) Where any breach of planning control constituted by the matters stated in the notice relates to relevant demolition (within the meaning of section 196D), an appeal may also be brought on the grounds that:

(a) the relevant demolition was urgently necessary in the interests of safety or health;
(b) it was not practicable to secure safety or health by works of repair or works for affording temporary support or shelter; and
(c) the relevant demolition was the minimum measure necessary.

(2D) An appeal against an enforcement notice may not be brought on the ground that planning permission ought to be granted in respect of a breach of planning control constituted by a matter stated in the notice, as specified in subsection (2)(a), if:

(a) the land to which the enforcement notice relates is in Wales, and
(b) the enforcement notice was issued after a decision to refuse planning permission for a related development was upheld on an

appeal under section 78 (and for this purpose development is "related" if granting planning permission for it would involve granting planning permission in respect of the matter concerned).

(2E) An appeal may not be brought on the ground that a condition or limitation ought to be discharged, as specified in subsection (2)(a), if:

(a) the land to which the enforcement notice relates is in Wales, and
(b) the enforcement notice was issued after a decision to grant planning permission subject to the condition or limitation was upheld on an appeal under section 78.

(2F) For the purposes of subsections (2D) and (2E), references to a decision that has been upheld on an appeal include references to a decision in respect of which:

(a) the Welsh Ministers have, under section 79(6), declined to determine an appeal or to proceed with the determination of an appeal;
(b) an appeal has been dismissed under section 79(6A).

(3) An appeal under this section shall be made:

(a) by giving written notice of the appeal to the Secretary of State before the date specified in the enforcement notice as the date on which it is to take effect; or
(b) by sending such notice to him in a properly addressed and pre-paid letter posted to him at such time that, in the ordinary course of post, it would be delivered to him before that date ; or
(c) by sending such notice to him using electronic communications at such time that, in the ordinary course of transmission, it would be delivered to him before that date.

(4) A person who gives notice under subsection (3) shall submit to the Secretary of State, either when giving the notice or within the prescribed time, a statement in writing:

(a) specifying the grounds on which he is appealing against the enforcement notice; and
(b) giving such further information as may be prescribed.

(5) If, where more than one ground is specified in that statement, the appellant does not give information required under subsection (4)(b) in relation to each of those grounds within the prescribed time, the Secretary of State may determine the appeal without considering any ground as to which the appellant has failed to give such information within that time.

(6) In this section *"relevant occupier"* means a person who:

(a) on the date on which the enforcement notice is issued occupies the land to which the notice relates by virtue of a licence; and
(b) continues so to occupy the land when the appeal is brought

175. Appeals: supplementary provisions.

(1) The Secretary of State may by regulations prescribe the procedure which is to be followed on appeals under section 174 and, in particular, but without prejudice to the generality of this subsection, may:

(a) require the local planning authority to submit, within such time as may be prescribed, a statement indicating the submissions which they propose to put forward on the appeal;
(b) specify the matters to be included in such a statement;
(c) require the authority or the appellant to give such notice of such an appeal as may be prescribed;
(d) require the authority to send to the Secretary of State, within such period from the date of the bringing of the appeal as may be prescribed, a copy of the enforcement notice and a list of the persons served with copies of it.

(2) The notice to be prescribed under subsection (1)(c) shall be such notice as in the opinion of the Secretary of State is likely to bring the appeal to the attention of persons in the locality in which the land to which the enforcement notice relates is situated.

(3) Subject to section 176(4), the Secretary of State shall, if either the appellant or the local planning authority so desire, give each of them an opportunity of appearing before and being heard by a person appointed by the Secretary of State for the purpose.

(3A) Subsection (3) does not apply to an appeal against an enforcement notice issued by a local planning authority in England.

(3B) Subsection (3) does not apply to an appeal against an enforcement notice issued by a local planning authority in Wales.

(4) Where an appeal is brought under section 174 the enforcement notice shall subject to any order under section 289(4A) be of no effect pending the final determination or the withdrawal of the appeal.

(5) Where any person has appealed to the Secretary of State against an enforcement notice, no person shall be entitled, in any other proceedings instituted after the making of the appeal, to claim that the notice was not duly served on the person who appealed.

(6) Schedule 6 applies to appeals under section 174, including appeals under that section as applied by regulations under any other provisions of this Act.

176. General provisions relating to determination of appeals.

(1) On an appeal under section 174 the Secretary of State may:

(a) correct any defect, error or misdescription in the enforcement notice; or
(b) vary the terms of the enforcement notice,

if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.

(2) Where the Secretary of State determines to allow the appeal, he may quash the notice.

(2A) The Secretary of State shall give any directions necessary to give effect to his determination on the appeal.

(3) The Secretary of State:

(a) may dismiss an appeal if the appellant fails to comply with section 174(4) within the prescribed time; and
(b) may allow an appeal and quash the enforcement notice if the local planning authority fail to comply with any requirement of regulations made by virtue of paragraph (a), (b), or (d) of section 175(1) within the prescribed period.

(4) If section 175(3) would otherwise apply and the Secretary of State proposes to dismiss an appeal under paragraph (a) of subsection (3) of this section or to allow an appeal and quash the enforcement notice under paragraph (b) of that subsection, he need not comply with section 175(3).

(5) Where it would otherwise be a ground for determining an appeal under section 174 in favour of the appellant that a person required to be served with a copy of the enforcement notice was not served, the Secretary of State may disregard that fact if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.

177. Grant or modification of planning permission on appeals against enforcement notices.

(1) On the determination of an appeal under section 174, the Secretary of State may:

(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;

(b) discharge any condition or limitation subject to which planning permission was granted;

(c) determine whether, on the date on which the appeal was made, any existing use of the land was lawful, any operations which had been carried out in, on, over or under the land were lawful or any matter constituting a failure to comply with any condition or limitation subject to which planning permission was granted was lawful and, if so, issue a certificate under section 191.

(1A) The provisions of sections 191 to 194 mentioned in subsection (1B) shall apply for the purposes of subsection (1)(c) as they apply for the purposes of section 191, but as if:

(a) any reference to an application for a certificate were a reference to the appeal and any reference to the date of such an application were a reference to the date on which the appeal is made; and
(b) references to the local planning authority were references to the Secretary of State.

(1B) Those provisions are: sections 191(5) to (7), 193(4) (so far as it relates to the form of the certificate), (6) and (7) and 194.

(1C) Subsection (1)(a) applies only if the statement under section 174(4) specifies the ground mentioned in section 174(2)(a).

(2) In considering whether to grant planning permission under subsection (1), the Secretary of State shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations.

(3) The planning permission that may be granted under subsection (1) is any planning permission that might be granted on an application under Part III.

(4) Where under subsection (1) the Secretary of State discharges a condition or limitation, he may substitute another condition or limitation for it, whether more or less onerous.

(5) Where:

(a) an appeal against an enforcement notice is brought under section 174, and
(b) the statement under section 174(4) specifies the ground mentioned in section174(2)(a),

the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control.

(5A) Where:

(a) the statement under subsection (4) of section 174 specifies the ground mentioned in subsection (2)(a) of that section;
(b) any fee is payable under regulations made by virtue of section 303 in respect of the application deemed to be made by virtue of the appeal; and
(c) the Secretary of State gives notice in writing to the appellant specifying the period within which the fee must be paid,

then, if that fee is not paid within that period, the appeal, so far as brought on that ground, and the application shall lapse at the end of that period.

