

Lesley Griffiths AC/AM  
Ysgrifennydd y Cabinet dros yr Amgylchedd a Materion  
Gwledig  
Cabinet Secretary for Environment and Rural Affairs



Llywodraeth Cymru  
Welsh Government

Eich cyf/Your ref  
Ein cyf/Our ref: APP/B6855/X/2015/516138 - 516144

Ms G Elias  
RWE Innogy UK Ltd  
Unit 22  
Baglan Bay Innovation Centre  
Central Avenue  
Baglan Energy Park  
Port Talbot  
SA12 7AX

20 July 2016

Dear Ms Elias

**COMMONS ACT 2006  
APPLICATIONS BY RWE INNOGY UK LTD UNDER SECTIONS 16 AND 38 OF THE  
COMMONS ACT 2006 IN RESPECT OF COMMON LAND AT MYNYDD Y GWAIR,  
SWANSEA**

1. Following your applications made under sections 16 and 38 of the Commons Act 2006 for the deregistration and exchange of common land and for restricted works on common land at Mynydd y Gwair, Swansea I have received the Planning Inspectorate report. The Inspector, Clive Nield BSc (Hon), CEng, MICE, MCIWEM, C.WEM, has reported on applications made under:
  - Section 38 for the surfacing and improvement of the proposed access route, including associated retaining structures (Application A) (APP/B6855/X/2015/516138);
  - Section 38 for the erection of temporary protective fencing for a CADW Scheduled Ancient Monument GM202 (Application B) (APP/B6855/X/2015/516139);
  - Section 38 for the erection of temporary protective fencing for an undesignated historic asset MG62 (Application C) (APP/B6855/X/2015/516140);
  - Section 38 for ditch improvement works (Application D) (APP/B6855/X/2015/516141);

Bae Caerdydd • Cardiff Bay  
Caerdydd • Cardiff  
CF99 1NA

*Wedi'i argraffu ar bapur wedi'i ailgylchu (100%)*

English Enquiry Line 0845 010 3300  
Llinell Ymholiadau Cymraeg 0845 010 4400  
Correspondence.Rebecca.Evans@wales.gsi.gov.uk

*Printed on 100% recycled paper*

- Section 16 for the deregistration and exchange of common land in connection with Common Land Unit CL77 (Application E) (APP/B6855/X/2015/516142);
- Section 16 for the deregistration and exchange of common land in connection with Common Land Unit CL74 (Application F) (APP/B6855/X/2015/516143); and
- Section 16 for the deregistration and exchange of land in connection with Common Land Unit CL68 (Application G) (APP/B6855/X/2015/516144).

### **Summary of decision**

2. The formal decision is detailed at paragraph 30 below. The applications are approved, with the exception of Application A, which is refused.

### **Procedural Matters**

3. Welsh Ministers have appointed the Planning Inspectorate Wales (PINs Wales) to undertake the processing of section 16 and section 38 applications on their behalf, including the making of recommendations to Welsh Minister on whether or not an application should be approved.
4. Representations both for and against the applications were received. PINs Wales considered it appropriate to hold an independent public inquiry, which sat for four days, 16-18 and 23 February 2016.

### **Considerations**

5. Section 16(1) of the Commons Act 2006 provides that the owner of any land registered as common land may apply for the land (release land) to cease to be so registered. If the area of release land is greater than 200m<sup>2</sup> a proposal must be made to replace it with other land to be registered as common land (replacement land).
6. Section 38 of the Commons Act 2006 requires the consent of Welsh Ministers for any restricted works on registered common land. Restricted works are identified as those which have the effect of preventing or impeding access to or over the land and include, in particular, the erection of fencing, construction of buildings and other structures, digging ditches and trenches, the building of embankments and the resurfacing of land with tarmac and similar measures.
7. The Welsh Government has issued guidance on 'Common Land Consents'. Welsh Ministers seek to adhere to the guidance in processing and determining applications. I note that every application must be considered on its own merits and a determination may, in exceptional circumstances, depart from the guidance if it appears appropriate to do so.
8. In determining these applications, regard is to be had to:
  - i) the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it);
  - ii) the interests of the neighbourhood;
  - iii) the public interest;
  - iv) any other matter considered to be relevant.

