81 Fountain Street
Manchester M2 2EE
T: +44 (0)8449 02 03 04
F: +44 (0)161 956 4009

gva.co.uk

SCB/08-08-11

8 August 2011

Mr Robert Cooper
Environmental & Regulatory Services Department
Halton Borough Council
Rutland House
Halton Lea
Runcorn
Cheshire
WA7 2GW

Dear Sir

**Application ref.: 11/00186/COND**
**Energy from Waste Combined Heat and Power Generating Station, at Ineos Chlor, Runcorn**
**Application pursuant to Planning Condition 57 of Deemed Planning Permission ref. 01.08.10.04/8C**

We have previously submitted correspondence of 10 June 2011 and 30 June 2011 on behalf of Covanta Energy Ltd regarding the above application.

Since that correspondence was issued:

- Ineos Chlor Vinyls (`Ineos') submitted a written response to our letter of 10 June 2011, dated 20 June 2011

- Mr Tully, Group Solicitor for the Council, and Mr Cooper, case planning officer, responded to our letters of 10 June and 20 June, in separate correspondence both dated 1 July 2011;

- The Council's Development Control Committee of 4 July resolved to defer consideration of the application to the next meeting of the Committee, which is scheduled for 15 August. The minutes of the 4 July meeting record that the reason for deferral was `to enable additional information to be provided.' However, having attended the Committee, it was clear that the resolution to defer specifically related to requests by a number of members of the Committee for an independent evaluation of the submitted Transport Carbon Assessment, as well as clarification of the position of Network Rail on the application with regard to rail network capacity.

- We have been provided with copies of the Environmental Impact Assessment (EIA) Screening Opinion adopted by the Council and correspondence and other documentation relating to the previous application made by Ineos pursuant to Condition 57, dated 22 July 2010.

- Ineos has submitted additional information to accompany the application, namely a Questions and Answers document, a document entitled `Additional Information Request' and an Addendum (dated July 2011) to the Transport Carbon Assessment.

Within this correspondence, we respond to matters arising from the above, and in doing so supplement our original objection to the application.

Notwithstanding the above information, our client still has very serious concerns about the application for the following principal reasons:

- **The application is not lawful as it seeks to introduce material changes to the consented development through the use of a 'tailpiece' to a condition not intended for such purposes;**

- **There is insufficient up-to-date environmental information supplied with the application to accurately determine the likely significant environmental effects of the proposals;**

- **The assessment of carbon 'savings' submitted with the application is seriously flawed and misleading. Alternative reasonable analysis demonstrates that the proposal does <u>not</u> represent the most sustainable solution, and is therefore contrary to the purpose of the condition imposed by the Secretary of State.**

We expand on these matters below, and in the accompanying enclosures.

## 1. The lawfulness of the application procedure

Ineos question the relevance of the *Midcounties* case and assert that it provides no precedent of importance to this application. The Borough Solicitor, Mr Tully, would appear to strongly share this view.

Our client's position remains quite clear: the use of Condition 57 to seek to achieve the material changes now proposed to the consented development is unlawful.

Covanta Energy is obtaining Leading Counsel opinion on this matter. Leading Counsel is away at the moment, but he has been requested to opine on the matter in advance of the 15th August Development Control Committee. This will be made available to the Authority as soon as it is received.

## 2. EIA Development

The basis on which the Council has determined that the proposal is not EIA development, as expressed within the Screening Opinion, is flawed.

In one respect, the Screening Opinion is predicated on the basis that the *'access to the site and routing of traffic remains the same as that previously assessed in the approved*

*document.'* WSP have been commissioned by Covanta Energy to review the Transport Assessment (TA) submitted with this application in the context of the original TA and Environmental Statement (ES) submitted in 2007. A note prepared by WSP is attached to this letter and identifies that the assumptions on distribution of traffic have altered since the original TA, and yet no further, amended information has been submitted relating to the consequential environmental effects of these altered assumptions, for instance in relation to noise or air quality. Without this information, the Council cannot reasonably conclude that the change to the project will not cause different or additional significant environmental effects compared to that assessed in the 2007 ES.

