IN THE HIGH COURT OF JUSTICE
CARDIFF DISTRICT REGISTRY
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

(on the application of

(1) JEREMY BAILEY
(2) ALLAN NORMAN
(3) PETER WILSON)

Claimants

-and-

SECRETARY OF STATE FOR BUSINESS, ENTERPRISE AND REGULATORY REFORM

Defendant

GROUNDS OF CLAIM

Introduction

1. This is a Claim for permission to apply for Judicial Review of the decision of the Defendant dated 20th November 2007 to:

   (1) Grant consent for the construction and operation of a 350 MW wood chip fuelled thermal generating station on land at Puckey House, Port Talbot Docks, South Wales ("the proposed power station") pursuant to section 36 of the Electricity Act 1989 ("the s 36 Consent"); and

   (2) Direct that planning permission is deemed to be granted for the said station pursuant to section 90(2) of the Town and Country Planning Act 1990 ("the Deemed Planning Permission").

Background

2. The Claimants are local residents and a members of an organisation known as the "Port Talbot Residents Against Power Stations" ("the PT-RAPS"). The PT-RAPS has campaigned against the construction of the proposed power station. The Claimants have written letters to both the First and First Interested Partys objecting to the proposed power station on grounds including its potential impact on human health due to its implications for local air quality.

3. The Defendant is the Secretary of State responsible for making the decision that is the subject of challenge in these proceedings.

4. The First Interested Party is the local planning authority.

5. The Second Interested Party is the applicant for the s 36 consent and the deemed planning permission.

6. The Third Interested Party made the application in October 2006. The application was accompanied by an Environmental Statement.

7. The application was considered by the First Interested Party on two occasions:

   (1) 13th March 2007; and
   (2) 3rd April 2007.

8. A number of objections were made to the First Interested Party by local residents. These included a number of letters raising concerns relating to the impact of the development upon air quality. In addition a 640 signature petition was submitted stating objection on the grounds of its implications for local air quality.

9. The consideration of the matter on the 13 March 2007 was deferred for a site visit.

10. On the 3rd April 2007 the First Interested Party reconsidered the application. It resolved that

"that the Department of Trade and Industry be informed that the Authority has no objections to the proposal subject to the conditions contained in the circulated report, being imposed."

11. The matter then passed to the Defendant for a determination. A number of objections were made to the Defendant that included reference to concerns relating to the impact of the development upon air quality and human health.

12. The First Claimant objected by letters dated the 7th November 2006, 31st January 2007 and 8th March 2007. The Third Claimant objected by letters dated the 28th October 2006, 3rd March 2007 and the 2nd October 2007.

13. An online petition of some 264 signatures (including the Claimants) was organised which explained:

"We the undersigned petition the Prime Minister to ask the Department for Business, Enterprise & Regulatory Reform to hold a full Public Inquiry into plans by Prenergy Power Ltd to build a 350 MW Biomass Power Station at Port Talbot Docks.

We believe that the proposals pose significant health and environmental risks to local residents and support the calls of the Aberavon Constituency Labour Party for a full independent investigation into the plans.

The hugely detrimental impact that the power station would have on the town in terms of air pollution, waste removal and quality of life far outweighs any benefits."

14. The Prime Minister's Officer declined to comment but passed the petition on to the Defendant.

15. A demonstration march was held against the proposed power station on the 15th September 2007. Over 300 people marched through Port Talbot in opposition to the proposed power station.

16. A further petition was undertaken in September 2007. Some 4,502 signatures signed a petition to the effect that:

"*We the undersigned, petition the Department for Business Enterprise and Regulatory Reform to hold a full Public Inquiry into plans by Prenergy Power Ltd. To build a 350 MW power station, the largest biomass plant in the world, at Port Talbot Docks because we believe that:*

- *The biomass plant should not be sited in an area of existing poor air quality.*

....

- *The human health impacts have not been properly assessed.*"

17. On the 2nd October 2007, Mr. Wilson the Third Claimant wrote a letter to the Secretary of State for Energy setting out his objections to the proposed power station. This letter enclosed a report on the consequences of the proposed power station for air quality in Port Talbot prepared by Mr. Wilson for PT-RAPS.

The Procedure

18. Section 36(1) of the Electricity Act 1989 makes it unlawful to construct, extend or operate a generating station except in accordance with a consent granted by the Secretary of State.

19. The procedure for applying for a section 36 consent is regulated by Schedule 8 to the 1989 Act.

20. Paragraph 2(2) of Schedule 8 provides that if the local planning authority objects to an application and do not withdraw that objection, the Secretary of State is required to cause a public inquiry to be held.

21. In the present case, the First Interested Party made not such objection and so this provision did not require such an Inquiry to be held.