9. The Commons Act 2006 sets out that 'public interest' includes the public interest in nature conservation, conservation of the landscape, the protection of public rights of access to any area of land, and the protection of archaeological remains and features of historic interest.
10. Where applications are made under both section 16 for the deregistration and exchange of common land and section 38 for restricted works on common land Welsh Ministers reserve the right to recover jurisdiction for the determination of all applications under the Commons Act 2006 in order that they may be considered in their entirety. In this case I exercise these functions in my role as Cabinet Secretary for Environment and Rural Affairs with portfolio responsibility for the Commons Act 2006 (2006 Act).
11. Welsh Government's aim is to protect common land as part of its strategic objectives in relation to biodiversity and for the sustainable use of natural resources to improve the benefits to local communities, the economy and the environment. The 2006 Act provides for the safeguarding of commons for current and future generations, helping the Welsh Government to ensure that the stock of common land is not diminished.

### **Inspector's Report**

12. Consideration has been given to the Inspector's report. The Inspector's conclusions, reasoning and recommendations are set out in paragraphs 206 - 261 of his report, a copy of which is enclosed. The inspector recommends that:
  - Application A – Consent should not be granted;
  - Application B and C – Consent should be granted;
  - Application D – Consent should be granted subject to a condition that the works shall be undertaken in accordance with the Construction Method Statement for the Rhydypany Ditch;
  - Applications E, F and G – Consent should be granted and Orders made.
13. The Inspector in making his recommendations considered a wide range of issues arising from the proposed development; including statutory requirements, policy guidance issued by PINs Wales and the Welsh Government and views offered by those attending the inquiry.

### **Conclusions reached by the Inspector**

#### **Applications A & G**

14. The Inspector concludes that Application G, to deregister and exchange land under section 16 of the 2006 Act, is preferable to Application A for consent for works under section 38. This is because it offers the benefit of the provision of an area of replacement land, rather than allowing the works to take place with no land being offered in compensation. The Inspector recognises that the value of the replacement land is small, although considers that it will provide some benefit to the adjoining common. The Inspector notes that whilst Application G would temporarily interrupt access along several public footpaths and bridleways near the southern end of the new access track during the construction of part of the route, the interruptions would be short-lived. The Inspector is satisfied that RWE Innogy has addressed concerns brought forward in response to the application with regard to hydrological issues and the decommissioning of the land. The Inspector is also satisfied that this access route is necessary to provide access for heavier loads.

15. I concur with the view of the Inspector that the benefit offered by the replacement land makes Application G preferable to Application A which offers no replacement land. This is in keeping with the spirit and purpose of the legislation as set out in the Common Land Consents Guidance. I further agree that the concerns outlined above have been adequately addressed and conclude that Application G is preferable to Application A. I therefore reject Application A. I deal with Application G below.

### **Applications B & C**

16. The Inspector is of the view that Applications B & C for the erection of temporary fencing to protect a scheduled ancient monument and an undesignated historic asset are a sensible and worthwhile precautionary measure. The Inspector therefore recommends that consent should be granted in respect of these applications.

17. The Inspector notes that no meaningful objections have been raised to the fences. I have considered the case both for and against these applications and agree with the Inspector's recommendations. Whilst public access during the 12 month construction phase would be more limited than is currently the case there would be no long term impact as the fencing is only in place on a temporary basis to protect the archaeological features. I conclude that granting consent for Applications B and C would have minimal impact and I therefore grant Applications B and C.

### **Application D**

18. The Inspector notes that the work involved in the application for ditch improvement works at Rhydypany Road is quite minor and that the application was submitted as a precautionary measure. The Inspector notes concerns about potential effects on the water supply to a property, but is of the view that the measures in place as part of the Construction Method Statement minimise the risks of pollution and give confident assurance that the water supply would not be affected. The Inspector distinguishes Application D from the other applications for consent under section 38, on the basis that the ditch works are not part of the planning permission. For this reason he concludes that consent be granted subject to a condition – as allowed for under section 39(3) of the 2006 Act – that they be undertaken in accordance with the Construction Method Statement for the Rhydypany Ditch.

19. Having considered the detail of the Inspector's report alongside the provisions of the 2006 Act I agree with the views of the Inspector that consent for ditch improvement works alongside Rhydypany Road should be granted subject to the condition specified by the Inspector. I also note the benefit this work will have in deterring unauthorised off-road vehicular access to the common. I therefore concur with the recommendation of the inspector and grant consent for Application D subject to the condition that the works shall be undertaken in accordance with the Construction Method Statement for the Rhydypany Ditch.

### **Applications E, F & G**

20. Whilst the circumstances of each application are different, most of the relevant matters are applicable to all three applications and it is therefore appropriate to consider these applications together. In considering applications E, F and G the Inspector applies the statutory tests under Section 16(6) of the 2006 Act and the Inspector's report sets out the arguments made both for and against each consideration. I set out those requirements that were the subject of considerable debate below.