Further, the Screening Opinion places considerable reliance on the 2007 ES. This assessment is four years old, and the survey information contained within it more historic. It is reasonable to expect that in the interim period, the baseline position against which the proposals must be assessed may have altered. In addition, other development proposals will have emerged and become committed developments. In the absence of any further environmental assessment addressing these matters, the effects of the project as proposed to be altered, on an individual and cumulative basis, cannot be evaluated and it cannot therefore be robustly concluded that the project will not cause different or additional significant environmental effects compared to that assessed in the 2007 ES.

The expectation on Local Planning Authorities in screening for EIA development is for a precautionary approach to be adopted. The Screening Opinion does not adopt such an approach, but to the contrary makes a series of conclusions that are not supported by up to date environmental information. **Accordingly, our client considers the Screening Opinion to be flawed and therefore Members are being asked to consider an application for which it is not possible to determine whether the project is likely to have significant environmental effects**.

## 3. Justification for Condition 57

In its letter of 20 June 2011, Ineos provide extracts of the Secretary of State's decision letter and cite the reason for Condition 57 as stated in the Deemed Planning Permission.

We do not question the reason behind Condition 57, nor have previously sought to do so. The question raised in our letter of 10 June 2010 is what change in circumstances has occurred that would justify any alteration to the terms of Condition 57, which the Secretary of State clearly considered to be reasonable and necessary at the time.

Ineos consider that there is no legal or policy requirement to support the application with such an explanation, on the basis, it seems, that this is an Application under Condition. Mr Cooper would seem to share this view, within his letter of 1 July 2011. If this is the case, and we would not accept this assertion, this highlights the inappropriate use of this procedure as a means of achieving the material changes sought. Explanation and justification for a change in position from that endorsed by the Secretary of State in the original grant of planning permission is absolutely central to evaluating whether such a change should be permitted.

As it happens, Ineos have now supplemented their arguments and justification, presumably for the very reason we identify above. However, as we set out below, this justification is considered to be inadequate.

## 4. Transport Carbon Assessment

We have previously raised concerns as to the basis on which the Transport Carbon Assessment submitted with the application was undertaken. An Addendum to that Assessment has now been submitted. This does not in any way alleviate those concerns, rather it reinforces our view that the applicant's assessment is inadequate and misleading, and does not provide a robust basis on which to justify the proposed change to the consented project.

Covanta Energy has commissioned ERM to undertake a review of the Transport Carbon Assessment and Addendum, and this is appended to this letter.

The review should be considered in its entirety, but to highlight particularly pertinent points arising from ERM's analysis:

- Many of the scenarios are based on Commercial and Industrial waste sources, but condition 2 of the Section 36 consent limits the facility to domestic waste treatment;
- The scenarios consider only sources in the North West region, but the consent is not subject to any limitation that would require waste to only be sourced from the North West region. Indeed, the Section 106 Agreement entered in to alongside the original consent limits waste sources to those arising in the UK. **Waste can therefore be sourced from outside the region but this scenario has not been modelled reflecting this reality. Further, large parts of the North West region have also not been considered**;
- The nature of the scenarios is **so extreme (to the extent of absurdity) that the extrapolation leads to an unjustifiable over-reporting of the potential greenhouse gas savings that might be made** through road transport;
- It could be concluded that the scenarios have been selected because they are advantageous to Ineos Chlor's case, rather than to present an objective analysis;
- With a range of waste sources beyond those exhibiting circumstances exceptionally unfavourable to rail, and with more reasonable rail emissions factors, **the carbon case presented in the RPS' reports is substantially undermined**.

Accordingly, the applicant has not robustly proven that the changes sought to the project would not lead to carbon savings, but rather their case is so undermined that **the change could in fact lead to an increase in carbon emissions**. This conclusion is central to the determination of this application, given the reason behind Condition 57.

We would also emphasise the point made above in relation to the Development Control Committee resolution. It was clear from discussion at the Committee that Members were seeking an independent appraisal of the Transport Carbon Assessment. Neither the applicants nor the Council have sought to address this specific request and therefore, the basis of the resolution for deferral has not been satisfied. Notwithstanding this, the analysis presented by ERM now provides the Committee with further understanding of the robustness or otherwise of this Assessment and it is clear that it is severely deficient in many respects.

