MID WALES (POWYS) CONJOINED PUBLIC INQUIRY

RESPONSE TO ALLIANCE SUBMISSIONS WITH RESPECT TO EIA ON BEHALF OF RES UK & IRELAND LTD

1. The Alliance ask the Inspector to decide at this stage that the applications for the *"4 free-standing windfarms"* (which includes Llanbrynmair) are not accompanied by sufficient information to enable the Secretary of State to comply with his obligations under the EIA Directive and/or EIA Regulations.
2. The Alliance's application is founded on the contention that the windfarm applications and any grid connections to connect to the existing Grid form a single project or are part of a group of projects (paragraphs 2 and 9).
3. The Alliance further contend as there are no formulated proposals for the grid connections the project(s) cannot be described let alone assessed (paragraph 10). Alternatively the Alliance contend that the grid connection is an effect of the project which must be assessed (paragraph 11).
4. The Alliance refer to paragraphs 4.9.2 and 4.9.3 of EN1 (paragraph 13).

Preliminary Observations

5. It can be noted at the outset that the Alliance provide no legal authority for their propositions nor do they provide any analysis of either the EIA Directive or the Electricity Works EIA Regulations ("the EIA Regs") to support their propositions.
6. Similar submissions were made by the local planning authority at the conjoined inquiries into proposals at Steadings, Ray Estate and Green Rigg Fell in Northumberland. The submissions were rejected by the Inspector, and both the Secretaries of State for Communities and Local Government and Energy and Climate Change. The decisions at that inquiry were not challenged and accord with the law and the guidance provided.

7. The Alliance does not contend that there has been a failure to transpose the EIA Directive correctly in respect to the relevant matters. In those circumstances it is not necessary to refer to the EIA Directive, the matter is properly addressed by consideration of the EIA Regs[1]. Nevertheless these submissions also address the EIA Directive[2].

Scope of the project

8. Article 2(1) of the EIA Directive provides that –

> *"Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4."*

9. It can be noted that the requirement for environmental assessment applies to *projects* before *development consent* is given for the project.

10. The term *project* is defined as *"the execution of construction works or of other installations or schemes, - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources"*[3].

11. The term *developer* is defined as *"the applicant for authorisation for a private project or the public authority which initiates a project"*[4]. Whilst the term *development consent* is defined as *"the decision of the competent authority or authorities which entitles the developer to proceed with the project"*[5].

12. It is plain that the requirement for environmental assessment in article 2(1) relates to the actual project for which development consent is sought. In the

[1] See for example *R v Hammersmith and Fulham LBC ex p CPRE London Branch (Leave to Appeal) (No 2) [2000] Env LR 565* and *Berkeley v SSETR [2001] 2 AC 603 @ 617 G,H*
[2] The submissions address 2011/92/EU as this is referred to by the Alliance without consideration as to whether it is the correct version of the Directive given the date of the applications.
[3] Article 1(2)(a)
[4] Article 1(2)(b)
[5] Article 1(2)(c)

case of Llanbrynmair the project consists of the wind farm proposal which is properly assessed in the ES as supplemented by the various SEIs.

13. The same conclusion arises on consideration of the EIA Regs. Regulation 3(1) prohibits the S of S from granting a section 36 consent which relates to *EIA development* unless the requirements of regulation 4 have been satisfied. *EIA development* is defined as *"development which is (a) Schedule 1 development; (b) Schedule 2 development which falls within regulation 3(2); or (c) any other development which the Secretary of State determines is EIA development in accordance with regulation 3(4)"*[6]. The term *development* is defined as *"the carrying out of building, engineering or other operations in, on, over or under land or sea in pursuance of any application to which these Regulations apply"*.

14. It is clear from the EIA Regs that the requirement for EIA applies to *development* that is the subject of a particular application.

15. Legal authority confirms that for the purposes of the EIA Directive and the EIA Regs *the development* which is to be considered by any EIA is limited to the actual development for which planning permission is sought – see *R(Candlish) v Hastings BC*[7].