21. The applications are made to facilitate the construction of the Mynydd y Gwair wind farm, which was granted planning permission by the City and County of Swansea Council of 10 March 2014. The scheme will involve the installation of 16 wind turbines and associated works. The common to be deregistered is registered under three separate register units, and the majority of this land is grazed moorland. In total, the release land totals 40.2 hectares, whilst the replacement land offered in exchange comprises 31.16 hectares. I note that the Welsh Government guidance takes the position that the 'stock of common land and greens is not diminished'. The current applications therefore appear to fall foul of this position. However, the Inspector sets out in his report that 32.39 hectares of the release land would be relicensed for grazing during the operational period of the wind farm, and the owner of the commons, the Somerset Trust, would suspend its own grazing rights through that period, which is equivalent to 41.33 hectares of land. The Inspector addresses this point and concludes that this would mean that the graziers would ultimately benefit from the equivalent of around 64.2 hectares of additional grazing land during the 25 years operational period of the wind farm. The Inspector concludes that 'in numerical terms the graziers would appear to gain a substantial benefit over the 25 year period'. Having considered what is said in the report I am satisfied that this approach follows the spirit of the purpose behind the 2006 Act and justifies a departure from the guidance.
22. Section 16(6)(a) requires me to have regard to the interests of persons having rights in relation to, or occupying, the release land (and in particular persons exercising rights of common over it). When balancing competing views on this point, the Inspector concludes that 'taken as a whole and on balance ... the interests of the commoners would not be unduly harmed'. The mitigation and compensation factors offered by the Applicant in addition to the improved provisions for replacement land are sufficient to overcome the concerns raised by the 2014 Inspector. The Inspector places considerable weight on the section 106 agreement executed for the planning permission and a separate section 106, the unilateral undertaking, which was prepared for the Commons Act applications. The Inspector recognises that inconvenience will occur during the construction period when movements around the common will be disrupted by the temporary fencing, but is of the view there would be limited impact on grazing livestock as construction work would be concentrated in a small number of locations at any one time. In addition the Inspector is of the view that the additional shepherding provided for in the section 106 agreement would substantially overcome or at least mitigate any problems that might arise. Additionally the Inspector considers the licencing of a significant part of the release land during the operational phase of the wind farm along with the suspension of grazing rights by the Somerset Trust will result in commoners benefitting from additional grazing land.
23. The Inspector accepts that there are doubts about the convenience and suitability of the replacement land and concludes that whilst not all the replacement land would be usable for grazing at least half would be and still provide a useful benefit overall. On balance the Inspector has concluded the interests of commoners would not be unduly harmed. Despite the fact that the replacement land may not be of equal benefit to the release land the inspector concludes that the development is very likely to go ahead and that therefore the commoners would benefit from the grazing rights conferred by the unilateral undertaking in addition to the rights over the replacement land. The unilateral undertaking also contains a commitment on the part of the owner to use reasonable endeavours to rededicate the release land once the development has been decommissioned.
24. When considering the interests of the neighbourhood (section 16(6)(b)) the Inspector is satisfied that the proposals include appropriate monitoring and mitigation proposals

in respect of local water supplies. He also appears satisfied in respect of concerns that were raised over drainage and underground water flows.

25. By way of overall conclusion, the Inspector sets out that the proposed wind farm scheme would 'have only limited detrimental effects'. He recognises that 'considerable inconvenience would occur during the construction period', however on balance concludes 'that the interests of commoners would not be unduly harmed'. He also concludes that the 'wider interests of the neighbourhood would not be significantly affected'. When addressing the various arguments that were made both in favour of the public interest considerations and those that were made against the Inspector concludes that whilst, on most matters, the public interest would not be significantly affected he is clear that the exception is in respect of the landscape and visual impacts.
26. He notes the visual impact from 16 very tall structures and a long length of access track, changing the character to a landscape with an element of industrial style development which in turn would change people's perceptions of the landscape. The Inspector concludes that the wind farm would be detrimental to the appearance of the commons and the majority of people's enjoyment of them. He goes on to state that the "weight to be attributed to that harm is tempered by the principles established in TAN 8." The Inspector notes the site lies within Strategic Search Area (SSA) E of Technical Advice Note 8 (TAN8), Planning and Renewable Energy, which reflects the Welsh Government's commitment to the provision of renewable energy in Wales. The SSA's were selected because they were considered to be technically, practically and environmentally better able to accommodate the landscape and visual impacts of wind farms than other parts of Wales, and their selection accepted the implicit objective of accommodating the inevitable landscape changes.
27. The Inspector concludes that the wind farm would be detrimental to the appearance of the commons and to the majority of people's enjoyment of them. However, as the site lies within Strategic Search Area E he sets out in paragraph 236 of the report that 'the weight to be attributed to that harm is tempered by the principles established by TAN8'. He is of the view that the renewable energy benefits and the Welsh Government's strong commitment towards the development of renewable energy in Wales is a factor of considerable weight in favour of approving these applications. In addition the Inspector notes the extensive EU, UK and Welsh policy support for renewable energy and the legislative commitment in the Environment (Wales) Bill (now the Environment (Wales) Act 2016) which places a duty on Welsh Ministers to achieve certain emissions targets and to set carbon budgets over the coming years. Whilst those opposing the scheme on the grounds that the energy generated would be so small it would have a negligible effect on global emissions of carbon the Inspector notes that the scheme would make an important contribution towards meeting the Welsh Government's target as part of the operational development target for this Strategic Search Area set by TAN 8.
28. Having considered the arguments raised in connection with the considerations under section 16, the Inspector considers that the benefits of the proposed scheme, including those relating to renewable energy and the economic benefits associated with the scheme far outweigh any detrimental effects. He therefore recommends the approval of Applications E, F and G.
29. I have considered the report and the arguments made both in favour of and against the scheme extensively. Whilst I agree with the Inspector's conclusion that the benefits of the proposed scheme outweigh its negative impacts, in particular those concerning the landscape and visual amenity, I do not agree that less weight should