22. Paragraph 3(2) provides that where the Secretary of State is not required to hold an Inquiry by virtue of paragraph 2(2) but objections by other persons have been made:

> "*the Secretary of State shall consider those objections*, **together with all other material considerations**, *with a view to determining whether a public inquiry should be held with respect to the application...*" (emphasis added)

The Decision

23. In a decision letter dated the 20 November 2007, the Defendant determined that a section 36 consent should be granted and that a direction deeming the grant of planning permission should be made.

24. In the decision letter the Defendant considers whether or not to hold a public inquiry in section 3. He notes at paragraph 3.4 that the impact of emissions upon human health has been raised by objectors.

25. At Paragraph 3.7 and 3.8 the Secretary responds to these concerns. He notes that the environmental effect of the proposed power station should be "*considered in combination with existing or planned developments*": see paragraph 3.7 of the decision letter.

26. He concludes that the separate integrated Pollution, Prevention and Control Permit procedure:

"will ensure that there will be no significant adverse effect on the health of local residents. While the Secretary of State acknowledges that there is concern over the impact on health in the locality, he is satisfied that health concerns can be adequately addressed and that there is no health grounds [sic] for refusing the grant of planning permission."

27. He concludes at paragraph 3.21 that it would not be appropriate to cause a public inquiry to be held.

Air Quality

28. The presence of pollutants in the air has a direct effect upon human health. In a Ministerial statement dated 17 July 2007 introducing the National Air Quality Strategy 2007, the Minister for Marine, Landscape and Rural Affairs and Minister for the South East stated that notwithstanding the previous Air Quality Strategy:

"air pollution still has a significant impact and is estimated to reduce the life expectancy of every person in the UK by an average of 7-8 months, with estimated annual health costs of up to £20 billion."

29. Against this background, the European Community and the Government has been conducting research to identify standards for air quality.

Air Quality Standards

30. Paragraphs 13 and 14 of the NAQS explain:

"Air pollution can have a serious effect on people's health. Exposure to air pollution can have a long-term effect on health, associated in particular with premature mortality due to cardiopulmonary (heart and lung) effects.

In the short-term, high pollution episodes can trigger increased admissions to hospital and contribute to the premature death of those people that are more vulnerable to daily changes in levels of air pollutants. Air pollution also has negative impacts on our environment, both in terms of direct effects of pollutants on vegetation, and indirectly through effects on the acid and nutrient status of soils and waters.

15. The UK Government's and devolved administrations' primary objective is to ensure that all citizens should have access to outdoor air without significant risk to their health, where this is economically and technically feasible. This strategy is based on standards from expert recommendations representing levels at which no significant health effects would be expected in the population as a whole and on the standards and principles of better regulation. The objectives in this strategy aim to move air quality as close to these standards as possible."

31. The Distinction between an air quality standard and an air quality objective is explained in paragraph 17 of the NAQS as:

For the purposes of the strategy

• standards are the concentrations of pollutants in the atmosphere which can broadly be taken to achieve a certain level of environmental quality. The standards are based on assessment of the effects of each pollutant on human health including the effects on sensitive subgroups or on ecosystems

• objectives are policy targets often expressed as a maximum ambient concentration not to be exceeded, either without exception or with a permitted number of exceedences, within a specified timescale.

32. Paragraph 18 explains:

"Standards, as the benchmarks for setting objectives, are set purely with regard to scientific and medical evidence on the effects of the particular

pollutant on health, or, in the appropriate context, on the wider environment, as minimum or zero risk levels."

33. A standard is therefore set by reference to scientific data as representing a threshold below which there is a minimum or zero risk of harm to human health and above which there either will be or is a risk that there will be an adverse effect upon human health.

Particulate Matter

34. Particulate Matter is generally categorised on the basis of the size of the particles (for example $PM_{2.5}$ is particles with a diameter of less than 2.5μm). PM is made up of a wide range of materials and arise from a variety of sources. Concentrations of PM comprise primary particles emitted directly into the atmosphere from combustion sources and secondary particles formed by chemical reactions in the air. PM derives from both human-made and natural sources (such as sea spray and Saharan dust). In the UK the biggest human-made sources are stationary fuel combustion and transport. Road transport gives rise to primary particles from engine emissions, tyre and brake wear and other non-exhaust emissions. Other primary sources include quarrying, construction and non-road mobile sources. Secondary PM is formed from emissions of ammonia, sulphur dioxide and oxides of nitrogen as well as from emissions of organic compounds from both combustion sources and vegetation (see NAQS p16 Table 1)

35. In terms of the health effects of Particulate Matter the NAQS explains (NAQS p16 Table 1):

"*Both short-term and long-term exposure to ambient levels of PM are consistently associated with respiratory and cardiovascular illness and mortality as well as other ill-health effects. The associations are believed to be causal.* ***It is not currently possible to discern a threshold concentration below which there are no effects on the whole***

population's health. *PM_{10} roughly equates to the mass of particles less than 10 micrometres in diameter that are likely to be inhaled into the thoracic region of the respiratory tract. Recent reviews by WHO and Committee on the Medical Effects of Air Pollutants (COMEAP) have suggested exposure to a finer fraction of particles* ($PM_{2.5}$, *which typically make up around two thirds of PM_{10} emissions and concentrations) give a stronger association with the observed ill-health effects, but also warn that there is evidence that the coarse fraction between (PM_{10} – $PM_{2.5}$) also has some effects on health.*" (emphasis added)

36. It follows that there is no safe level of PM_{10}. Further pollution episodes of PM_{10} have been scientifically established to bring forward deaths.