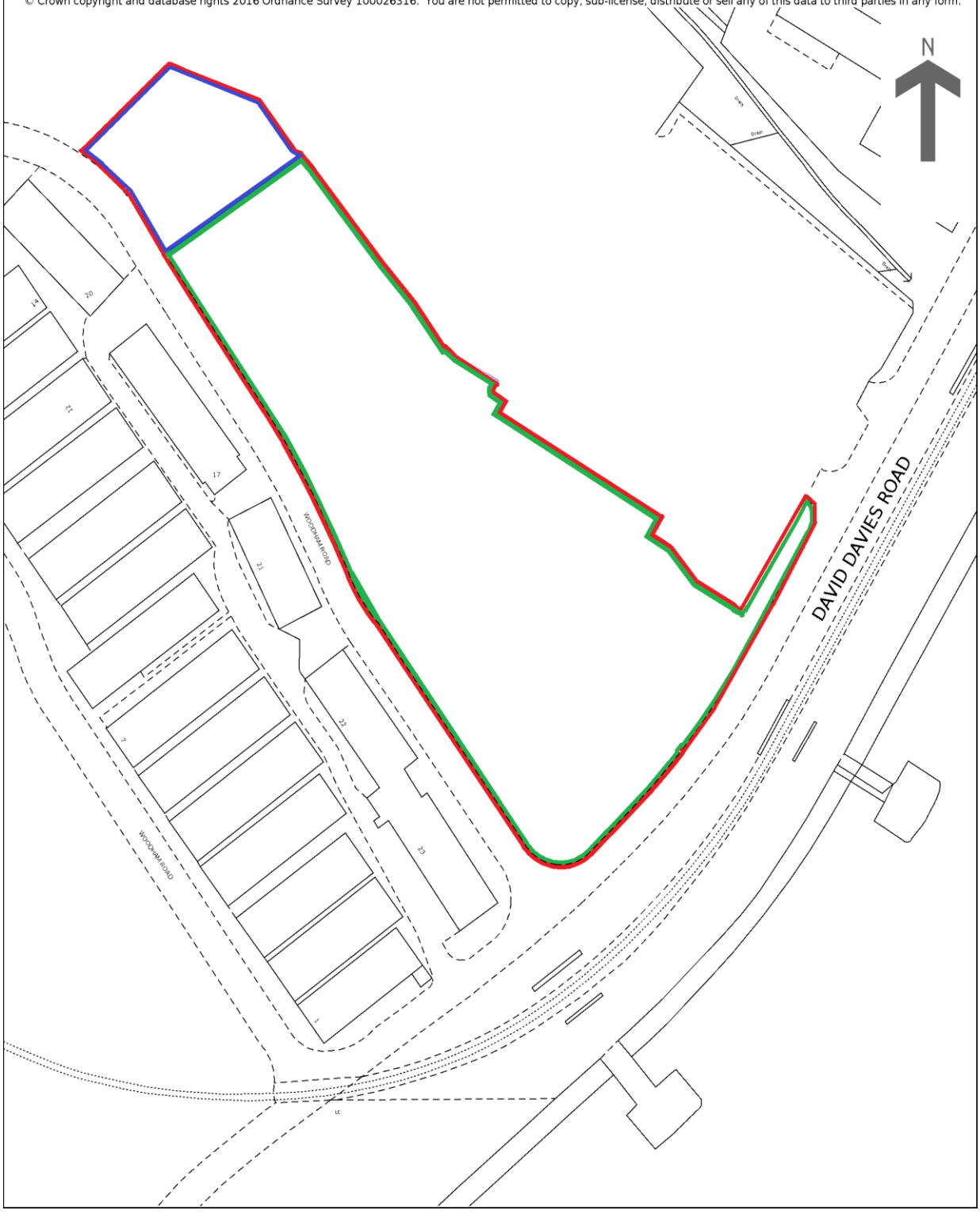
(6) Any planning permission granted under subsection (1) on an appeal shall be treated as granted on the application deemed to have been made by the appellant.

(7) In relation to a grant of planning permission or a determination under subsection (1) the Secretary of State's decision shall be final.

(8) For the purposes of section 69 the Secretary of State's decision shall be treated as having been given by him in dealing with an application for planning permission made to the local planning authority.

HM Land Registry
Official copy of title plan

Title number **CYM670867**
Ordnance Survey map reference **ST1267NE**
Scale **1:1250**
Administrative area **The Vale of Glamorgan / Bro Morgannwg**



VoGC Officer's Report (1st September 2021)

Agenda Item No.

THE VALE OF GLAMORGAN COUNCIL

PLANNING COMMITTEE : **1 SEPTEMBER, 2021**

REPORT OF THE HEAD OF REGENERATION AND PLANNING

5. ENFORCEMENT ACTION

LAND AND BUILDINGS AT BARRY BIOMASS, WOODHAM ROAD, BARRY

Background

1. This report seeks authorisation to issue an Enforcement Notice under Section 172 of the Town and Country Planning Act 1990 (as amended) in respect of the development which has been undertaken at the Barry Biomass site, in Woodham Road, Barry. The site is located to the north-east of the industrial units along Woodham Road with access off David Davies Road and has undergone extensive re-development to provide the biomass facility.

2. The redevelopment of the site to provide a wood fuelled renewable energy plant has attracted a significant amount of public and media interest which has been evident through both the level of objection which was raised in opposition to the original scheme and the very active public interest and scrutiny that has been given to the development undertaken on site.

3. The Council has investigated a number of 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. In 2017, a complaint was received that works had commenced on site prior to the determination of planning application 2017/01080/FUL, which had sought a variation to condition 5. of 2015/00031/OUT to include a fire water tank and associated building, as well as the relocation of parking. Following the developer's decision to withdraw that application and to complete the development in accordance with the outline consent (2015/00031/OUT), it became apparent through the complaints that were received and the investigations undertaken including a site inspection in July 2020, that there were a number of 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.

4. Correspondence was sent to the developer in July 2020 confirming the variances that had been identified with the approved plans and a revised layout plan was submitted by the developer in December 2020 identifying the locations where changes had occurred. 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 maintained the position that the outline and reserved matters applications (2015/00031/OUT and 2016/00187/RES) have been lawfully implemented and the discrepancies could be remedied through Non-Material Amendment (NMA) or Section 73A applications limited to the individual structures. On 12th May 2021, the developer submitted a retrospective Section 73A application for the fire water tank that has been constructed (2021/00695/FUL), however no further NMA or Section 73A applications have been received for the remaining structures which therefore remain unauthorised. The developer was contacted again on 9th, 12th, and 16th August 2021 regarding the performance testing that has recently been undertaken and advised that the current facility was considered to be unauthorised and in the absence of the development being fully regularised, it was likely that enforcement action would be taken to stop the facility from becoming fully operational. Despite protracted correspondence with the developer and their initial acceptance of the differences with the scheme that had been approved, the existing development has however failed to be regularised.

5. It has been confirmed by NRW that an environmental permit is in place which enables the developer to commence operations and performance testing has also recently been undertaken in preparation for the continuous operation of the facility. In the absence a fully consented scheme against which enforcement action could be pursued in respect of breaches of necessary and important conditions, it is the Council's view that it would be expedient to take action at this stage to prevent the possibly unauthorised development from becoming fully operational and potentially lawful. It is therefore considered that such action is 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.

6. Alongside the Council's investigation of complaints regarding the site, 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. At the time the outline application 2015/00031/OUT was under consideration, the Council screened the proposed development and concluded that EIA was not required. Following a request made by a third party to the Welsh Government for a screening direction to be made which would have required the submission of an EIA, the Welsh Government also concluded that a screening direction and EIA, was not required. In response to further queries that have been raised, a review of previous planning consents, together with the voluntary Environmental Statement submitted by the developer has been undertaken by the Welsh Government. As a result, the Welsh Government has issued an interim decision dated 29th July 2021 (see **Appendix A**) which has concluded that the development approved under 2015 outline planning permission is Schedule 1 development and should have been subject to EIA. It has also been concluded that as a result 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 provide by the developer.

7. The 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 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 decision not to pursue discontinuance action should affect the Council's decision in respect of enforcement action, 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.

Details of the Breach

8. The first application for the erection of a new industrial building and installation of a 9MW wood fuelled renewable energy plant was received by the Council in September 2008 and was refused on 31st July 2009, however that decision was overturned on appeal to the Welsh Government and planning permission was granted on 2nd July 2010 (2008/01203/FUL).

