

ADDENDUM FOR THE MEETING OF DEVELOPMENT AND REGULATION

COMMITTEE 25 FEBRUARY 2022

Item 4.1 (DR/06/22) Rivenhall IWMF, Coggeshall Road (A120), Braintree

Page 66 REPRESENTATIONS

Add- A further letter has been received from Priti Patel MP (attached at APPENDIX H)

In summary the further concerns raised are

- waste incineration is viewed as being a less favourable approach and through the Government's Resources and Waste Strategy as there is an increased focus on waste reduction, re-use and recycling.
- The proposed plan of action from Indaver to address condition 66 is unacceptable as all three options they have put forward fail to provide certainty and the application should be refused.
- No scheme of rehabilitation was submitted and therefore should be refused.
- That there is continued uncertainty that the permitted facility would be delivered as the applicant has stated that they do not think that they can deliver the integrated waste management facilities in full.
- There would be continued uncertainty and impact on the local community and Option 1 should therefore be refused.
- Refusing the application would enable the Council to take enforcement action to stop the development.
- There are strong material grounds to refuse the application including on environmental and climate change grounds.
- Approving Option 1 conflicts with planning and environmental policy.
- If granted, conditions should be tightened to ensure the facility is constructed as permitted. All the component parts of the IWMF should be constructed and ready for beneficial operation at the same time rather, than as suggested with the proposed condition.
- A scheme for rehabilitation should be sought by condition as well as a deadline imposed for completion of the IWMF.

Page 78 Section 7 APPRAISAL

Replace the list of key issues for consideration with the following

A. NATURE OF THE APPLICATION

B. INTERPRETATION OF CONDITION 66 AND WHAT IS REQUIRED

C. WHETHER THERE IS CURRENTLY A BREACH OF PLANNING CONTROL

D. APPRAISAL OF THE INFORMATION SUBMITTED TO DISCHARGE THE
CONDITION

E. APPRAISAL OF OPTION 1

F. APPRAISAL OF OPTION 2

G. APPRAISAL OF OPTION 3

GG. APPRAISAL OF THE PLAN OF ACTION, AS A WHOLE (STAGED
APPROACH)

H. IMPLICATIONS IF NONE OF THE OPTIONS WERE APPROVED TO
DISCHARGE CONDITION 66

I. ENVIRONMENTAL PERMIT

J. LEGAL ADVICE

JJ. LAWFULNESS OF APPROACH

K. CONCLUSION

Page 96 New section before section H

**GG. APPRAISAL OF THE PLAN OF ACTION, AS A WHOLE (STAGED
APPROACH)**

Since publication of the report the applicant's solicitors Herbert Smith Freehills have submitted a letter dated 22 February 2022. The letter is attached to the Addendum and forms Appendix G to Agenda Item 4.1.

The applicant's solicitor considers that the Plan of Action should have been considered as a whole.

If this position was accepted by the WPA, it is likely that a recommendation to refuse the whole plan of action would have been reached, especially as the WPA could not fully appraise Option 2 without a further planning application being lodged (for example a standalone EFW facility) and necessary Environmental Impact Assessment (EIA). As such it would not be anticipated (and has not been offered) that this submission (to discharge Condition 66) should have come forward with such information that would be needed to support a planning application.

In any case, if that was the position, it would be unlikely that the (whole) Plan of Action could be determined until such a fresh permission for an alternative (viable) waste management proposal was in place, which, without prejudice, would not be certain given the highlighted concerns regarding sustainable development and current and future policy approaches to such.

Therefore, and taking into account the requirement to determine the submission swiftly, the only course of action would be for the WPA to recommend refusal of the whole Plan of Action. It is not considered that the applicant could supply any further information at this stage that could make Option 2 acceptable, except by way of a new planning application (and EIA) and subsequent decision on such, as stated.

The WPA remains of the view that it is not possible under Condition 66 to give express planning permission for something that is not that already permitted by the extant permission; it could only approve a plan of action as to how an alternative use might be brought forward. If Option 2 had included, for instance, that the applicant was to submit a planning application for only parts of the permitted IWMF, with an estimated timescale for the same and the following sequential steps, then, potentially, the Plan of Action as a whole could have been approved,. But that is not the case and, as the letter from the applicant's solicitor points out, it would not be for the WPA to seek to propose "*approval of a plan of action which is substantially different from that for which approval was sought*" by effectively re-writing what was submitted.

If the Plan of Action was considered as a whole and refused, the applicant would be in breach of Condition 66. The only way they could resolve that is by a successful appeal against the refusal. If the Options are considered separately, as currently appraised in the report, the applicant could appeal the refusal of Option 2 or appeal the conditions imposed on Option 1 or appeal refusal of Option 3 or a combination of such.