37. The NAQS defines the following objectives for particulate matter:

	Averaging period	*Objective Value*
24-hour limit value for the protection of human health	24 hours	50 µg/m³ PM_{10}, not to be exceeded more than 35 times a calendar year
Annual limit value for the protection of human health	Calendar year	40 µg/m³ PM_{10}

These objectives are to be achieved now.

38. The NAQS explains that in respect of the Air Quality Objectives:

"The air quality objectives in the Air Quality Strategy are a statement of policy intentions or policy targets. As such, there is no legal requirement to meet these objectives except in as far as these mirror any equivalent legally binding limit values in EU legislation." (paragraph 22 of the NAQS)

39. In respect of $PM_{2.5}$, the NAQS explains:

"29. The current policy framework and the legislative requirement to meet EU air quality limit values everywhere in the UK tends to direct our

attention to localised hotspot areas of pollution (where the objectives are not met). There is clear and unequivocal health advice that there is no accepted threshold effect, i.e. no recognised safe level for exposure to fine particles ($PM_{2.5}$). For this pollutant, the current policy framework is therefore not going to generate the maximum improvement in public health for the investment made, because it focuses attention on hotspots only, despite much more widespread adverse effects on health being likely.

30. We have therefore adopted an 'exposure reduction' approach for $PM_{2.5}$ to seek a more efficient way of achieving further reductions in the health effects of air pollution by providing a driver to improve air quality everywhere in the UK rather than just in a small number of localised hotspot areas, where the costs of reducing concentrations are likely to be exceedingly high. This will act to make policy measures more cost-effective and is more likely to maximise public health improvements across the general population."

40. Thus, there is a general policy of reducing exposure to $PM_{2.5}$ where this costs of doing so do not outweigh the benefits.

EU Legislation

41. Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (or the "Air Quality Framework Directive") set out the framework within Europe for the identification of air quality limit values, for the assessment of existing levels of ambient air quality and for the steps that Member States must take in circumstances where ambient air quality exceeds the limit values. In particular it should be noted that:

(1) The purpose of the Directive is to "*protect the environment as a whole and human health*" and that "*concentrations of harmful air pollutants should be avoided, prevented or reduced*": Recital 2.

(2) A limit value is defined as:

> *"a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained"*

(3) Article 7(1) provides:

> *"Member States shall take the necessary measures to ensure compliance with the limit values."*

(4) Article 9 provides that where limit values have been aiitained:

> *"Member States shall maintain the levels of pollutants...below the limit values and shall endeavour to preserve the best ambient air quality, compatible with sustainable development."*

42. In respect of particulate matter, the EU has defined limit values in the Directive 1999/30/EC ("the First Air Quality Daughter Directive"). In particular Article 5(1) provides:

"*Member States shall take the measures necessary to ensure that concentrations of PM_{10} in ambient air, as assessed in accordance with Article 7, do not exceed the limit values laid down in Section I of Annex III as from the dates specified therein.*"

43. The limit values laid down in Section I of Annex III are the same as the NAQS objectives for PM_{10}. In other words, the NAQS objectives are not merely policy objectives but are limit values that are to be attained within the UK in order to protect human health.

The Air Quality Standards (Wales) Regulations 2007

44. The EU Directives have been transposed into law in Wales in the Air Quality Standards (Wales) Regulations 2007 with effect from 15th March 2007.

45. Regulation 7(1) of the 2007 Regulations provides that:

"(1) The National Assembly shall take the necessary measures to ensure that the air quality standards in regulation 6 are attained.
(2) In the case of Group B pollutants, the necessary measures are—
(a) measures not entailing disproportionate costs; and
(b) in so far as concentrations of a relevant pollutant arise as a result of emissions from installations to which Council Directive 96/61/EC concerning integrated pollution prevention and control(10) applies, the application of best available techniques to prevent pollution from those installations in accordance with that Directive."

46. Regulation 6 of the 2007 Regulations provides:

"(1) Schedule 1 prescribes the following air quality standards—
(a) for Group A pollutants, the limit values set out in Part 1 of that Schedule;
(b) for Group B pollutants, the target values set out in Part 3 of that Schedule; and
(c) for ozone, the target values and long-term objectives set out in Part 4 of that Schedule.

(2) Limit values—
(a) shall be attained by the attainment date specified for the limit value concerned; or
(b) apply when these Regulations come into force, if no attainment date is specified.