9. This decision was not however implemented and an outline application was subsequently made in February 2015 for a wood fired renewable energy plant, which was approved on 31st July 2015 (2015/00031/OUT) . A plan of the approved site layout is provided below:

10. The outline permission was approved as it was concluded that the proposal would represent a sustainable renewable energy proposal which would comply with national and local planning policies, whilst also satisfactorily protecting the interests of local residential and visual amenity and highway safety, whilst no compromising other material consideration. The consent was subject to a number of conditions which were designed to control both the construction and the future operation of the facility including condition 5. (implementation of registered plans as well as air quality and waste planning assessment) 6. (management of fly ash and bottom ash waste), 11. (scheme to control dust within site and locality), 12. (details of lighting and light spillage), 21. (noise survey and potential mitigation) 22. (limitation on wood waste treated), 23. (limitation on waste wood processing), 24. (restriction on deliveries), 25. (restriction on noise) 26. (no open storage) 29. (Green Travel Plan) 30. (doors to feedstock building to remain closed except for deliveries) and 31. (air quality monitoring).

11. A reserved matters application for the approval of the landscaping of the development (a requirement of condition 1. of 2015/00031/OUT), was submitted in March 2016 and approved on 29th April 2016 (2016/00187/RES).

12. The current breaches of planning control have arisen as a result of the changes that the developer has undertaken in developing the site and their decision to revert back to implementing the 2015 outline consent (2015/00031/OUT). On implementation of the outline permission, the

developer constructed a fire water tank which was not in accordance with the approved plans and in March 2017, a further planning application was submitted for the installation of a number of additional site services, plant and machinery within the site which were described as ancillary to the renewable power plant approved under 2015/00031/OUT (2017/00262/FUL). At the time these details were submitted, the applicant was advised that as the development was not substantially complete, the changes would amount to a new application for the development as a whole. The applicant's agent confirmed that they would await the substantial completion of the approved development and submit a full application at a later stage for just the additional plant and machinery on the site and the application was subsequently withdrawn in June 2018.

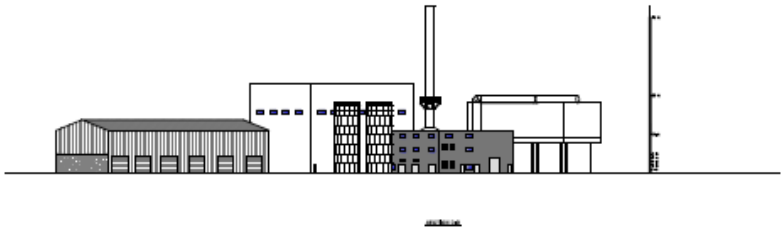
13. A further retrospective S73A planning application was submitted in October 2017 for the variation of condition 5. of planning permission 2015/00031/OUT to include a fire water tank and fire water pump house as well as the relocation of parking resulting from the provision of these two structures (2017/01080/FUL). During the consideration of the application and due to the proposed extension of the site, the question was raised as to whether there was the need for an Environmental Impact Assessment (EIA). On two previous occasions, the Welsh Government had upheld the Council's decision that an EIA was not required, however following re-consultation, the Welsh Government advised in a letter dated 14th February 2018, that they were minded to direct that the development fell within Schedule 1 of the 2017 EIA regulations and that an Environmental Statement was required. The Council also considered that the 2017 proposal may be a Development of National Significance (DNS) and if this was the case, the developer would need to submit their application to the Welsh Government for determination. The applicant therefore determined that they would continue to implement the 2015 planning permission (2015/00031/OUT) by dismantling and removing the water fire tank and re-aligning the site boundary in the location of the car park. The application was therefore withdrawn on 9th February 2020 and the fire water tank subsequently removed from the site.

14. As a result of queries received regarding the appearance of the facility that had been constructed and additional structures provided within the site, a review of the 'as-built' development with the approved scheme was undertaken. Following a site inspection undertaken in July 2020, it was identified that a number of discrepancies existed between the approved development and that which has been built and 3 areas have been identified where a breach of planning control is considered to have occurred:

(i) <u>Discrepancy between the Approved Elevation and Site Layout Plans</u>

15. The most significant discrepancy identified was that the approved elevations are a 'mirror image' of what was shown on the approved layout plan so the development is shown the wrong way round on the elevation plan to what is shown on the approved layout and what has been constructed on site. So in the example below, the 2 cylindrical towers are shown to be on the south-west

elevation plan, however as shown the photograph, these towers are located on the north-east elevation.

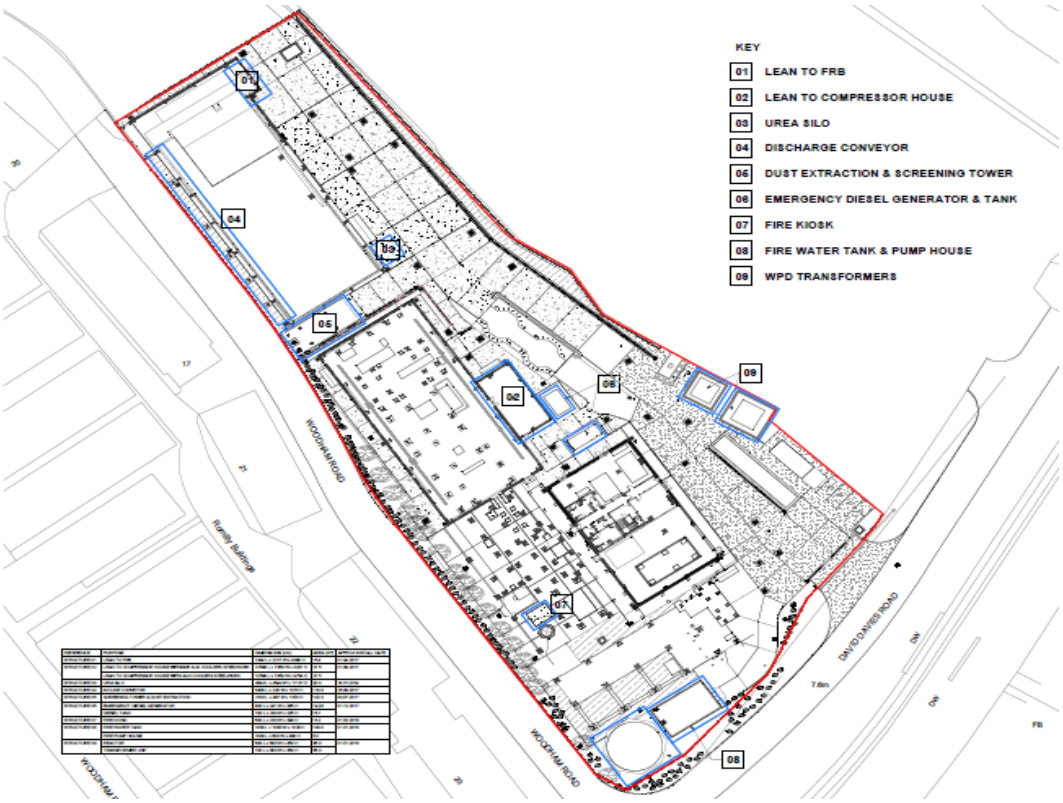


16. It is understood that this was a technical error which resulted in them appearing as a ‘mirror image’ of what was proposed and it is important to note that the development undertaken is considered to be visually acceptable in relation to the outline consent granted, however the development that has been constructed does not accord with the elevation plans that were approved for the outline application 2015/00031/OUT and therefore needs to be regularised. It is possible that this position could potentially be resolved through the submission of a ‘Non-Material Amendment’ (NMA) application,

however the developer has made no such application to regularise this position.

(ii) Additional Plant and Equipment

17. During the investigation, it was also identified that there were a number of structures that had been constructed at the site which were considered to be at variance with the approved scheme including plant and equipment and the developer has submitted the following plan which identifies, outlined in blue, the locations where these changes have occurred.



18. Further details have also been provided by the developer in respect of the dimension and function of the structures and the plant which are detailed below, together with what mechanism that exists for their regularisation. In determining the need for planning permission, the Council has considered whether each of the structures / plan constituted 'permitted development' under Part 8, Class B of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) which enables extensions and alterations to industrial development to be undertaken subject to certain criteria without requiring planning permission. However, in most cases, as the structures have been provided during the course of developing the site and were therefore built as part of one continuous building operation, rather than being the extension of a substantially constructed building, they were not considered to constitute an 'extension', or therefore constitute 'permitted development'.