be attributed to harm caused by the development to the character and appearance of the commons because the land lies within Strategic Search Area E. Rather, I believe the correct approach to section 16 is to attribute a weight to each of the statutory considerations and then carry out a balancing exercise of whether one factor weighs more heavily than another. I agree with the Inspector's conclusion that the development would deliver significant benefit to emissions targets and carbon budgets over the coming years in line with Welsh Government commitments under the Environment (Wales) Act 2016. The Welsh Government is committed to reducing net Welsh emissions by at least 80% by 2050. Renewable energy sources such as wind power have a critical part to play in achieving this. Having considered the competing interests of the landscape and visual amenity as against the benefits of renewable energy, I have formed the view that benefits of renewable energy outweigh the detrimental effects to landscape and visual amenity outlined above.

### **Formal Decision**

30. I have considered the Inspector's Report and noted the case for the applicants, the representations, objections and the Inspector's conclusions. In conclusion, for the reasons given above, and in exercise of my authority as Cabinet Secretary for Environment and Rural Affairs, one of the Welsh Ministers, I hereby:

- Refuse the application (Application A – APP/B6855/X/2015/516138) made under Section 38 for the surfacing and improvement of the proposed access route, including associated retaining structures on land registered as CL68;
- Grant the application (Application B – APP/B6855/X/2015/516139) made under Section 38 for the erection of temporary protective fencing for a CADW Scheduled Ancient Monument known as Penlle'r Bebyll Cairn (Monument GM202) located at CL74;
- Grant the application (Application C – APP/B6855/X/2015/516140) made under Section 38 for the erection of temporary protective fencing for an undesignated historic asset MG62 located at CL77;
- Grant the application (Application D – APP/B6855/X/2015/516141) Section 38 for ditch improvement works alongside Rhydypany Road, subject to the works being undertaken in accordance with the Construction Method Statement;
- Grant the application (Application E – APP/B6855/X/2015/516142) made under Section 16 to deregister 12.31 hectares of common land at CL77 and to offer in exchange an area of 12.5 hectares;
- Grant the application (Application F – APP/B6855/X/2015/516143) made under Section 16 to deregister 25.75 hectares of common land at CL74 and to offer in exchange an area of 17.42 hectares; and
- Grant the application (Application G - APP/B6855/X/2015/516144) made under Section 16 to deregister 2.36 hectares of common land at CL68 and to offer in exchange an area of 1.24 hectares.

31. I enclose a copy of the Inspector's Report and a copy of the Order made under Section 17(1) and 17(2) of the Commons Act 2006, which has today been sent to the City and County of Swansea Council and all other parties who appeared at the Inquiry.

32. The Welsh Ministers' decision on these applications will be published as required by regulation 19 of the Deregistration and Exchange of Common Land and Greens (Procedure) (Wales) Regulations 2012 and 18(4) of the Works on Common Land, etc. (Procedure) (Wales) Regulations 2012.
33. This letter does not convey any approval or consent which may be required under any enactment, by-law, order, regulation or private agreement other than sections 16, 17, 38, 39 or 40 of the Commons Act 2006

Yours sincerely  
Lesley Griffiths

**Lesley Griffiths AC / AM**

Ysgrifennydd y Cabinet dros yr Amgylchedd a Materion Gwledig  
Cabinet Secretary for Environment and Rural Affairs