Renewables Update July 2011

CLOSER TO A STRATEGY FOR AD?

The Government looks to be inching closer to its goal of increasing the uptake of anaerobic digestion (AD) in the UK, with Defra publishing the AD Strategy and Action Plan (ADSAP) alongside its much awaited Waste Policy Review. However, despite the fanfare, reactions have focused on the lack of concrete actions and strategy in both, with the Waste Policy Review particularly slated for failing to go far enough – especially given Scotland's relatively radical Zero Waste Plan.

The ADSAP is the latest in a succession of documents seeking to stimulate investment in, and development of, new AD facilities across the UK. These have, so far, all failed to deliver, with the Government just recently having to tweak the Feed-in Tariff to try to further drive farm-scale projects. So what does this document do that none before it have?

In terms of strategy, the document is thin on the ground, with no particular feedstock, business model or type of plant identified for promotion. However, there are some themes that appear throughout the document, including:

- **Grid injection of biogas.** Biogas use was identified as one of the key issues needing addressed to facilitate a sustainable framework for AD. Barriers identified included costs and regulation, particularly for smaller scale operations. Some work is already being done in this area, with DECC exploring the potential for a gas licence exemption for onshore gas production. However, there is far more to be done to make these types of project commercially viable. Challenges identified include simplifying the protocols governing grid injection and promotion of the benefits of such schemes. A Quality Protocol is also to be developed for biomethane. However, strictly speaking none of this is news to us – all of these actions have been progressing for some time.

- **Use of biomethane as a transport fuel.** The limited use of biomethane as a transport fuel was noted, and one of the actions identified is to gather evidence on the barriers to this use of biomethane, and develop an understanding of the economics of supplying biomethane for transport. The Low Carbon Vehicle Partnership will produce a paper looking at the principal opportunities and barriers in this market. The Department for Transport is to analyse the subsidies available for biomethane under the Renewable Transport Fuels Obligation, and will look at the scale of potential supply of biomethane from various sources for transport. It will be interesting to see whether the proposed actions stimulate the market.

- **Co-digestion of sewage sludge and other wastes.** One of the key things highlighted is the need for a better understanding of the available AD feedstocks and business models. In this context, it has already been noted that the water companies have a monopoly on sewage sludge, which potentially represents a significant feedstock for the purposes of AD. The Office of Fair Trading (OFT) is undertaking a study of the market in this respect, and is specifically looking at the potential to open up the sewage sludge market to waste companies, in the interests of best promoting AD in the UK. The results of this will be available in September 2011, following which Ofwat will consult on a new framework for sewage sludge in the context of AD. In the meantime, Water UK and the EA are to clarify the regulation of co-digestion. Within the water industry, co-digestion is seen as a major issue, with much debate over the types of business models that might emerge and the thorny issue of what (if anything) might happen about existing water industry infrastructure.

- **Finance and investment.** Another key issue was access to finance, as well as certainty in terms of financial incentives for renewable energy. A key matter in this context remains security of feedstock supply, and for that reason the outcome of the

OFT study will be very much of interest. It is suggested that information and guidance could go a long way to resolving some of the issues, and actions are highlighted to put this in motion, including improving the knowledge of financiers and venture capitalists on best practice. Meanwhile, BIS is to consider the case for innovative financial products, while WRAP is to set up a loan fund to help stimulate investment.

The Waste Policy Review does not appear to particularly complement the ADSAP, with biowaste to be examined separately in yet another strategy document due later this year, and no ban on biodegradable waste to landfill. This seems a real missed opportunity, and the question has to be asked why the ADSAP, which is fundamentally dependent on biowaste feedstocks, has been published ahead of the review of biowaste policy.

WHAT IS ALL THE NOISE ABOUT?

Noise can have a significant effect on the environment and on the quality of life enjoyed by individuals and communities. It is often the weapon of choice for those opposing wind farm developments, and its potential impact on residential amenity must be heavily scrutinised by decision-makers when determining planning applications. The planning system ought to ensure that, where it is not possible to achieve a separation of land uses, noise is controlled through the use of conditions or planning obligations. Even after careful scrutiny and compliance with planning conditions, noise complaints can still cause problems during the operation of a wind farm, and three cases have recently hit the courts highlighting these issues.

Legal review of Secretary of State's scrutiny

In the case of *R (Lee) v Secretary of State for Communities and Local Government,* Mr Lee challenged the grant of planning permission for a wind farm close to his property, with three grounds relating to noise, on the basis that the planning inspector had failed to:

- grapple with uncertainties surrounding the developer's noise propogation model;
- take into account that, even if the ETSU noise criteria were met, there would remain an effect on amenity; and
- have regard to whether design changes could reduce the development's impacts.