Item 01 – Lean to FRB

19. This a lean-to structure located on the north-east elevation towards the rear of the building shown within the centre of the above photograph. The developer has confirmed the dimensions as 7434 L x 2217 W x 4000 H (area 16.4 sqm) and that the structure and the plant within was installed on 01.04.2017 and is not fundamental to the operation of the development.

20. It is considered that 'permitted development' rights do not apply to this structure as it is part of a single building operation, rather than an extension, however the potential mechanisms for regularising this development are available either under Section 96A (non-material amendment) or Section 73A (planning permission for development already carried out) of the Town and Country Planning Act 1990, subject to whether the Council considers the change to be 'non-material' or not.

Item 02 – Lean-to Compressor House with Plant Above

21. This structure is also located on the north-east elevation located centrally within the site and within the centre of the above photograph. The developer has confirmed the dimensions as 12508 L x 7350 W x 4231 H or 9754 if auxilliary coolers are included (area 27.5 sqm). It was installed on 01.09.2017 and the structure houses air compressors that can no longer fit in the main building.

22. It is considered that 'permitted development' rights do not apply to this structure as it is part of a single building operation, rather than an extension. The potential mechanisms for regularising this development are available under Section 73A (Planning permission for development already carried out) of the Town and Country Planning Act 1990.

Item 03 – Urea Silo

23. This cylindrical structure is also located on the south-west elevation located centrally within the site and just off the centre (right) of the above photograph. The developer has confirmed the dimensions as 4544 L x 4544 W x 11131 H (area 20.3 sqm) and the silo was installed on 18.01.2019. The developer has confirmed that the silo contains urea which is mixed to provide a solution that is used in the combustion process. The plant could be operated without it, however this would require the regular delivery of pre-mixed urea by tankers which reduces efficiency.

24. It has been confirmed that this structure is under 15m in height and the permitted development 'test' would be whether this materially affects the external appearance of the premises (Part 8, Class B of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) refers). However, legal advice on such matters has stated that Permitted development rights do not apply if the existing operations to which they relate are unlawful themselves.

Item 04 – Discharge 'Incline' Conveyor

25. This structure is also located on the north-east elevation located diagonally and just off the centre (left) of the above photograph. The developer has confirmed the dimensions as 5400 L x 220 W x 1370 H and that this was installed on 26.09.2017. The developer has maintained that this conveyor is shown on the approved layout plan and therefore forms part of the development authorised by the outline planning permission. It has also been confirmed that the as-built conveyor connects to Structure 5, whereas on the approved layout plan, it connects to the main process building. The developer has advised that it should have been understood that a conveyor was needed to transfer the feedstock to the gasifier and the Planning Statement submitted with the application also included a photograph of another plant which included an external conveyor, identical to that erected.

26. Whilst it has been maintained by the developer that this structure has been 'authorised in principle' and the location of this structure is outlined on the approved layout plan, it now connects to a different building and there are no elevation details approving its size, dimensions or appearance. It is considered that 'permitted development' rights cannot in any case apply to this structure as it is part of a single building operation, rather than an extension. It is also considered that this structure materially affects the appearance of the

building. The mechanism for regularising this development is available under Section 73A (Planning permission for development already carried out) of the Town and Country Planning Act 1990.

Item 05 – Screening Tower and Dust Extraction

27. These structures are located on the south-west elevation located centrally within the site and immediately to the right of the conveyor on above photograph. The developer has confirmed the dimensions as 2100 L x 487 W x 1370 H (area 102.3 sqm) and the structures were installed on 30.07.2017. The developer has confirmed that the structure screens oversize and metal products form the fuel stream. The structure is not essential to the operation of the plant and fuel could be screened off site, however it is less economic to do so.

28. It is considered that 'permitted development' rights cannot in any case apply to this structure as it is part of a single building operation, rather than an extension.
It is considered that this structure materially affects the appearance of the building. The mechanism for regularising this development is available under Section 73A (planning permission for development already carried out) of the Town and Country Planning Act 1990.

Item 06 – Emergency Diesel Generator and Diesel Tank

29. These structures are also located on the north-east elevation located centrally within the site and immediately in front of the lean-to compressor house. The developer has confirmed the dimensions as 800 L x 241 W x 285 H (area 19.28 sqm) and tank 700 L x 230 W x 225 H (area 16.1) and that the structures were installed on 01.12.2017. The developer has confirmed that the approved layout plan included a room which was originally intended to house the generator and tank however during the development, they have been located a few metres away from the building. It has also been confirmed that the emergency equipment would provide essential back-up to bring the plant to a safe condition in the event of a mains electricity back-out.

30. Whilst it has been maintained by the developer that this structure is ‘authorised in principle’ and it was shown within a building on the approved layout plan, the current structure is not clearly identified on the plans and there are no elevation details approving its size, dimensions or appearance. It is considered that ‘permitted development’ rights cannot apply to this structure as it is part of a single building operation, rather than an extension. the potential mechanisms for regularising this development are available either under Section 96A (non-material amendment) or Section 73A (planning permission for development already carried out) of the Town and Country Planning Act 1990, subject to whether the Council considers the change to be ‘non-material’ or not.

Item 07 – Fire Kiosk

31. This structure is also located on the north-east elevation and the rectangular structure with double doors shown centrally within the above photograph. The developer has confirmed the dimensions as 600 L x 220 W x 290 H (area 13.2 sqm) and that the structure was installed on 01.02.2018 and houses valve sets necessary to distribute fire water to the deluge system.

32. It is considered that 'permitted development' rights cannot in any case apply to this structure as it is part of a single building operation, rather than an extension, the potential mechanisms for regularising this development are available either under Section 96A (non-material amendment) or Section 73A (planning permission for development already carried out) of the Town and Country Planning Act 1990, subject to whether the Council considers the change to be 'non-material' or not

Item 08 – Fire Water Tank and Pump House

33. These structures are located in the southern corner of the site and comprise the cylindrical tank and adjacent rectangular building (to the right) within the above photograph. The developer has confirmed the dimensions of the tank as 1000 L x 1000 W x 1020 H (area 100 sqm) and the pumphouse as 1000 L x 600 W x 400 H (area 6 sqm) and was installed on 01.01.2018. The structure houses fire water as specified by the fire prevention plan that forms part of the environmental permit and pumping equipment.

34. It is considered that 'permitted development' rights do not apply to these structures as they are part of a single building operation, rather than an extension. It is considered that this structure materially affects the appearance of the building however the mechanism for regularising this development is available under Section 73A (planning permission for development already carried out) of the Town and Country Planning Act 1990.

35. On 12th May 2021, a retrospective (S73A) planning application for the erection and use of a cylindrical fire water tank has recently been submitted by the developer and is currently under consideration by the Council (2021/00695/FUL). The Council initially determined that due to the number of discrepancies between the development approved under planning permission 2015/00031/OUT and that which had been constructed which had not been regularised, applications to regularise these matters would effectively be consenting a 'generating station' and these should be considered as Developments of National Significance, the application was not validly made. Whilst the Planning Inspectorate subsequently determined that as the application related only to a fire water tank, the Council's reason for not validating it did not constitute a validation requirement, it was confirmed that its determination did not prevent the Council from requesting an Environmental Statement, (ES) if this was considered to be required. The Council has therefore sought clarification whether an ES is intended to be submitted on the basis that the Welsh Government is of the view that the development in its entirety is Schedule 1 development and the EIA threshold for any change to or extension of development listed in Schedule 1 is whether 'the development as changed or extended may have significant adverse effects on the environment'.

Item 09 – WPD Reactor and Transformer Unit

36. This reactor and transformer unit are located adjacent to the north-eastern boundary of the site and comprise structures erected by Western Power Distribution on 01.01.2018. It is considered that these are likely to fall within the permitted development rights set out in Part 17, Class G of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) relating to statutory undertakers and therefore no planning permission is required.