(3) Target values shall be attained from the attainment date specified, in so far as this is possible.

47. Regulation 2(1) of the 2007 Regulations defines "Group A pollutants" means benzene, carbon monoxide, lead, nitrogen dioxide and oxides of nitrogen, PM_{10} and sulphur dioxide. PM_{10} is therefore a Group A pollutant within the meaning of the 2007 Regulations.

48. The PM_{10} limit value applies from the date when the 2007 regulations came into force as no attainment date is specified in Schedule 1 for PM_{10}. In other words as at the date on which the Defendant took the decision, the National Assembly was under a duty to take the necessary measures to ensure that the PM_{10} limit values are attained in Wales.

49. It should be noted that there is a distinction between Group A pollutants and Group B pollutants in Regulation 7(2) of the 2007 regulations. In respect of Group B pollutants, the cost of attaining the limit value is a relevant consideration. There is no such qualification in respect of Group A pollutants.

50. It is also relevant to note that Regulation 10 (2) of the 2007 regulations provides that where limit value is complied with, the National Assembly is under a duty to:

(1) maintain compliance with the relevant limit values or target values; and
(2) endeavour to maintain the lowest concentration which he considers to be compatible with sustainable development.

51. In other words the objective is to reduce concentrations to their lowest levels consistent with the need for economic development.

The Environment Act 1995

52. Part IV of the Environment Act 1995 provides for local authorities to carry out reviews of the air quality in their areas. Section 83 of the 1995 Act provides that:

"Where, as a result of an air quality review, it appears that any air quality standards or objectives are not being achieved, or are not likely within the relevant period to be achieved, within the area of a local authority, the local authority shall by order designate as an air quality management area (in this Part referred to as a "designated area") any part of its area in which it appears that those standards or objectives are not being achieved, or are not likely to be achieved within the relevant period."

53. Section 84(2)(b) of the 1995 Act provides that a local authority is under a duty to prepare:

"...a written plan (in this Part referred to as an "action plan") for the exercise by the authority, in pursuit of the achievement of air quality standards and objectives in the designated area, of any powers exercisable by the authority."

54. So where the limit value for PM_{10} is identified in a review as likely to be exceeded the local authority must:

(1) Designate the area where the limit is likely to be exceeded as an air quality management area (An AQMA);

(2) Prepare an air quality action plan (an AQAP);

Air Quality Management Policy

55. Under section 88 of the 1995 Act the National Assembly for Wales has the power to issue guidance relating to local air quality monitoring. Policy Guidance LAQM.PG(03) is joint guidance issued by the National Assembly and DEFRA. It sets out, amongst other things the general

principles behind air quality and land use planning (see para 1.01 of LAQM.PG(03)).

56. LAQM.PG(03) advises that:

"7.33 Any air quality consideration is capable of being a material planning consideration, in so far as it affects land use. Whether it actually is and how much weight should be attached to it will depend upon the facts of each individual case. Over the last three years this has been tested through the English courts in a number of cases.

7.34 Wherever a proposed development is likely to have significant air quality impacts, close co-operation between local planning authorities and those with responsibilities for air quality and pollution control will be essential. The impact on ambient air quality is likely to be particularly important, however:

- ***where the development is proposed within, or adjacent to, an AQMA**;*
- *where the development could in itself result in the designation of an AQMA or extension of an existing AQMA;*
- ***where the development, or associated traffic, is likely to result in predicted levels of air pollutants close to a breach (i.e. leaving little headroom for future developments) of the Air Quality Objectives**; or*
- ***where to grant planning permission would conflict with, or render unworkable, elements of a local authority's air quality action plan.***

7.35 It is not the case that all planning applications for developments within or adjacent to AQMAs should be refused if the developments result in a deterioration of local air quality. Such an approach could sterilise development, particularly where authorities have designated their entire areas as AQMAs.

7.36 Local planning authorities may be faced with numerous individual, small planning applications which separately might not be considered to have a significant impact on air quality but which cumulatively would

have a significant impact. Each planning application should be determined on its individual merits in accordance with the development plan unless material considerations indicate otherwise. In practice, this should mean that individual small-scale applications that accord with the development plan may well continue to receive approval ***until there is a danger an Air Quality Objective may be breached.***

7.37 All planning applications should be supported by such information as is necessary to allow a full consideration of the impact of the proposal on the air quality of the area. ***It may be appropriate in some circumstances for the developer to fund mitigating measures elsewhere within the AQMA to offset any increase in local pollutant emissions as a consequence of the proposed development, such as funding of better public transport links****.*

In considering whether a site within an AQMA is an appropriate location for new housing, local authorities should consider where, within the AQMA, likely exceedances have been identified and by how great a margin the Air Quality Objective levels are currently exceeded, as well as when they are forecast to be achieved. ***Housing developments might in some cases best be delayed until the relevant Air Quality Objective levels have been achieved*** *or the layout modified to avoid the area of the exceedance."* (emphasis added)