His challenge was dismissed on all three grounds. The Court held that:

- the Inspector was well aware of the difficulties in precisely predicting noise levels;
- there would be for some residents, at times, an impact on amenity, and the Inspector made reasoned findings regarding this; and
- in making his decision, he considered minimisation of impact, having taken into account location, scale, design, heritage and noise impact. On this issue the Court stressed that "there is no legal principle that planning permission should be refused if a different scheme could achieve similar benefits with a lesser degree of harm".

This case clearly demonstrates that the Courts are not prepared to "unpick" Secretary of State decisions where those decisions are reasoned, clearly intelligible and adequate.

Wide interpretation of ambiguously drafted planning conditions

In a recent Court of Appeal case, *Hulme v Secretary of State for Communities and Local Government,* the construction and interpretation of ambiguously drafted planning conditions for a wind turbine development in Devon (Den Brook) was considered. Planning conditions attempted to cater for the impact on residential amenity of amplitude modulated (AM) noise caused by the movement of turbine blades, or "blade swish". However, Mr Hulme challenged the permission partly on the basis that the conditions relating to blade swish

noise did not adequately achieve the Inspector's objective of ensuring that noise levels would not exceed acceptable levels.

The conditions in question:

- set out that following a complaint, the wind farm operator should arrange an assessment of noise emissions considered to be excessive; and
- prohibited the generation of electricity to the grid until a scheme for measuring and evaluating the AM noise levels has been approved by the Local Planning Authority.

However, neither condition specified that whether exceeding those limits was a breach, nor was there any provision about enforcement if acceptable levels were exceeded, as can often be the case for noise conditions.

Mr Hulme relied on established planning law – that no implied prohibition or enforcement wording could be read into the conditions and accordingly the entire permission should fall. The Court dismissed the appeal and held that "it plainly was the intention that the AM noise condition could be enforced in some way". The conditions were to be construed as imposing an obligation on the developer to comply with the noise levels set out, even though the condition was silent about what was to happen if the AM noise levels were exceeded.

This case is significant in terms of how the Courts construe and interpret planning conditions, and is an important lesson in ensuring conditions are precisely drafted so as to avoid legal challenge. Developers benefiting from planning conditions containing imprecisely drafted conditions should see this as a warning that the Courts are willing to look beyond the specific wording and interpret conditions "benevolently" in the context of the decision letter as a whole, not narrowly. It may not be sufficient to sit back and ignore imprecisely drafted noise conditions in the hope that planning authorities cannot enforce them. There are a number of strategic approaches to this type of issue, so wind farm developers can avoid the risk of possible enforcement proceedings further down the line.

Noise challenges during operation under Statutory Nuisance

Noise complaints and legal challenges have tended to arise in the planning arena. However, there may be a shift to the environmental arena, under the statutory nuisance regime under the Environmental Protection Act 1990, with a landmark compensation claim currently being heard by the High Court.

In Davis v Fenland Windfarms Ltd and others, Mr and Mrs Davis did not object to a wind farm development during the planning process, but are now seeking an injunction or damages of £2.5 million for noise nuisance from blade swish noise from nearby turbines. This case has the potential to set a significant precedent for operational wind farms, so wind farm developers will be keen to know the outcome and the set compensation level, if the couple are successful. Operators should be aware that even where there is compliance with noise conditions, this does not necessarily exclude a claim for nuisance. From the outset of a project, developers need to fully consider securing noise protection agreements, especially with residential neighbours, in order to potentially avoid costly litigation in the future.

CAPITAL ALLOWANCES – HMRC CONSULTATION ON FITS AND THE RHI

HM Revenue & Customs (HMRC) recently published a consultation document seeking the views of taxpayers and other interested parties on some proposed changes to the Capital Allowances (CA) rules on assets used in trades, which qualify for Feed-In Tariffs (FITs) or the Renewable Heat Incentive (RHI). HMRC propose to reduce the rate of tax relief for capital expenditure on certain types of asset.

The FITs regime began on 1 April 2010, with a tariff being paid to operators of small-scale renewables projects capable of generating up to 5MW of electricity using eligible

technologies (e.g. wind, solar, hydro). The rates of FIT are set by the Government, vary depending on the technology used, and are set at an artificially high level to support the financial viability of the various renewable energy technologies.

The RHI, which is expected to begin later this year, is intended to provide long-term financial support to renewable heat installations, in order to encourage the uptake of renewable heat generation and use. Various methods of heat generation will be eligible under the RHI, including biomass boilers, ground source heat pumps and anaerobic digestion.