Whichever way the application details pursuant to the Condition 66 submission are interpreted, the underlying difference of opinion is whether a different waste management development may be built and operated at this site without all the approved elements of the IWMF being constructed and operated in an integrated manner.

If the applicant remains of the view that, for example, the EFW facility may be developed without other elements of the IWMF being constructed and operated, this may, at some stage, need to be tested at appeal or by way of other challenge and it is at the applicant's discretion whether or not to do that in the absence of any future planning permission (either by DCO or issued by the WPA) being in place.

JJ. LAWFULNESS OF APPROACH

As explained previously, since publication of the report the applicant's solicitors Herbert Smith Freehills have submitted a letter dated 22 February 2022. The letter is attached to the Addendum circulated at the meeting and forms Appendix G to Agenda Item 4.1.

The letter indicates that it would be "*not be appropriate and unlawful*" for the Council to determine the application as the current report contains "*fundamental flaws*".

Applicant's solicitor's letter sub heading "Misunderstanding of submitted Plan of Action"

The applicant considers that the scope of the decision making is defined by the application that is made and that the WPA can only approve, approve subject to lawful conditions or refuse the whole "plan of action" (inclusive of all the 3 options).

They then go on to state that that the Plan of Action described a staged approach, to be followed in sequence, thus is an integral whole, it "*does not present Options from which the Council may select at its discretion.*"

Thus the applicant does not accept that the WPA may approve only one or more of the options. The applicant considers that, as this misunderstanding underpins the entire approach of the Report, the recommendation is for "*approval of a plan of action which is substantially different from that for which approval was sought*".

They say that "*the necessity for this staged approach is explained within the Application*".

The 'Application' is the submission letter dated 1 September 2021 (at Appendix D page 296-298 of this report) which explained the current position of the applicant's development, some of the detail of future commissioning timelines, the fact that a scheme of rehabilitation was not considered sensible and that (under Plan of Action, page 297) "*proposes the following staged plan of action which we believe reflects the circumstances and decisions we currently face. They are presented in a manner which aims to provide the planning authority with transparency in relation to our intentions for the site. In sequence the plan is:*" and then proceeds to set out what it identifies as 1,2 and 3 with indications that they are "*options*" and a "*stage*", some of which are in combination, with 'option' being the primary reference to each of those 3 scenarios thereafter.

While it is accepted that reference is made to a staged approach within the applicant's original submission letter at Appendix D it is not the case that it is actually a staged approach, especially as the applicant states that sequentially, whilst "*option*" 1 would come first, it may be that "*options*" 2 "*or/and*" 3 would follow (and either stand independently or follow in sequence). Whilst the approach may have

been signalled as a “*staged*” approach it is clear that sequentially there are several option scenarios that the applicant claims they might pursue.

Option 1 is to implement the whole development as implemented.

It is stated in the application letter that if elements of Option 1 are unviable for “*technical or commercial reasons*” the applicant is “*likely to wish to resort to options under stage 2 or 3 of the plan of action*” (top of page 198), clearly indicating that Option 2 doesn’t need to have been pursued before Option 3 could be commenced. It is known that the applicant has already approached the Planning Inspectorate with respect to the potential submission of a DCO which forms part of the proposed plan of action under Option 3. This supports the WPA’s impression that Option 2 does not have to have occurred for Option 3 to be progressed.

The applicant also considers that the WPA’s unlawful approach is unfair as Condition 66 “*requires the approved plan [of action] to be implemented by the operator within 6 months*”.

If Option 1 were to be approved by the WPA, under Option 1 the applicant submitted a timetable as part of the submission for Condition 66 that showed that the development would likely be completed by early 2026 (page 296 of this report). Accordingly, it is not considered that the approval of Option 1 alone requires any ‘alternative use’ to be completed within 6 months of approval, only that the applicant implement the plan of action contained in Option 1. As Option 1 is technically ratifying the implementation of the development permitted under planning permission ESS/34/15/BTE it is not considered that it would be “*fundamentally and patently unfair*” to approve a plan of action (for Option 1) that is consistent with the extant planning permission.

Applicant’s solicitor’s letter sub heading “Refusal of Option 2”

The applicant considers the WPA’s position that Option 2 should be refused because it would only allow the partial implementation of the planning permission, which is in breach of the planning permission, is wrong.

The applicant considers that the Inspector’s report expressly rejected this through his refusal of the proposed condition that “*no element of the development may be implemented in isolation of others*” (see condition 23 at page 239 of the report).