57. Planning Policy for Wales advises:

"13.12.1 The potential for pollution affecting the use of land will be a material consideration in deciding whether to grant planning permission. Material considerations in determining applications for potentially polluting development are likely to include:

- *location, taking into account such considerations as the reasons for selecting the chosen site itself;*
- ***impact on health and amenity****;*

• ***the risk and impact of potential pollution from the development insofar as this might have an effect on the use of other land and the surrounding environment (the environmental regulatory regime may well have an interest in these issues, particularly if the development would impact on an Air Quality Management Area*** *or a SAC);*

• *prevention of nuisance;*

• *impact on the road and other transport networks; and*

• *the need, where relevant, and feasibility of restoring the land (and water resources) to standards sufficient for an appropriate after use. (Powers under the Pollution Prevention and Control Act 1999 require an operator to return a site to a satisfactory state on surrender of an Integrated Pollution Prevention and Control Permit).*

13.12.2 Local planning authorities should work closely with pollution control authorities when determining planning applications. The timing of applications under the different regimes may vary and the information relevant to an authorisation under Part I of the Environmental Protection Act 1990 may not be available when applying for planning permission. ***In deciding to grant permission for a development local planning authorities should be satisfied that any remaining pollution concerns are capable of being dealt with under the other pollution regimes****."*
(emphasis added)

Air Quality in Port Talbot

58. Port Talbot is an industrialised area with the M4 motorway is close proximity.

59. In accordance with its duties under the Environment Act 1995 (see above), the First Interested Party carried out an appraisal as to whether there was a likelihood of the air quality in its area exceeding the relevant air quality objectives.

60. The First Interested Party concluded that in respect of PM_{10} there was likelihood that the relevant objective (i.e. the limit value) would be exceeded in a part its area. Accordingly it designated the Taibach Margam Air Quality Management Area ("the AQMA"). The geographical extent of the AQMA can been on the plan attached as Appendix 1.

61. As a result, the First Interested Party produced an Air Quality Area Action Plan in January 2003, the objective of which was to reduce the levels of PM_{10} within the AQMA so that the limit value would not be exceeded.

62. The AQAAP identified a number of steps that would be taken to reduce PM_{10} the most important of which were:

(1) The rebuilding of a blast furnace at the Corus Steel Works. The AQAp identified that an air quality improvement in the range of a 10-80% would result. Indeed the AQAP states:

"it is likely that the level of PM_{10} within the AQMA is likely to fall below the current national standard by the end of 2004 as a result of the Council's multi-agency Action Plan, a major part of which is the investment by Corus in rebuilding blast furnace number 5..." (Ref A3 within the AQAP);

(2) A Dust reduction Programme at the Corus Steel Works

(3) A planning policy approach which was set out in the draft Unitary Development Plan

63. The draft Unitary Development Plan stated:

"7.19.3 A significant contribution to the problem (which is defined as the number of occasions when the Assembly Government's Air Quality Objective for PM_{10} is exceeded) has been attributed to processes within the Corus Steel works. ***A programme of investment has been committed by Corus which is anticipated should substantially address***

the problem by the end of 2004. *This programme has been accelerated by Corus's decision to replace Blast Furnace No 5 following the tragic incident in 2001."* (emphasis added).

64. Thus, the AQAP anticipated that the works to the Corus Plant would solve the PM_{10} air quality issue in the area. Further, the air quality policies in the draft UDP were based upon an assumption that this was the case.

65. The works to the Corus plant were undertaken, however the anticipated reductions in PM_{10} did not materialise. The draft UDP was modified so that it now explains:

> *"A significant contribution to the problem (which is defined as the number of occasions when the Assembly Government's Air Quality Objective for PM_{10} is exceeded) has been attributed to processes within the Corus Steel works. It had been anticipated that the rebuilding and upgrading of Blast Furnace No. 5 following an explosion in 2001 would have substantially addressed the problem. Following recommissioning, however, PM_{10} levels have risen above the objective although not to levels as high as previously. As a result the AQMA is likely to remain in force until the objectives are met."*

66. Thus, the main action identified in the AQAP has been undertaken and has not resulted in the PM_{10} limit value being met year on year within the AQMA.

67. Data in the Second Interested Party's Environmental Statement identifies that there were breaches of the 24 hour limit value for PM_{10} in 2001, 2003 and 2004. The Environmental Statement presented no data for 2006 or 2007 (understandably given that it was produced in October 2006).

68. In respect of 2005, however, the First Interested Party produced an Air Quality Report which indicated that there had been 29 days when the 24 hour value had exceed 50 $\mu g/m^3$. However the Report explains:

"This is a little less than the corresponding number of exceedences in 2004, i.e. 38. However, nearly one month of data was lost in November/December due to equipment failure, which necessitated the analyser being returned to the manufacturer for repair....