(iii) Extension of Site to the North

37. The land which is located immediately north of the site shown in the photograph above has been used throughout the construction phase and now continues to be open to the main site and is being used for storage containers

and a vehicle turning space. This does not form part of the application site that was granted permission, however it has not been confirmed whether it is the developer's intention to regularise this use through the submission of a full application for planning permission or cease the use of this site.

Action Pursued to Date

38. Following the site inspection undertaken in July 2020, a significant exchange of correspondence has been undertaken with the developer in an attempt to regularise the position. Correspondence was sent in July 2020 confirming that as a result of the review that had been undertaken, a number of variances had been identified, including that the approved elevation plans appeared to be a 'mirror image' of the approved layout plans and the other equipment and structures that had been erected on site. In view of the nature and size of those variances, the developer's views were sought on the position, however it was advised that the Council was also seeking legal advice on the implications of the differences.

39. Following the submission of a revised site layout plan by the developer in December 2020 which had identified (outlined in blue), the locations where the changes had occurred, the developer was advised that following the legal advice the Council had received, it was considered that a number of the discrepancies, including the 'mirror image' elevation plans and certain items including 01 (Lean-to FRB) and 07 (Fire kiosk) could potentially be dealt with through the Non-Material amendment (NMA) procedure, if the Council concluded that the change was 'non-material'. It was confirmed that in relation to the other items including 02 (Lean-to Compressor House and Plant), 04, (Discharge Conveyor) 05 (Screening Tower and Dust Extraction) and 08 (Fire Water Tank and Pump House), it was very unlikely that these could be dealt with through the NMA procedure as they were highly visible from outside of the site and due to their size. It was confirmed that where discrepancies could not be regularised through NMA applications, an application under Section 73A could be applied for.

40. The Council therefore wrote to the developer on 12th January 2021 to advise that the legal advice it had received supported the view that a Section73A application should be submitted to regularise the entire development. It was explained that whilst technically it may be possible for certain discrepancies to be regularised through the Non-Material Amendment (NMA) procedure, there was no guarantee that any such application would be approved and there was also no right of appeal against any refusal of permission. It was advised that a Section 73A application for the whole development would need to be made to the Welsh Ministers as a Development of National Significance, however this was considered to represent the most sensible way forward as it would enable all of the identified discrepancies to be considered together and for the unauthorised development to be regularised without further delay.

41. It was also confirmed that in the absence of a valid planning permission, the Council effectively would have no control over the development or its operation, which was considered to be unacceptable given the nature of the development

and level of public interest. It was confirmed to the developer that if they decided against this course of action, it was likely that enforcement action would be taken to require that all development cease and all structures to be removed from the land.

42. The developer responded on 15th January 2021 confirming that they were seeking their own legal advice, however it was maintained that both the outline application 2015/00031/OUT and the reserved matters application 2016/00187/RES had both been lawfully implemented and pre-commencement conditions had been discharged, prior to the lawful implementation for the development in 2016. It was confirmed that they understood the discrepancies to consist of 9 ancillary structures and an error on the plans, however they considered that any planning irregularities could be capable of being remedied at a local level, without the need for a Section 73A application. The developer suggested that given the existence of planning permission and nature of the discrepancies identified, it was not considered expedient, reasonable or proportionate to remove all of the structures from the land, however they wished to resolve matters.

43. A response was sent by the Council on 19th January 2021 requesting a date when remedial action would be taken to resolve the identified breaches. It was advised that in the absence of planning permission, the development remained unauthorised and, in such circumstances, it would be expedient to take enforcement action, particularly if it was the developer's intention for the facility to become operational. The developer was therefore requested to provide a timely resolution to avoid the need for formal enforcement action to be taken.

44. The developer's response on 17th February 2021 advised that the project had been 'developed substantially in accordance with planning permission 15/00031/OUT and reserved matters approval 2016/00197/RES' and following the discharge of pre-commencement conditions, the development was therefore authorised by a lawfully subsisting and implemented planning permission. The developer advised that the Council could not compel a Section 73A application to be made and that there was no need for an application to regularise the whole development, and none would be made. It was advised by the developer that only six of the structures merited any further consideration as it was claimed that Item 04 (Discharge 'Incline' Conveyor) and Item 06 (Emergency Diesel Generator and Diesel Tank) were authorised in principle by the planning permission. Of the six remaining structures, it was claimed that four were non-essential to the operation of the development (Item 01 (lean to FRB) Item 02 (Lean-to Compressor House with Plant Above) Item 03 (Urea Silo) and Item 05 (Screening Tower and Dust Extraction. It was also confirmed that Items 07 (Fire Kiosk) and 08 (Fire Water Tank and Pump House) related to fire prevention and were necessary to comply with the environmental permit and insurance requirements, however the developer considered that within the context of the development as a whole, were arguably non-material.

45. In the developer's opinion, the starting point was the outline planning permission as it was maintained that by comparing the approved layout plan and as-built plan, the six structures had no significant environmental impacts

and did not invalidate the assessments previously considered by the Council. It was also confirmed that an updated environmental statement would shortly be submitted to the Welsh Government confirming that there were no significant environmental effects arising from the development that had not already been satisfactorily mitigated by the outline planning permission (2015/00031/OUT). It was also confirmed by the developer that all of the issues were capable of being addressed through NMA applications or a retrospective Section 73A application limited to individual structures. There was therefore, in the developer's opinion. no need for a section 73A application and it would not be expedient to take enforcement action in respect of the development as a whole, which would be vigorously defended and costs applied for if the Council decided to commence such action.

46. As identified above on 12th May 2021, the developer submitted a retrospective Section 73A application for the erection and use of a cylindrical fire water tank (2021/00695/FUL). Following the receipt of the recent interim decision from the Minister, the Council has written to the developer to ask whether it is their intention to submit an Environmental Statement. At the time of writing this report, no response had however been received to this question and no further NMA or Section 73A application had been received in relation to any of the remaining structures.

47. At the beginning of August, the Council was made aware of a 'letter to residents' dated 28th July 2021, that had been recently posted on the Barry Biomass website. The letter referred to the voluntary retrospective Environmental Impact Assessment (EIA) that was submitted to the Welsh Government by Biomass UK No. 2 Ltd and that the Welsh Government were intending to carry out a public consultation on the EIA later in the year. It was also confirmed however that 'after a period of voluntary downtime, Biomass UK No. 2 now intends to resume performance testing in August 2021'. The developer was therefore requested on 6th August 2021 to confirm what the proposed performance testing consisted of and whether the details of the testing was included within the EIA submitted to the Welsh Government. It was also confirmed that it was not considered that the development as constructed had the benefit of planning permission and had not been regularised and therefore, if further performance testing resumed, the Council would need to consider whether it would be expedient to issue a Temporary Stop Notice, which would require the performance testing to immediately cease.

48. On 9th August 2021, the Council received confirmation from NRW that Biomass No. 2 Ltd had notified them if their intention to start up their operations and it was confirmed that with their environmental permit in place, the developer would be allowed to commence operations covered by the permit.

49. The developer was therefore contacted on 9th August 2021 regarding the notification that had been received from NRW and advised that the existence of a permit from NRW did not authorise the starting up of the facility, which

was considered by the Council to remain unauthorised and therefore, any further activity at the site remained at risk of enforcement action.

50. On 9th August 2021, the developer confirmed that the voluntary Environmental Statement considered by the Minister for Climate Change and referred to in her letter dated 29 July 2021, had assessed the as-built scheme. They understood that the Welsh Government intended to publish the voluntary Environmental Statement next month for public consultation and were checking to see whether a copy of the statement could be shared with the Council in advance. It was confirmed that in their letter of 17 February 2021, they had identified the differences between the as-built scheme and the approved drawings and the six differences had no significant environmental impacts, which had been confirmed by the Welsh Minister.