**5. Regional Self Sufficiency and Proximity Principles**

Ineos seeks to place considerable emphasis within its letter of 20 June and indeed the supplementary information now submitted, on the concepts of Regional Self Sufficiency and Proximity Principles. It does so in order to explain and justify why, in their view:

- the catchment for the Energy from Waste plant is effectively limited to the North West region and unless it can meet is full capacity from North West sources its efficiency would be severely undermined;
- the scenarios presented in their Transport Carbon Assessment, which only consider a North West catchment (although as ERM highlight by no means the full extent of this catchment), are reasonable and robust;
- it would be unacceptable and contrary to policy and legislation if, as a consequence of the limitations of Condition 57, waste had to be brought in from outside of the North West region.

However, this is all predicated on a misapplication and misreading of current legislation and policy.

Dealing firstly with the concept of regional self-sufficiency, this is a European Community and national concept only. The Waste Framework Directive refers to self-sufficiency (not regional self sufficiency) but this relates to the European Community as a whole and individual Member States to move towards this aim – there is no requirement or indeed expectation for individual regions within countries to achieve self-sufficiency.

There is also no policy basis for regional self-sufficiency. Within PPS10 this is no requirement for regions to be entirely self-sufficient nor for cross-regional movements of waste to be prevented. In respect of the Regional Spatial Strategy (RSS) for the North West, again there is no reference to regional self-sufficiency and indeed it envisages instances where the region may accommodate nationally significant waste management facilities.

As to the proximity principle, the legal requirement is for the (waste management) network to enable waste to be disposed of (or in specific instances subject to recovery) in 'one of the nearest appropriate installations', in order to ensure a high level of protection for the environment and public health.

'The nearest appropriate installation' clearly does not necessarily mean the most proximate. The language is deliberate and the objectives are clear: to protect the environment and public health. This judgement is not to be made on the basis of administrative boundaries, such as the extent of a region, and must be made on the basis of particular circumstances. For instance, **if it is advantageous or at worst neutral to the environment and public health to transport waste over a greater distance to a particular facility but by more sustainable means, this may well represent the nearest appropriate installation.**

Accordingly, we consider that Ineos' blanket reliance upon regional self sufficiency and the proximity principle in justifying the basis of their proposed change is at best misleading. There is not a need for the plant to only serve the North West region for it to be consistent with legislation or policy. A number of Secretary of State decisions have affirmed that this is the case.

The carbon analysis presented by the applicants is flawed for a number of reasons, but their reliance on a misapplication of legislation and policy to justify their approach is clearly inappropriate and undermines their justification for the proposals.

## 6. The Council's previous decision on the proposals

The papers supplied by the Council demonstrate that the original attempt by Ineos to achieve the proposed variation by use of the tailpiece of Condition 57 was unanimously rejected by the Development Control Committee. There has been no change in circumstances since that original decision and for the reasons given above, the additional justification that has been supplied by the applicant is seriously flawed. Therefore, the same decision should be made in this case.

## 7. Unilateral Undertaking

There is reference in the additional documentation submitted by Ineos to a Unilateral Undertaking requiring the company to use 'reasonable endeavours' to achieve the use of the most sustainable transport mode. The Unilateral Undertaking submitted to the Council in advance of the 4 July 2011 Committee does **not** contain such an obligation, as it relates solely to traffic routeing.

If it is the intention for Ineos to submit an amended or additional Undertaking, We would reserve our position in this regard until this document has been made available to us, and we would request this is provided sufficiently far in advance to allow for comment in advance of the Committee meeting.

However, based on the description provided of this proposed Undertaking, this would appear to be very vague and consequently have very limited benefit. The most effective means of limitation is by means of enforceable conditions or obligations relative to a quantum of material and mode of transport; indeed precisely as Condition 57 provides for.

I trust the above is clear and reiterates our client's objections to the application. Much of the content of our 10 July 2011 letter remains pertinent and we would therefore ask that the Committee is made aware of both letters and their content.

We will provide further comment on the question of lawfulness of the procedure, alongside Leading Counsel opinion, in advance of the 15th August Committee.

Yours faithfully

**GVA Ltd.**