The Air Quality Objective Level, which is to be achieved by 31st December 2004, was complied with, but it is possible that additional exceedences may have arisen during the weeks when the equipment was being fixed. Consequently it is too soon to consider un-declaration of the Air Quality Management Area."

69. In addition, the Council has indicated in the Addendum report of 13th March 2007 to the Planning and Development Control Committee that the Environment Agency had completed a trial in 2005 whereby that Agency had monitored PM_{10} in Port Talbot. The Agency found that if the trial had been for 12 months then it was more likely than not that the 24 hour limit value for PM_{10} would have been breached.

70. It should be noted that the defects in the monitoring data for 2005 were not reported in the Second Interested Party's Environmental Statement.

71. In respect of 2006, the Council has indicated in the Addendum Report of 13th March 2007 to the Planning and Development Control Committee that there were 35 days where the level of 50 $\mu g/m^3$ of PM_{10} were exceed i.e. exactly at the limit value. Thus the limit value was not exceeded in 2006.

72. In respect of 2007, PT-RAPS identified in its Health report that as at 28th October 2007 there had been 38 exceedences of the level of 50 $\mu g/m^3$ of PM_{10}. Thus, at the date of the decision that is the subject of challenge in this case, the limit value for 2007 had already been breached.

73. Indeed, in a letter from Dr. Ann Delahunty, Consultant in Public Health and the Local Director of Public Health for Port Talbot within the National

Public Health Service for Wales, dated 1st June 2007 to the First Interested Party stated:

"*As regards air pollution in Neath Port Talbot, and specifically the level of PM10s, I share your concern. In the light of the large amount of work and money invested by all partners to improve air quality in recent years,* ***the levels seen in the first half of this year are particularly disturbing****. The exceedences which happened across the UK in March were due to causes external to the UK and not manageable locally. The reason for the increased number of exceedences since that time, however, is unclear and is under investigation.* ***It appears inevitable that this standard will be breached for 2007***." (emphasis added)

74. Thus, the position is that at present there is an AQMA designated in Port Talbot. The actions that were expected to lower grounds level concentrations of PM_{10} so that the 24 hour limit value would be met have been taken. Since then, as a matter of fact, the extent to which the limit value is breached has increased. Thus, the AQAAP has failed to reduce ground level concentrations to a level where the limit value is being met year on year.

The Impact of the Development

75. The proposed development lies within the AQAAP area.

76. The proposed development has the potential to produce PM_{10} form the following sources:

(1) the stack;
(2) vehicles associated with the development. The ES identified that the development would generate traffic movements of 250 cars, 15 Light Goods Vehicles and 45 Heavy Goods Vehicles during course of day. The ES also identified that generally speaking the largest single source of PM_{10} from man made source is road transport;

(3) Wind blown dust from woodchip piles.

77. The Second Interested Party produced an Environmental Statement. In this consultants instructed by the Second Interested Party examined the impact that the development would have upon air quality. It should be noted that

(1) The ES was produced on 5 October 2006
(2) It adopted as a baseline air quality level for the consideration of PM_{10} an average of the 2002, 2004 and 2005. This was a level that resulted in a baseline being adopted where the limit value was not breached.
(3) The atmospheric dispersion modelling methodology used for impact assessment only examined the implications of the emission of PM_{10} from the stack.
(4) The impact assessment within the ES did not identify any particular level of contribution to PM_{10} from windblown dust describing the impact from this source as "negligible" (see page 96 section 8.7.1)
(5) The impact assessment within the ES did not assess the potential effect of emissions from vehicles associated with the development
(6) Notwithstanding these omissions it predicted that the development would increase the level of PM_{10} within the AQMA.
(7) Notwithstanding that there was an assessment of the cumulative impact of the proposed development with the impact of a proposed ESBI 1,100 MW combined cycle gas turbine power station in respect of nitrogen dioxide, there was no such assessment in respect of PM_{10};
(8) There was no assessment of the implications of the proposed development upon $PM_{2.5}$ ground level concentrations.

THE GROUNDS OF CLAIM

78. The Grounds of Claim are that the decision to refuse to hold and inquiry and/or to grant deemed planning permission for the proposed development was unlawful because:

(1) The Secretary of State has failed to have regard to the duty pursuant to section 7 of the 2007 Regulations and/or the Air Quality Framework Directive to take all necessary measures so that the PM_{10} 24 hour limit value is attained in Part Talbot;

(2) Alternatively, if he had such regard to the duty under section 7 of the 2007 Regulations and/or the Air Quality Framework Directive, his decision to grant planning permission thereby increasing the amount of ground level concentrations of PM_{10} within an area which has such levels in excess of the PM_{10} 24 hour limit value was perverse and/or irrational;

(3) Alternatively, if he had regard to the duty under section 7 of the 2007 regulations and/or Air Quality Framework Directive, he failed to give any adequate reasons for his conclusion that that the proposed development would be acceptable in air quality terms and in terms of its impact upon human health;

(4) He failed to have regard to a material consideration, namely Policy Guidance LAQM.PG(03), in particular he failed to consider:

i. Whether the development could in itself result in the designation of an AQMA or extension of an existing AQMA;
ii. Whether to grant planning permission would conflict with, or render unworkable, elements of a local authority's air quality action plan.