51. Their letter had also explained that the differences between the approved plans and the as-built scheme and did not materially impact on the development and suggested that the differences were capable of being addressed through non-material amendment applications, PD Rights or individual Section73A applications. It was confirmed by the developer however that given that the Council had been 'resistant to receiving NMA applications to regularise the differences (and has sought to obstruct the s.73A submitted to regularise the fire water tank)' no further applications had been submitted and they did not consider them to be necessary in view of the non-materiality of the differences they had identified. Furthermore, in the absence of any serious harm to amenity, public safety or the environment attributable either to the differences or the development as a whole (a view which the developer considered was supported by the Welsh Minister), they did not consider it expedient for the Council to take enforcement action to stop operations and to do so would cause them to incur significant costs.

52. In the Council's response on 12th August 2021, it was advised that confirmation had been received that performance testing had been taking place. It was confirmed however that as the development undertaken did not accord with the outline consent and the discrepancies identified had failed to be regularised, the current facility was considered to constitute unauthorised development. In previous correspondence, the developer had confirmed that all of the 'differences between the Approved Layout Plan and the as-built scheme' were capable of being addressed through either non-material amendment applications or retrospective S73A applications. However with the exception of the recently submitted S73A application for the fire water tank (2021/00695/FUL), none of the remaining items /structures had been regularised and the as-built scheme therefore remained at variance with that approved under the outline application 2015/00031/OUT. The developer was also asked to confirm how, in the absence of any planning consent which regularised the remaining unauthorised structures, the means by which the development as constructed, had become regularised.

53. It was also confirmed that the Council had received a copy of the letter dated 29 July 2021 from the Minister for Climate Change to the Docks Incinerator Action Group (DIAG) and whilst the Minister's conclusions were

acknowledged, the voluntary Environmental Statement had not been submitted to the Council and it had not therefore been confirmed whether this covered the approved or as-built scheme. The Council identified that it had been corresponding for some time regarding the need to regularise the unauthorised structures and whilst there had been some disagreement over the way in which these could be regularised, the need for regularisation had not been disputed.

54. Finally, it was confirmed that until such time as the as-built development has been fully regularised, it was the Council's view as the enforcing authority, that it may be expedient to stop the development from becoming fully operational in order to protect its position in relation to any further enforcement action that may be required in the future.

55. In their response sent on 13th August 2021, the developer confirmed their understanding that the Welsh Government intended to publish the voluntary Environmental Statement in the next month for public consultation and were checking whether a copy could be shared in advance. They advised that within the context of the outline planning permission, the six differences under scrutiny had no significant environmental impacts which had been confirmed in the recent conclusions of the Welsh Minister. Whilst they had suggested that the differences were capable of being addressed through non-material amendment applications, or individual section 73A applications, the Council had recommended a comprehensive s.73A application for the entire development. It was advised that as the Council had been 'resistant to receiving NMA applications to regularise the differences', no further applications had been submitted and they did not consider them to be necessary in view of the non-materiality of the differences concerned. In the absence of any serious harm to public safety or the environment attributable either to the differences or the development as a whole (a view which was supported by the Welsh Minister), they did not consider that it would be expedient for the Council to take enforcement action to stop operations and would cause them significant costs.

56. The developer confirmed that if the Council's position had changed and it would be willing to receive NMA applications then they would be willing to discuss this further, however there seemed little point in ProjectCo submitting applications if they were 'only going to obstructed by the Council'. It was maintained that the plant did benefit from a lawfully implemented planning permission authorising operations and that four out of six of the differences under scrutiny were non-essential to operations but increased efficiency and the remaining two related to fire safety and increased public safety.

57. A response was sent by the Council on 16th August 2021 confirming the fact that the Welsh Government had reached the conclusions it had in relation to the voluntary ES, did not mean that the differences did not need to be regularised through a further planning application. It had previously been confirmed that the differences between the approved and as-built schemes were more than 'de minimis' and whilst these are capable of being addressed through Section 73A, none had been regularised. It was also confirmed that

the need to regularise the development undertaken was not dependent on the non-materiality (or otherwise) of the identified differences. It was also confirmed that the main concern of the Council was that no application had been made for the development with the differences identified by both parties and as such, there remained a very real risk that the development, as a whole, was not formally authorised by the 2015 permission. Irrespective of the conclusions reached in relation to the voluntary Environmental Statement submitted to the Welsh Government, it was advised that the situation must be resolved either by the submission of formal applications or by enforcement action, which would hopefully end in the submission of the correct applications.

58. As identified above, the Council has been in correspondence with the developer throughout the construction period and has explained the need to regularise the full extent of the changes that were confirmed last year. Whilst the developer has previously indicated that they would be prepared to regularise the development, only one planning application seeking to regularise the fire water tank has since been received and there remains a number of other structures within the site that need to be regularised. In light of the developer's most recent correspondence which indicates that there is no intention to submit any further applications, it has been concluded that the existing development will remain unauthorised. The Council considers that this position is unacceptable because in the event that the existing unauthorised development becomes lawful over time, the Council would then be unable to enforce any of the planning conditions attached to the outline planning consent 2015/00031/OUT, which were designed to ensure that the plant was able to be monitored and controlled in the future. Without the ability to do this, it is considered that the development is unacceptable and there is therefore no alternative open to the Council but to take enforcement action to secure the cessation of the performance testing and removal of the plant.

59. In reaching this conclusion, the Council has taken account of the fact that the developer would occur costs in suspending operations and removing the plant which would be a requirement of any enforcement notice issued, however the developer has been aware that the development was at risk of enforcement action since the beginning of the year and has not resolved the position. It has been noted that the interim decision recently published by the Welsh Government considered that the plant was not likely to have significant effects on the environment while the EIA process was carried out. On that basis, it was concluded that it would not be expedient to issue a discontinuance order, as the benefits of suspending operations while undertaking EIA did not outweigh the costs. It is however considered that the interim decision of the Welsh Government is based on entirely different short-term circumstances, rather than the consequences of the Council not having any control over the future operation of the development, which could have a significant long-term effect on the environment and public health, the mitigation for which would outweigh any costs involved.

Planning History

60. The site benefits from the following planning history:

2021/00695/FUL : Barry Biomass Facility, David Davies Road, Barry - A retrospective (S73A) planning permission for the erection and use of a cylindrical fire water tank at its biomass fired renewable energy generation facility at the Barry Docks - Undetermined

2017/01080/FUL : Barry Port Biomass Plant, David Davies Road, Barry - Variation to condition 5 of planning permission 2015/00031/OUT to include fire tank and building as well as relocation of parking - Withdrawn

2017/00262/FUL : Barry port Biomass Plant, David Davies Road, Barry - Erection of the following site services, plant and machinery: (1) Reception Building Conveyor Cover; (2) Reception Building Power Packs; (3) Reception Building Conveyer Cover; (4) Reception Building Conveyer Screening Tower Structure; (5) Fire System Control Kiosks x 6; (6) Fire Water Tank; (7) Fire Water Pump House; (8) ACC Ancillary Equipment Structure; (9) Emergency Generator; (10) Diesel Tank and (11) Process Building Plant Room With Ancillary Air Blast Coolers – Withdrawn

2016/00187/RES : Biomass Ul No.2 Limited, David Davies Road, Barry - Approval of the landscaping of the development condition 1 of the outline 2015/00031/OUT – Approved 29/04/2016

2015/00031/5/CD : Barry Port Biomass Plant, David Davies Road, Barry - Conditions 5, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 25 & 29 of Planning Application 2015/00031/OUT - Discharged

2015/00031/4/CD : Barry Port Biomass Plant, David Davies Road, Barry - Outline application for a wood fired renewable energy plant. - Withdrawn

2015/00031/3/CD : Barry Port Biomass Plant, David Davies Road, Barry - Discharge of Conditions 11, 12, 20 and 29. - Withdrawn

2015/00031/2/CD : Barry Port Biomass Plant, David Davies Road, Barry - Discharge of Condition 13-Susutainable Drainage - Withdrawn

2015/00655/FUL : Land off Woodham Road, Barry - Erection of a new industrial building and the installation of a 9mw wood fuelled renewable energy plant - Undetermined

2015/00031/OUT : David Davies Road, Woodham Road, Barry - Outline application for a wood fired renewable energy plant - Approved 31/07/2015

2014/01065/NMA : Land at Woodham Road, Barry - Modification to Sunrise Renewables planning permission 2008/01203/FUL - Withdrawn 30/10/2014

2010/00240/FUL : Land off Woodham Road, Barry - Erection of new industrial building and installation of 9MW wood fuelled renewable energy plant - Withdrawn 20/04/2010

2008/01203/FUL : Land at Woodham Road, Barry - Erection of new industrial building and installation of 9MW fuelled renewable energy plant - Refused 31/07/2009

2008/00828/SC1 : Land at Woodham Road, Barry Docks - Proposed industrial building and installation of 9MW Biomass Gasification Plant to generate electricity from reclaimed timber - Environmental Impact Assessment (Screening) - Not Required 14/08/2008

1987/00821/FUL : Woodham Way, Barry Docks - Construction of plant store - Approved 17/11/1987

1985/00574/FUL : Woodham Road, North Side, No. 2 Dock, Barry - The land will be enclosed by a security fence and used for the storage of car trailers, such as touring caravans, boats etc. – Approved 23 July 1985.