The Inspector did state, as referred to by the applicant, he wished to allow “*flexibility to accommodate future changes in waste arisings and in waste management techniques and practices*” (see paragraph 13.61 at page 200). However, it is considered that this quote needs to be taken in context. The Inspector, whilst acknowledging there needed to be some flexibility in the changes in waste arising and waste management techniques and practices, did not envisage that potentially there would only be an incinerator element coming forward as part of the IWMP.

The IWMF that was granted planning permission permits the heat and steam to be used to process waste paper, not to be used simply to generate more energy, which is a less efficient use of the heat and steam and as explained in the Report. This is not in accordance with the more recent position of central government trying to drive the more sustainable use of energy from waste facilities which is now coming forward, as explained on pages 91 and 92 of the report.

Also, without the other elements of the IWMF, it is considered (for reasons explained in the report) that the facility would not deliver sustainable development as permitted (as required by the Development Plan and national policy) as, for one, it would not push waste management higher up the waste hierarchy. For example, without the materials recycling facility there would be no opportunity to recover any recyclates from waste imported to the IWMF.

The applicant considers that the WPA's recommendation to refuse Option 2 is "*unlawful*" and "*manifestly unreasonable*", because the applicant considers that the WPA is wrong in its interpretation of the extant planning permission that it requires development of the facility as a whole and also consider that it would still be "*manifestly unreasonable*", even if the WPA's interpretation was correct.

Ultimately there is a difference of opinion on this point. Should members be minded to follow the officer recommendation, the applicant is entitled to appeal the refusal of Option 2 (as a part of the parts of the submitted plan of action that the WPA does not consider can be approved) and therefore it is not considered unlawful or unreasonable to refuse Option 2 as there is a method of remedy open to the applicant should the WPA's interpretation of the planning permission be found to be incorrect. The interpretation of the extant planning permission would need to be considered as part of the appeal. The applicant has indeed suggested in paragraph 1.6 of the letter at Appendix G (with this Addendum) that an appeal may be lodged in this respect.

The applicant suggests that the WPA is not complying with the NPPF in that it is not taking a positive and creative approach to the proposed development under Option 2. As explained in the report on page 94, the operation of potentially the EFW facility in isolation would give rise to different impacts, which could only be appropriately considered through a new planning application, supported by an updated EIA. As explained on page 95 of the report it is not the view of the WPA that a submission under Condition 66 could grant a standalone permission for alternative development that needs express planning permission in its own right.

Applicant's solicitor's letter heading "Refusal of Option 3"

The applicant once again contends that it is not possible for the WPA to refuse Option 3 as the applicant considered the Plan of Action to include all 3 options. It is also said that, if the WPA wanted to understand better the timescale for such applications proposed under Option 3, it could have sought this additional

information; it could have formed part of the “plan of action” following discussions or imposed a condition requiring submission of such information.

As stated previously the WPA is not of the view that the “plan of action” requires to be considered as a whole; each option has the ability to be progressed regardless of whether another option is or is not progressed. Option 3 is stated to be an “*and/or*” to Option 2 and Options 2 and 3 are both stated to be a “*resort*” to the applicant being “*unable to bring forward all parts of the consented development*”. Option 3, as acknowledged by the applicant (at paragraph 1.5.3 (A) of the letter at Appendix G (with the Addendum)), requires the submission of further application(s) to either the WPA or the Planning Inspectorate. The applicant is free to submit such applications at any stage regardless of any timescales that might have been submitted in the Application letter containing the plan of action and which related to Option 3.

The applicant states because they consider any decision would be unlawful and unreasonable that they would appeal any decision and to avoid such an appeal request that the item be deferred such that the

- a) misunderstandings of the application can be addressed,
- b) allow submission of any further information required, and
- c) enable Indaver to respond in full to the legal analysis set out in the report.

This is dealt with below.

Consideration of the Plan Of Action if taken as a staged approach i.e. as a whole

The applicant considers that the Plan of Action should have been considered as a whole.

If this position was accepted by the WPA, it is likely that a recommendation to refuse the whole plan of action would have been reached, especially as the WPA could not fully appraise Option 2 without a further planning application being lodged (for example a standalone EFW facility) and necessary EIA. As such it would not be anticipated (and has not been offered) that this submission (to discharge Condition 66) should have come forward with such information that would be needed to support a planning application.

In any case, if that was the position, it would be unlikely that the (whole) Plan of Action could be determined until such a fresh permission for an (viable) waste management proposal was in place, which, without prejudice, would not be certain given the highlighted concerns regarding sustainable development and current and future policy approaches to such. For example if a standalone EFW facility was applied for it is considered that, without the utilisation of the heat and steam offtake, this would not be in line with National waste policy, which seeks to move EFW facilities away from just power mode to heat and power mode.