(5) He failed to have regard to the "exposure reduction" policy within the National Air Quality Strategy with regard to $PM_{2.5}$.

Ground 1 - The Duty Under the 2007 Regulations

79. The framework Directive requires Member States to take the necessary measures to ensure that the 24 hour limit value is achieved now.

80. This duty is transposed into law in Wales through the 2007 Regulations. The 2007 Regulations place the duty to take the necessary steps upon the National Assembly.

81. Insofar as the 2007 Regulations do not directly impose the duty under section 7 upon the Defendant, the State has failed to transpose the requirements of the Framework Directive properly:

(1) The Framework Directive imposes a requirement on the State to take necessary measures to ensure that the 24 hour PM_{10} limit value is achieved;

(2) That requirement is directly effective;

(3) It applies to the Defendant as an emanation of the State.

82. Accordingly, the Defendant is required when determining a section 36 consent application and when determining whether or not to grant deemed planning permission to consider whether if the consent/deemed planning permission were granted, this would be consistent with taking the necessary steps to ensure that the 24 hour PM_{10} limit is met.

83. This requires the Secretary of State to have regard to:

(1) The existing ground level concentrations of PM_{10} in the area that may be affected by the proposed development;

(2) The extent to which there is variation in the existing ground level concentrations of PM_{10} from year to year in the area that may be affected by the proposed development;

(3) The likely impact which the development as a whole will have upon ground level concentrations of PM_{10} in the area that may be affected by the proposed development;

(4) The likely impact of other planned or proposed developments may have, in combination with the development that is the subject of the application upon ground level concentrations of PM_{10} in the area;

(5) The extent to which any AQAP may result in a reduction in ground level concentrations of PM_{10} in the area that may be affected by the proposed development.

84. **Existing Ground Level Concentrations:** the Secretary of State has to have regard to the latest information available regarding the existing ground level concentrations of PM_{10} in the area that may be affected by the proposed development. As such there is a duty on the Secretary of State to obtain the necessary information if it is not provided to him. In the present case, the Secretary of State had no information regarding the monitoring of PM_{10} in the AQMA for 2007. He failed to obtain such information even though it was available. He has therefore failed to have regard to a material consideration. Further this information would have demonstrated that the 24 hour limit value for PM_{10} for 2007 had already been exceeded within the AQMA by October 2007.

85. **Annual Variation:** In order to ensure that the limit value is obtained, if it is the case that there is a variation in the ground level concentrations of PM_{10}, the decision maker will have to ensure that a baseline level of PM_{10} is attained that is such that even allowing for such variation the limit value is not likely to be exceeded. The Defendant has failed to have regard to this factor in his decision.

86. **Impact of the Development:** The Defendant is required to determine the likely impact of all sources of PM_{10} arising from the development upon ground level concentrations. In the present case, the Defendant had no

quantified assessment of the likely impact of the development upon ground level concentrations within the AQMA from all sources. He had no quantified assessment of the likely PM_{10} contribution from windblown dust and there was no assessment before him of the likely impact of road traffic associated with the proposed development even though this is the most significant man-made source of PM_{10}. As a result the Defendant failed to have regard to a material consideration.

87. **Cumulative Impact**: In his decision letter, the Defendant explains that the environmental effect of the proposed power station should be "*considered in combination with existing or planned developments*": see paragraph 3.7 of the decision letter.

88. **Air Quality Action Plan:** The Defendant is required to form a view as to likely level of ground level concentrations of PM_{10} in the future. In order to form such a view, the Defendant must have regard to the Air Quality Action Plan. The Defendant did not have regard to the AQAP. It was not before him. He did not therefore consider the extent to which the AQAP would result in any future reduction in ground level concentrations of PM_{10}, if at all. In the circumstances he failed to have regard to a material consideration.

Ground 2 – Irrational/Perverse Conclusion

89. The Claimants contend that, in the light of the obligations set out in the Framework Directive and/or the 2007 Regulations, to grant permission for development in circumstances where ground level concentrations are above the limit value, where an AQAP is unlikely to reduce ground level concentrations below the limit value and where the proposed development would add to ground level concentrations is unlawful.

90. In the circumstances of this case, the grant of a section 36 consent and/or deemed permission could only be lawful if the Defendant concluded that the ground level concentrations of PM_{10} within the AQMA with the

proposed development in operation would be such as to ensure that the limit value would be achieved.