16. The same point is made in *circular 2/99 "the development should be judged on the basis of what is proposed by the developer"* (paragraph 45), *"it should be noted that a developer can be asked to provide an Environmental Statement only in respect of the specific development he has proposed, though the statement will need to address not only direct, but also indirect effects of the development. Any wider implications would be for the local planning authority to consider, although it is open to developers to assist the local planning authority by supplying any additional information relevant to this consideration"* (paragraph 47). The advice contemplates that there may be wider implications which the decision maker will have to consider, but these do not have to be addressed in the ES. There is nothing in the quoted paragraphs from NPS EN1 which contradicts this; indeed they make essentially the same point.

[6] Reg 2(1) – my emphasis.
[7] *[2005] EWHC 1539 (Admin) [2006] 1 P&CR 337 @ paras 58-61*

17. In summary it is plain from consideration of the EIA Directive, the EIA Regs, legal authority and government guidance that in the case of the Llanbrynmair application (and each of the other proposals) the project for which EIA is required is the development the subject of the application namely the wind farm alone.

18. The Inspector and Secretaries of State came to a similar conclusion with respect to the Steadings, Ray and Green Rigg proposals. In particular the Inspector ruled that *"...although each of the proposed wind farms and future grid connections would have an inextricable link, the grid connections would be a secondary and subsidiary consequence of approval or consent for any of the wind farm developments. In that regard, even though the wind farms and the grid connections would not proceed independently, they could be distinguished from each other and said to be separate projects. On that basis each could be the subject of a separate application and appropriate Environmental Impact Assessment."*[8].The Secretary of State for Communities and Local Government came to the same conclusion stating *"he shares the Inspector's view that even though the wind farms and the grid connections would not proceed independently, they could be distinguished from each other and be said to be separate projects and, on that basis, each could be the subject of a separate application and appropriate Environmental Impact Assessment"*[9] and the Secretary of State for Energy and Climate Change came to the same conclusion[10].

19. It can further be observed that the requirement to provide a grid connection is common to wind farm proposals and in many cases this may involve a separate substantial development but it does not require the grid connection to be considered as part of the project.

<u>*Scope of required information*</u>

20. Where EIA is required the EIA Directive provides that the developer is to be required to supply the information specified in Annex IV *"inasmuch as (a) the Member States consider that the information is relevant to a given stage*

[8] IR p512 para 15.14 and see also paras 1.24 – 1.28
[9] DL para 7
[10] DL paras 6.1-6.3

of the consent procedure and to the specific characteristic of a particular project or type of project and of the environmental features likely to be affected, and (b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment"[11]. The information specified in Annex IV includes *"a description of the likely significant effects of the proposed project on the environment"*[12]. A footnote to the word *description* provides that this *"should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project"*.

21. Similar provision is made in the EIA Regs. Regulation 4(1) provides that the environmental statement shall include at least the information referred to in Part II of Schedule 4 and *"such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which, having regard in particular to current knowledge and methods of assessment the applicant can reasonably be required to compile, taking into account the terms of any scoping opinion given"*[13]. The information referred to in Part I of Schedule 4 includes *"A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development..."*[14].

22. An assessment should therefore consider relevant indirect, secondary and cumulative effects. It is a matter for the decision maker whether these matters are adequately addressed. Whilst the grid connection does not fall to be assessed as part of the development it is recognised that a judgement needs to be taken as to whether it falls to be considered as an indirect or secondary effect, and if so whether it is adequately addressed in the ES.

[11] Article 5(1)
[12] Annex IV para 4
[13] Reg 4(1)(b)
[14] Para 3

23. In the case of the Llanbrynmair application the effects of the grid connection are considered in volume 2 of the 2011 SEI (section 5 pp31-56) with supporting information in volume 3.

24. In providing an Environmental Statement and/or Additional Information a developer is only expected and required to provide information which is *reasonably required* and which is information which the developer can be reasonably required to compile *having regard to current knowledge and methods of assessment* (see EIA Directive article 5(1) and EIA Regs reg 4(1)(b) set out above). The courts have repeatedly emphasised that developers are not required to provide information about inchoate projects even if they may be contemplated and that they can only be expected to provide information which is reasonably available to them[15].