Therefore, and taking into account the requirement to determine the submission swiftly, the only course of action would be for the WPA to recommend refusal of the whole plan of action. It is not considered that the applicant could supply any further information at this stage that could make Option 2 acceptable, except by way of a new planning application (and EIA) and subsequent decision on such, as stated.

The WPA remains of the view that it is not possible under Condition 66 to give express planning permission for something that is not that already permitted by the extant permission; only approve a plan of action as to how an alternative use might be brought forward. If Option 2 had included, for instance, that the applicant was to submit a planning application to bring forward only part of the IWMF e.g. a standalone EFW facility, with an estimated timescale for the same and the following sequential steps, then, potentially, the Plan of Action as a whole could have been approved. But that is not the case [and, as the letter from the applicant's solicitor points out, it would not be for the WPA to seek to propose "*approval of a plan of action which is substantially different from that for which approval was sought*" by effectively re-writing what was submitted.

If the Plan of Action was considered as a whole and refused, the applicant would be in breach of Condition 66. The only way they could resolve that is by a successful appeal against the refusal. If the Options are considered separately, as currently appraised in the report, the applicant could appeal the refusal of Option 2 or appeal the conditions imposed on Option 1 or appeal refusal of Option 3 or a combination of such.

Whichever way the application details pursuant to the Condition 66 submission are interpreted; the underlying difference of opinion is whether a different waste management development may be built and operated at this site without all the approved elements of the IWMF being constructed and operated in an integrated manner.

If the applicant remains of the view that, for example, the EFW facility may be developed without other elements of the IWMF being constructed and operated, this may, at some stage, need to be tested at appeal or by way of other challenge and it is at the applicant's discretion whether or not to do this in the absence of any future planning permission (either by DCO or issued by the WPA) being in place.

Deferral of consideration of the application

It is the view of the WPA that a deferral of consideration of the submission would not necessarily be beneficial nor prevent a future appeal. The WPA fundamentally has a different interpretation of the extant planning permission to that of the applicant/developer. The submission under Condition 66 has required the WPA to take advice on the matter and this advice has supported the WPA's position that the extant planning permission permits development of all elements of the IWMF – in

integration - to effectively deliver sustainable waste management development as originally considered and granted permission.

If it is established by the applicant/developer that it is technically or commercially unviable to bring forward all elements of the IWMF, then the applicant/developer should, at an appropriate time, come forward with any relevant application(s), supported by any necessary supporting information, including EIA, for what is proposed to be developed. Such an application(s) could then be properly considered against the prevailing planning policy and any other material considerations.

Conclusion on the issues raised by the applicant's solicitors' letter dated 22 February 2022 (Appendix G)

It is the view of officers that there is no fundamental reason why the submission cannot be determined, as presented to members of the committee, and the recommendation on page 98 of the report remains unaltered. Should members determine the application in accordance with the officer recommendation, as stated, the applicant would have the right of appeal.

Page 97 Section K CONCLUSION

Add after last paragraph

If the Plan of Action had been taken as a staged approach i.e. as a whole, it is likely that a recommendation to refuse the whole plan of action would have been reached for the reasons explained in Section GG. If the Plan of Action was considered as a whole and refused, the applicant would be in breach of Condition 66. It is considered that by appraising the three options separately the WPA is able to approve Option 1, the continuation of the development of the IWMF, with additional condition to ensure all elements are delivered and not leave the applicant in breach of condition 66.

Page 99 LIST OF APPENDICIES

Add

Appendix G Applicant's solicitors Herbert Smith Freehills letter dated 22 February 2022

Appendix H Priti Patel letter dated 24 February 2022 received by email at 16:54

Item 4.3 (DR/08/22) Lufkins Farm, Great Bentley Road, Frating

RECOMMENDED

Add 'c) that it is not considered expedient to take enforcement action at this time or during the period until the legal agreement is completed and the planning permission issued. If the legal agreement is not completed, then the situation with respect to enforcement action will be reviewed at that time.'

Item 5.1 (DR/09/22) Fairview, Fairview Road, Basildon, Essex, SS14 1PW

RECOMMENDED

Condition 22 replace 'prior to commencement of development' with 'post demolition and prior to commencement of construction of the development hereby permitted'

Condition 23 replace 'prior to commencement of development' with 'post demolition and prior to commencement of construction of the development hereby permitted'

Page 415

APPRAISAL – NEED

4th paragraph – Delete 'Up to 70' and replace with 'Up to 60'

Page 421

2nd paragraph – Delete 'up to 70' and replace with 'up to 60'