91. If the Defendant is to be taken as having so concluded, such a conclusion is perverse and/or irrational:

(1) The background level concentrations monitoring of PM_{10} reveals consistent breach of the 24 hour limit value;

(2) There is wide variation in the extent of the breach over recent years;

(3) In order to ensure that the limit value is attained, the Defendant would have to determine that the ground level concentrations within the AQMA would drop to a level where even allowing for such variation, the addition of the proposed development in combination with other proposed developments would not result in breach of the limit value;

(4) The steps in the AQAP that were expected to result in large reductions in PM_{10} to the extent that the limit value would be complied with by 2004 have been taken. Breach of the limit value continues and the remaining steps within the AQAP were identified as only likely to have a small impact upon PM_{10} levels;

(5) The AQAP is unlikely to reduce PM_{10} levels any further and in the future the limit value is not likely to be attained even without the proposed development;

92. In the circumstances it was irrational/perverse to conclude that with proposed development the limit value within the AQMA would be attained.

93. Rather, the only reasonable conclusion to draw is that:

(1) The local authority considers that within the AQMA the 24 hour limit value for PM_{10} is not likely to be attained. If it considered otherwise it would have de-designated the AQMA. Thus the limit value is not likely to be attained even without the proposed development.

(2) The AQAP is unlikely to reduce PM_{10} levels significantly;

(3) The proposed development will result in an increase in the levels of PM_{10} within the AQMA;

(4) To grant the section 36 consent and the deemed planning permission, is therefore to increase the level of PM_{10} in an area where the limit value is not attained.

(5) To increase PM_{10} levels in such circumstances is not consistent with the requirement to take the necessary measures to ensure that the limit value is attained;

(6) To grant the section 36 consent and the deemed planning permission, is therefore irrational/perverse and unlawful.

94. If the Defendant is to be taken as having concluded to permit the proposed development was to take all necessary measures to ensure that the limit value is attained, that conclusion was perverse/irrational.

Ground 3: Reasons

95. The Defendant concluded that he was satisfied that the proposed development would not give rise to harm to human health.

96. The Defendant has failed to provide any or any adequate reasons to explain how he arrived at his conclusion that the proposed development would be acceptable in air quality terms and in terms of its impact upon human health. In particular, he has failed to provide reasons:

(1) Explaining whether he has had regard to the State's duty to take necessary steps to ensure that the 24 hour PM_{10} limit value is attained;

(2) Explaining whether he took the view that with the proposed development the 24 hour PM_{10} limit value would be attained or not, and, if not, why harm to human health would not arise;

(3) Explaining what view he took of the likely level of existing and future ground level concentrations of PM_{10} in the area that may be affected by the proposed development and why;

(4) Explaining what view he took of the likely level of variation in the existing and future ground level concentrations of PM_{10} from year to year in the area that may be affected by the proposed development and why;

(5) Explaining how he took that view of the likely level of variation into account;

(6) Explaining the view he took of the likely impact which the development as a whole will have upon ground level concentrations of PM_{10} in the area that may be affected by the proposed development, and in particular in respect of PM_{10} arising from windblown sources and from road traffic;

(7) Explaining, the view he took of the likely impact of other planned or proposed developments, in combination with the development that is the subject of the application upon ground level concentrations of PM_{10} in the area;

(8) Explaining, the view he took of the extent to which the AQAP may result in a reduction in ground level concentrations of PM_{10} in the area that may be affected by the proposed development and why.

97. In the circumstances, the Claimants are unable to determine the reasons why the Defendant came to the view that the proposed development would not cause harm to human health and would be acceptable in terms of its impact upon air quality. As a result he is substantially prejudiced.

Ground 4 - Policy Guidance LAQM.PG(03)

98. The Defendant has failed to have regard to the Policy Guidance in LAQM.PG(03) which is a material consideration. In particular he failed to consider:

i. Whether the development could in itself result in the designation of an AQMA or extension of an existing AQMA;
ii. Whether to grant planning permission would conflict with, or render unworkable, elements of a local authority's air quality action plan.

Ground 5: $PM_{2.5}$

99. The Defendant has failed to have regard to the policy of exposure reduction contained within the NAQS in relation to $PM_{2.5}$.

100. In particular, he has failed to consider what the impact of the proposed development would be upon levels of $PM_{2.5}$ in the locality. He had not forecasts of the impact of the proposed development upon levels of $PM_{2.5}$ and he had no information regarding current background ground level concentrations of $PM_{2.5}$.

101. Further he has failed to consider whether to grant the section 36 consent and the deemed planning permission would be consistent with or contrary to the policy of exposure reduction to $PM_{2.5}$.

The Relief Sought

102. In the circumstances, the Claimants seek an order quashing the Defendants decision to grant the section 36 consent and the direction that deemed planning permission be granted. The Claimants also seeks their costs.

Conclusion

103. The Claimants respectfully request that permission to apply for judicial be granted in this matter.

REUBEN TAYLOR

Landmark Chambers
180 Fleet Street
London EC4A 2HG