1984/00348/FUL : Woodham Road, No. 2 Dock, Barry Docks, Barry – Proposed fenced off compound for the purpose of storage and distribution of solid fuel -Approved 17 May 1984.

1984/00214/FUL : Woodham Road, No. 2 Dock, Barry - Erection of a security fence around the plot of land which will be used for the storage of caravans. Approved 1 May 1984.

Policy and Guidance

61. Welsh Government advice on the enforcement of the planning control is found in the Development Management Manual (Revision 2, May 2017). It states that, '*When considering enforcement action, the decisive issue for the LPA should be whether the unauthorised development would unacceptably affect public amenity or the existing use of land and buildings meriting protection in the public interest.'*

Local Development Plan:

62. The Development Plan for the area comprises the Vale of Glamorgan Adopted Local Development Plan 2011-2026, which was formally adopted by the Council on 28 June 2017, and within which the following policies are of relevance:

Strategic Policies:
POLICY SP1 – DELIVERING THE STRATEGY
POLICY SP8 – SUSTAINABLE WASTE MANAGEMENT
POLICY SP9 – MINERALS

Managing Development Policies:
POLICY MD1 - LOCATION OF NEW DEVELOPMENT
POLICY MD2 - DESIGN OF NEW DEVELOPMENT
POLICY MD7 - ENVIRONMENTAL PROTECTION
POLICY MD16 – PROTECTION OF EXISTING EMPLOYMENT SITES AND PREMISES
POLICY MD19 - LOW CARBON AND RENEWABLE ENERGY GENERATION
POLICY MD20 - ASSESSMENT OF WASTE MANAGEMENT PROPOSALS

63. In addition to the Adopted LDP the following policy, guidance and documentation supports the relevant LDP policies.

Future Wales: The National Plan 2040:

64. Future Wales – the National Plan 2040 is the national development plan and is of relevance to the determination of this planning application. Future Wales provides a strategic direction for all scales of planning and sets out policies and key issues to be considered in the planning decision making process.

Planning Policy Wales:

65. National planning policy in the form of Planning Policy Wales (Edition 11, 2021) (PPW) is of relevance to the matters considered in this report.

66. The primary objective of PPW is to ensure that the planning system contributes towards the delivery of sustainable development and improves the social, economic, environmental and cultural well-being of Wales.

67. The following chapters and sections are of particular relevance in the assessment of this planning application:

Chapter 3 - Strategic and Spatial Choices

- Good Design Making Better Places
- Promoting Healthier Places
- Sustainable Management of Natural Resources
- Placemaking in Rural Areas
- Accessibility
- Previously Developed Land
- The Best and Most Versatile Agricultural Land
- Development in the Countryside (including new housing)
- Supporting Infrastructure
- Managing Settlement Form –Green Wedges

Chapter 5 - Productive and Enterprising Places

- Economic Infrastructure (electronic communications, transportation Infrastructure, economic development, tourism and the Rural Economy)

- Energy (reduce energy demand and use of energy efficiency, renewable and low carbon energy, energy minerals)
- Making Best Use of Material Resources and Promoting the Circular Economy (design choices to prevent waste, sustainable Waste Management Facilities and Minerals)

Technical Advice Notes:

68. The Welsh Government has provided additional guidance in the form of Technical Advice Notes. The following are of relevance:

- Technical Advice Note 11 – Noise (1997)
- Technical Advice Note 18 – Transport (2007)
- Technical Advice Note 21 – Waste (2017)
- Technical Advice Note 23 – Economic Development (2014)

Supplementary Planning Guidance:

69. In addition to the adopted Local Development Plan, the Council has approved Supplementary Planning Guidance (SPG). The following SPG are of relevance:

- Renewable Energy (March 2019)
- Sustainable Development (2006)

Welsh National Marine Plan:

70. National marine planning policy in the form of the Welsh National Marine Plan (2019) (WNMP) is of relevance to the determination of this authorisation. The primary objective of WNMP is to ensure that the planning system contributes towards the delivery of sustainable development and contributes to the Wales well-being goals within the Marine Plan Area for Wales. The following chapters and sections are of particular relevance in the assessment of this authorisation:

- Living within environmental limits
    - Maintain and enhance the resilience of marine ecosystems and the benefits they provide in order to meet the needs of present and future generations.
- Promoting Good Governance
    - Support proportionate, consistent and integrated decision making through implementing forward-looking policies as part of a plan-led, precautionary, risk-based and adaptive approach to managing Welsh seas.
- Using Sound Science Responsibly
    - Develop a shared, accessible marine evidence base to support use of sound evidence and provide a mechanism for the unique

characteristics and opportunities of the Welsh Marine Area to be better understood.

Other relevant evidence or policy guidance:

- Welsh Government Circular 016/2014: The Use of Planning Conditions for Development Management
- Welsh Office Circular 11/99 – Environmental Impact Assessment
- Welsh Office Circular 24/97 - Enforcing Planning Control
- Welsh Government Development Management Manual – Section 14 Annex "Enforcement Tools"
- Section 58 (1) of the Marine and Coastal Access Act places a requirement on the Council to take decisions in accordance with the appropriate marine policy documents, unless relevant consideration indicates otherwise.

Well Being of Future Generations (Wales) Act 2015:

71. The Well-being of Future Generations Act (Wales) 2015 places a duty on the Council to take reasonable steps in exercising its functions to meet its sustainable development (or wellbeing) objectives. This report has been prepared in consideration of the Council's duty and the "sustainable development principle", as set out in the 2015 Act. In reaching the recommendation set out below, the Council has sought to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

<u>Reasons for Serving an Enforcement Notice</u>

72. Planning permission was granted for the redevelopment of the site to provide a wood fuelled renewable energy plant under outline planning permission 2015/00031/OUT. Despite a significant level of local opposition, the outline permission was approved as it was concluded that the proposal would represent a sustainable renewable energy proposal which would comply with national and local planning policies, whilst also satisfactorily protecting the interests of local residential and visual amenity and highway safety. In order to ensure that the development was acceptable, a number of planning conditions were imposed which were designed to control both the construction and the future operation of the facility. These included measures to control issues such as air quality, waste management, the control of dust within the site and locality, light spillage, noise mitigation, deliveries and open storage and without such controls, it was considered that the development would have been unacceptable. A reserved matters application was approved for the approval of the landscaping of the development (2016/00187/RES) and the pre-commencement conditions for the scheme have been discharged.

73. Whilst the Council has investigated a number of complaints that have been received regarding the site since 2016, which initially related to construction issues including noise, dust, hours of construction and air quality, the investigation of more recent complaints has identified a number of

discrepancies between the consented scheme and that which had been built including 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. Despite protracted correspondence with the developer and their initial acceptance of the differences with the scheme that had been approved, the existing development has failed to be regularised, which could affect the Council's ability to take enforcement action in the future if the unauthorised development were to become lawful.