Currently there are no special CA rules relating to assets connected with FITs or the RHI, so the ordinary rules apply. Using the rates which will apply from April 2012, there are:

- the 100% "enhanced" CA (ECA) on certain designated energy-saving or water-saving items of plant or machinery;
- the 100% Annual Investment Allowance (AIA), available on the first £25,000 of annual expenditure by a taxpayer;
- the 18% main rate; and
- the 8% "special rate".

In general, currently, the cost of electricity generation equipment and heating systems, including installation expenditure, qualifies for the 8% "special rate" if installed in a building so as to become part of it, or if it has a useful life exceeding 25 years. If not, the 18% rate will apply.

The HMRC proposal is simple – assets would not be eligible for ECA or the 18% rate of CA if they are used in generating electricity which qualifies for a FIT, or heat which qualifies under the RHI. However, such assets would remain eligible for the AIA and the 8% rate. The reasoning is that the rates of FIT and RHI have been set to provide sufficient financial incentive to businesses without the need for further support, and therefore the 100% rate is not justified. However there are no figures in the consultation document to back this up.

The main effect of the proposal would be to cut the rate of CA from 18% to only 8% on many items of plant. This would affect both heat generation and electricity generation equipment, but the main hit would be on electricity generation equipment which is not part of a building, e.g. solar PV panels mounted on a roof or at ground level, or wind turbines. Over the life of an asset, the total amount of tax relief would not be changed, but the relief would be deferred significantly. The 18% rate gives relief for 90% of expenditure over a period of 12 years, but the 8% rate takes 28 years.

The removal of ECAs would mostly affect businesses in receipt of the RHI. ECAs are designed to encourage businesses to save resources, and many items which qualify for them are likely to be used in heat generation from renewable sources. Here the difference in the rates of tax relief is much more marked – from 100% relief in the year of purchase to the miserly 8% rate. On the other hand, few ECA qualifying items could be used in electricity generation, so the overlap between ECA and FIT is small and the removal of ECA would have little or no effect on electricity generation companies.

The closing date for comments is 31 August 2011.

RENEWABLE DEVELOPMENT V ENVIRONMENTAL VALUE

The UK Government's vision for the natural environment in England for the next 50 years aims to put the value of nature at the heart of its economic thinking, by valuing the services nature provides and assessing how a natural asset is or could be used.

Defra's proposals, which are detailed in the White Paper "The Natural Choice: Securing The Value Of Nature", should be taken into account by renewable developers – especially those developing wind and hydro projects. This is because there are a number of key measures

contained in the White Paper that will impact directly on site selection and possibly also the prospect of securing consent for development.

The key measures include:

- **Local Nature Partnerships** (LNPs) – these will be established to strengthen local leadership on issues surrounding nature.

- **Natural Improvement Areas** (NIAs) – LNPs will create natural environment versions of Local Enterprise Partnerships operating Enterprise Zones by creating NIAs. NIAs are to restore and reconnect fragmented and dispersed sites and so provide bigger connected sites for wildlife. It is the intention that they will be brought forward by local authorities through development plans.

- **Biodiversity Offsets** – there are also plans to pilot voluntary "biodiversity offsets" for losses of biodiversity caused by development. The intention is to simplify the planning requirements for reducing the impacts on biodiversity.

- **Local Green Areas** (LGAs) – this is a designation which will allow local people to "protect" land where it is demonstrably special in some way. Essentially, local communities will be able to earmark land for special consideration – whether its value is based on natural beauty, historic resonances, recreation, tranquillity or importance to wildlife habitat.

- **Green Infrastructure Partnerships** (GIPs) – will also be set up to support the development of a network of green spaces, water and environmental features in rural and urban areas. The GIPs will consider how these "Green Infrastructure" features can be enhanced to strengthen ecological networks and improve communities health, quality of life and resilience to climate change.

- **Nature Value Ambassadors** (NVAs) – there are plans to "inaugurate" fifty NVAs, who will be given the remit of demonstrating the economic and social value of nature to decision makers and opinion formers.

- **Services** – at the heart of the policy are the services provided by the environment. Green spaces and trees, for example, provide a service by reducing noise – this will now be valued.

- **Localism** – the White Paper also anticipates that measures in the Localism Bill will be used by communities to preserve the natural environment, through local referendums for example. Communities are also encouraged to form voluntary conservation networks to protect and enhance nature.

Organisations such as the RSPB and WWF-UK have welcomed the White Paper. However, The Ramblers and British Mountaineering Council do not think it goes far enough in terms of recognising the valuable role that access and recreation play in understanding nature.

For wind and hydro developers, its measures could clearly impact upon site selection and possibly also securing consent. There will be concerns about the scope and geographical coverage of NIAs, but also over how LNPs will interact with developers. For instance:

- prime wind or water resource locations may be off limits because land has been designated as an LGA, due to its visual quality or recreational value;
- the service value that may be given to trees will be concerning for those intending to fell trees; or
- NVAs could advocate against development, even where Natural England or JNCC support it.