25. The same point is made in *Circular 2/99* which provides that an ES *"should be prepared on a realistic basis and without unnecessary elaboration"*[16]. Similarly paragraphs 4.2.7 and 4.2.8 of NPS EN1 (in the section addressing ES but not referred to by the Alliance) recognise that it may not be possible at the time of application for development consent to have settled precise details of the proposal and provides

> *"Where some details are still to be finalised the ES should set out, to the best of the applicant's knowledge, what the maximum extent of the proposed development may be in terms of site and plant specifications, and assess, on that basis, the effect which the project could have to ensure that the impacts of the project as it may be constructed have been properly assessed."*

It can be observed that this is dealing with details of the actual proposal – not as here indirect effects. However, it emphasises that in the case of indirect effects one is not expected to provide unknown detail.

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[15] *R(Candlish) v Hastings BC [2005] EWHC 1539 (Admin) [2006] 1 P&CR 337 @ paras 58-61, R(Littlewood) v Bassetlaw DC [2008] EWHC 1812 (Admin) [2009] Env LR 407 @ para 32* and *Brown v Carlisle CC [2010] EWCA Civ 523 [2011] Env LR 71 @ paras 28-31*

[16] See paragraph 82

26. As already noted the contention that precise details of any grid connection were required to be assessed was rejected in the Steadings, Ray and Green Rigg proposals.

27. In the case of Llanbrynmair the applicant has provided such information as could reasonably be required with respect to potential grid connection. There is no requirement for the applicant to provide further information nor could it reasonably be asked to provide further information.

Adjournment

28. If the view is taken that any additional information with respect to grid connection is required there is power for the S of S in writing to request *"such further information as may be specified"*[17]. No such request has to date been made by the S of S with respect to the grid connection, but if, contrary to the above submission further information was considered to be necessary this would be the appropriate method of dealing with the situation. Given the timescales involved with the inquiry this information could be provided in good time to enable proper consideration of the issues at the inquiry – it does not provide a reason for adjourning or delaying the inquiry as suggested by the Alliance. Any such request would need to be in writing and it must be remembered that it could not seek information which is not reasonably available to the applicant.

29. In the case of Green Rigg a request was made for further information. It should be noted that this request was made after the inquiry had opened and the information was provided some 4 months after the opening of the inquiry[18]. This emphasises that the Alliance application provides no proper grounds for delaying this inquiry.

30. A final point to note is that in his ruling at the Steadings, Ray and Green Rigg inquiry the Inspector observed in rejecting the applications for adjournment

> *"To the extent that any of the environmental information remains deficient it would be open to the decision making Secretary of State*

[17] Regulation 13(1) EIA Regs

[18] The inquiry opened on 15th January the request was made after hearing legal submissions on the 22nd January and the information was provided in May - See IR paras 1.24, 1,27 and footnote 42

> *to require further information before reaching a decision on the applications. Moreover, if concurrent decisions on the applications and the grid connections were deemed to be essential, it would be open to the Secretary of State to issue a minded to approve letter as the catalyst to an authoritative and reliable grid connection proposal."*

The same considerations apply equally in this case and provide further reasons why the Alliance application for an adjournment should be rejected.

Conclusions

31. The project to be considered in the ES in each case is properly limited to the proposal the subject of the relevant section 36 application. The grid connection does not form part of the proposal.

32. Whilst it may be appropriate to consider the grid connection as an indirect or secondary effect the developer can only be expected and required to provide such information as is reasonably available to them. The Alliance submissions emphasise that a final line for a grid connection has not to date been identified. In the circumstances no more can be provided or required than that which has already been provided. There is no deficiency in the ES.

33. If there were thought to be a need for further information this should be required under regulation 13, but it can only request information reasonably available to the developer. If a regulation 13 request is thought appropriate this can be accommodated within the timeframe of the inquiry and provides no grounds for an adjournment. It is furthermore open to the Secretary of State to obtain further information after the Inquiry if necessary.

34. These proposals have already taken a considerable time to reach inquiry. It is important that matters are not further delayed. In the circumstances there are no good grounds for adjournment and very good grounds why the Inquiry should proceed as planned.

VINCENT FRASER QC

11th February 2013