74. It is considered the retention and operation of the plant without the ability to take enforcement action in the future could have a significant and irreversible adverse impact on the local environment and affect residential amenity and highway safety. The unauthorised development is therefore considered to conflict with strategic policies SP1 (Delivering the Strategy) and SP8 (Sustainable Waste Management), and the wider principles of managing new development set out in policies MD1 (Location of New Development), MD2 (Design of New Development), MD7 (Environmental Protection), MD16 (Protection of Existing Employment Sites and Premises), MD19 (Low Carbon and Renewable Energy Generation) and MD20 (Assessment of Waste Management Proposals). These breaches are also considered to conflict with the principles of sustainable development set out in PPW Edition 11 (2021), , Technical Advice Note 11 (Noise), Technical Advice Note 18 (Transport) and Technical Advice Note 21 (Waste) and Technical Advice Note 23 (Economic Development).

75. The appropriate marine policy documents have been taken into account in the consideration of this authorisation in accordance with Section 59 of the Marine and Coastal Access Act 2009 however at the present time, there is no specific evidence to demonstrate how the development being undertaken on this site would constitute sustainable development or how it would be contrary to the well-being goals within the WNMP.

76. Finally, under the 2015 Act the Council not only have a duty to carry out sustainable development but must also take reasonable steps in exercising its functions to meet its sustainable development (or wellbeing) objectives. This report has been prepared in consideration of the Council's duty and the "sustainable development principle", as set out in the 2015 Act, in recommending the service of an Enforcement Notice, the Council has sought to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

<u>Conclusions</u>

77. Whilst planning permission has been granted under outline permission 2015/00031/OUT and reserved matter application 2016/00187/RES for the renewable energy plant it is clear from the investigations undertaken that not only are there discrepancies between the approved layout and elevation plans but also that additional structures, plant and equipment have been provided and the site to the north is also being used in association with the plant.

Despite protracted correspondence with the developer, all of the unauthorised development which has been constructed on site has failed to be regularised. This position is unacceptable because in the event that the existing unauthorised development becomes lawful over time, the Council would then be unable to enforce any of the planning conditions attached to the outline planning consent 2015/00031/OUT, which were designed to ensure that the plant was able to be monitored and controlled in the future. Without the ability to do this, it is considered that the development is unacceptable and contrary to policies SP1, (Delivering the Strategy),SP8 (Sustainable Waste Management), MD1 (Location of New Development), MD2 (Design of New Development), MD7 (Environmental Protection), MD16 (Protection of Existing Employment Sites and Premises), MD19 (Low Carbon and Renewable Energy Generation) and MD20 (Assessment of Waste Management Proposals) of the Local Development Plan, PPW Edition 11 (2021) and Technical Advice Notes 11 (Noise), 18 (Transport), 21 (Waste) and 23 (Economic Development). In view of the developer's decision not to regularise the as-built scheme, it is considered that there is no alternative but for the Council but to take enforcement action.

78. In view of the issues identified in the paragraphs above, it is considered expedient to pursue action to secure the cessation of the operation of the plant including performance testing and the removal of the buildings, plant and equipment, including the land to the north.

79. It is considered that the decision would comply with the Council's well-being objectives and the sustainable development principle in accordance with the requirements of the Well-being of Future Generations (Wales) Act 2015.

Resource Implications (Financial and Employment)

80. Any costs involved in drafting and issuing Notices, attending enquiries and undertaking monitoring work can be met within the departmental budget. There are no employment issues.

Legal Implications (to include Human Rights Implications)

81. If an Enforcement Notice is served, the recipient has a right of appeal under Section 174 of the Town and Country Planning Act 1990 (as amended).

82. The Action is founded in law and would not be considered to breach any of the rights referred to in the Human Rights Act.

Equal Opportunities Implications (to include Welsh Language Issues)

83. None.

RECOMMENDATION

(1) That the Head of Legal Services be authorised to issue an Enforcement Notice under Section 172 of the Town and Country Planning Act 1990 (as amended) to require:

(i) Permanently cease the operation of the renewable energy plant, including the carrying out of any performance testing.

(ii) Permanently remove the renewable energy plant including all buildings, plant and associated equipment from the land.

(iii) Permanently cease the use of the land located to the north for the storage of containers and the parking and manoeuvring of vehicles in association with the renewable energy plant.

(iv) Permanently remove the containers and vehicles from the land resulting from the cessation of the use identified in step iii above.

(v) Following the taking of steps (ii) and (iv) above, restore the land to its former condition prior to the commencement of development.

(2) In the event of non-compliance with the Notice, authorisation is also sought to take such legal proceedings as may be required.

Reason for Recommendation

(1) It appears to the Council that the above breach of planning control constituting operational development (construction of the renewable energy plant) has occurred within the last 4 years and the breach of planning constituting the material change of use of the land (extension of land to the north), has occurred within the last 10 years.

(2) The site is located within the wider coastal area of Barry Docks, to the north-east of existing industrial units on Woodham Road and was previously occupied by a container storage and refurbishment operation. Planning permission was granted for the redevelopment of the site to provide a wood fuelled renewable energy plant under outline planning permission 2015/00031/OUT. Despite a significant level of local opposition, the outline permission was approved as it was concluded that the proposal would represent a sustainable renewable energy proposal which would comply with national and local planning policies, whilst also satisfactorily protecting the interests of local residential and visual amenity and highway safety. In order to ensure that the development was acceptable, a number of planning conditions were imposed which were designed to control both the construction and the future operation of the facility. These included measures to control issues such as air quality, waste management, the control of dust within the site and locality, light spillage, noise mitigation, deliveries and open storage and without such controls, it was considered that the development would have

been unacceptable. A reserved matters application was approved for the approval of the landscaping of the development (2016/00187/RES) and the pre-commencement conditions for the scheme have been discharged.

(3) Whilst the Council has investigated a number of complaints that have been received regarding the site since 2016, which initially related to construction issues including noise, dust, hours of construction and air quality, the investigation of more recent complaints has identified a number of discrepancies between the consented scheme and that which had been built including 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. Despite protracted correspondence with the developer and their initial acceptance of the differences with the scheme that had been approved, the existing development has failed to be regularised, which could affect the Council's ability to take enforcement action in the future if the unauthorised development were to become lawful.

(4) It is considered the retention and operation of the plant without the ability to take enforcement action in the future could have a significant and irreversible adverse impact on the local environment and affect residential amenity and highway safety. The unauthorised development is therefore considered to considered to conflict with strategic policies SP1 (Delivering the Strategy) and SP8 (Sustainable Waste Management), and the wider principles of managing new development set out in policies MD1 (Location of New Development), MD2 (Design of New Development), MD7 (Environmental Protection), MD16 (Protection of Existing Employment Sites and Premises), MD19 (Low Carbon and Renewable Energy Generation) and MD20 (Assessment of Waste Management Proposals). These breaches are also considered to conflict with the principles of sustainable development set out in PPW Edition 11 (2021), , Technical Advice Note 11 (Noise), Technical Advice Note 18 (Transport) and Technical Advice Note 21 (Waste) and Technical Advice Note 23 (Economic Development).

(5) It is considered that the decision complies with the Council's well-being objectives and the sustainable development principle in accordance with the requirements of the Well Being of Future Generations (Wales) Act 2015.

Background Papers

Enforcement File Ref: ENF/2020/0230/M

Contact Officer - Sarah Feist, Tel: 01446 704690

Officers Consulted:

All relevant Chief Officers have been consulted on the contents of this report.

MARCUS GOLDSWORTHY
HEAD OF REGENERATION AND PLANNING

APPENDIX A

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

Llywodraeth Cymru
Welsh Government

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

[redacted]
Docks Incinerator Action Group

[redacted]

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.

Canolfan Cyswllt Cyntaf / First Point of Contact Centre:
0300 0604400
Gohebiaeth.Julie.James@llyw.cymru
Correspondence.Julie.James@gov.Wales

Bae Caerdydd • Cardiff Bay
Caerdydd • Cardiff
CF99 1SN

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-NOx 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

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