The further strengthening of communities will certainly make community engagement even more crucial than it already is.

It is intended that protecting natural value will be partly secured through the planning system. However, it is unclear whether the White Paper's ambitions may actually conflict with changes to the planning system. The key reform, which the UK Government is still to consult on, is the draft National Planning Policy Framework (NPPF) – which will have long term sustainable economic growth, and a new presumption in favour of sustainable development, as its top priority. The draft NPPF, due for consultation this summer, may help to clarify matters. However, a recent amendment to the Localism Bill allowing "local financial considerations" to be a material consideration in planning decisions may further hinder the ambitions for nature. For renewable developers, the White Paper may in fact remain just another material consideration, among a long list, for planning authorities to consider, rather than delivering the ambition for nature net gain that conservation groups hope for.

CRC ENERGY EFFICIENCY SCHEME STREAMLINED

The CRC Energy Efficiency Scheme (CRC) is a mandatory emissions trading scheme for large non-energy intensive organisations in the private and public sectors in the UK. It started in April last year, with the aim of reducing carbon emissions from business through incentivising energy efficiency improvements.

Since the start of the CRC, a number of aspects of the policy have been criticised by stakeholders. There were concerns that it forced organisations to participate in ways which do not accommodate their natural business or energy management structures and processes, that there were overlaps with other energy efficiency measures, and that it was simply far too complex and expensive for businesses to administer.

The Department of Energy and Climate Change (DECC) therefore published five discussion papers in January, seeking views on how the scheme could be simplified. Interested parties had until March to send in their comments. The awaited proposals to make the CRC simpler, easier and more straightforward were finally outlined at the end of June.

The proposals state that the CRC will no longer be such an administrative burden on businesses, that greater certainty about how to comply with the CRC will be given, and that there will be greater flexibility for businesses.

The proposals also note the need to reduce the overlap between the CRC and other climate change policies made by the Government, and proposes excluding businesses covered entirely by Climate Change Agreements or EU ETS from the CRC.

The much anticipated document sets out the proposed changes in detail. Amongst other simplifications the Government is proposing to:

- **Reduce the number of fuels covered by the scheme.** Under the current scheme businesses have to report on the emissions from 29 different fuels. It is proposed that this will be reduced to four: electricity, gas, kerosene and diesel for heating. This will cover over approximately 95% of emissions captured under the CRC while significantly reducing the administration burden of the scheme.

- **Move to fixed price allowance sales.** Instead of the annual auction concept previously proposed, the CRC will, from the start of phase 2 in 2014, involve two sales per year where the price of allowances is fixed. This would remove the need for businesses to come up with auctioning strategies and give price certainty to help with investment decisions. As indicated in the Spending Review, the Government has again confirmed that the revenue will not be circulated back to the participants, making it effectively a carbon tax.

- **Simplify the organisational structure rules.** It is proposed to abolish the need for large businesses to participate in groups which do not reflect their natural structure, such as in the case of venture capitalists. Parent organisations must notify the Environmental Agency of the overall structure of its group, however, the group will now be able to disaggregate in a way that better reflects its "natural business units".

- **Make qualification processes easier.** It is proposed that the qualification process will become a one step process instead of two. Previously businesses had to firstly determine that they had a qualifying electricity meter and then declare they used a particular amount of electricity. This would be abolished in favour of participants just having to determine that they use a certain amount of electricity.

- **Evidence pack requirements to be reviewed.** There is an intention to reduce the administrative burdens on participants as well as the requirement to keep records of their energy usage being halved from twelve years, to six.

The document confirms that there is to be no change to the way that renewables are treated in the context of the CRC. There will be no additional benefits for renewables generation other than in terms of reporting alongside the league table on renewable energy generation, on the basis that renewables are subject to various other financial incentives. It also confirms that landlords will remain responsible for the supplies of their tenants – one of the more controversial aspects of the CRC for property investors.

The Government is also going to undertake a consultation on changes to Climate Change Agreements to make them less burdensome and more effective until they end in 2023. Any simplifications to the numerous and sometimes complex climate policies are bound to be welcomed by companies across the UK.

Greg Barker, the Minister of State for Energy and Climate Change, has stated that his Department and the Devolved Administrations welcome any comments on the proposals printed on 30 June 2011. Interested parties have until 2 September 2011 to comment. The next steps will be the formal consultation, expected to take place early next year, and then implementation from Phase 2 onwards in April 2013.

CRC participants should remember that the submission date of their first footprint and annual report is 29 July 2011.

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