

**PLANNING ACT 2008  
 Section 53: Rights of Entry**

**SECRETARIAT REPORT TO COMMISSIONER**

**PROPOSAL BY NNB GENERATION COMPANY LIMITED ('the Applicant')  
 PROPOSED HINKLEY POINT C NEW NUCLEAR POWER STATION ('the Project')**

Date s.53 request received by Commission	07 January 2011
Landowner details	Innovia Cellophane Limited
Details of the land to which the request relates	Land at the former Innovia factory site, Bridgwater, Somerset (postcode TA6 4PA)  Plan A of correspondence dated 25 March 2011 shows the 'Green Land' to which the request relates.
Is this is a stand alone application or part of a series of s.53 applications made to the Commission?	Stand alone

**Background**

Under s.53 of the Planning Act 2008 ("the Act"), the Commission has a power to authorise a person to enter on to third party land to carry out surveys.

Ss. 53(1) and (2) of the Act state that:

(1) Any person duly authorised in writing by the Commission may at any reasonable time enter any land for the purpose of surveying and taking levels of it in connection with—

- (a) an application for an order granting development consent, whether in relation to that or any other land, that has been accepted by the Commission,
- (b) a proposed application for an order granting development consent, or
- (c) an order granting development consent that includes provision authorising the compulsory acquisition of that land or of an interest in it or right over it.

(2) Authorisation may be given by the Commission under subsection (1)(b) in relation to any land only if it appears to the Commission that—

- (a) the proposed applicant is considering a distinct project of real substance genuinely requiring entry onto the land,
- (b) the proposed application is likely to seek authority to compulsorily acquire the land or an interest in it or right over it, and
- (c) the proposed applicant has complied with section 42 in relation to the proposed application.

On 7<sup>th</sup> January 2011 the Commission received a request from the Applicant under s.53 of the Act to enter third party land in connection with the proposed application for Hinkley C nuclear power station (Document 1).

As this application has not yet been submitted to the Commission the request falls within s.53(1)(b) and the Commission can only grant an authorisation if it appears to the Commission that the requirements of s.53(2) have been met.

There is no prescribed procedure for making a request under s.53 so in order to assist applicants the Commission has produced an Advice Note (May 2010) setting out the information that the Commission would expect to receive. This advice has no statutory status and therefore the Commissioner would determine a request even if the applicants had not followed the advice.

### **The Land to which entry is requested**

The s.53 request relates to a plot of land shown coloured green (“the Land”) on the revised Plan A (dated 17 March 2011) enclosed with the Applicant’s correspondence dated 25 March 2011 (Document 26, Enclosure 5).

The Applicant has confirmed that the Land is within the freehold title of Innovia Cellophane Limited and they have supplied a copy of the registered title (ST125423) (Document 2).

The Applicant has stated that the following parties may have interests in the Land and therefore may fall within categories 1 or 2 of s.44 of the Act in relation to the Land and would need to be included within the s.42 consultation:

- Bridgewater Sports and Social Club
- Henry Boot plc and Hallam Land Management
- ANB AMRO Bank N.V/Royal Bank of Scotland N.V
- Shell Mex and BP Ltd
- BFF Nonwovens Ltd and Kenmore (Bridgewater) LLP

The Applicant has confirmed that these parties have been included in the Stage 2 Update consultation (s.42 consultation).

The Applicant has confirmed that they have contacted Henry Boot and Hallam Land Management who confirmed that their consent was not needed to access the Land. The Applicant has confirmed that the rights held by the other

parties would not be affected and therefore their consent has not been sought (Document 26, Schedule 1, Section A, paragraph 2.3).

It is considered that the Applicant's view on this point is correct and such consent is not required.

### **Purpose of Requiring Entry onto the Land**

Authorisation under s.53(1) for entry onto land is only for the purpose of surveying and taking levels. The Commission has given s.51 advice to the effect that it considers that authorisation under s.53 extends to entry for the purposes of environmental surveys on the basis of statutory interpretation following case law deriving from *Pepper v. Hart* ([1993] 1 All ER 42 HL).

The Applicant has confirmed in a letter dated 7<sup>th</sup> January 2011 that "NNB Genco requests entry to the Land in order to carry out surveys, including for the purposes of investigating and assessing environmental impacts". The results of the work will be relevant to the environmental impact assessment of the project that the Applicant is required to carry out under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009" (Document 1).

### **Compliance with criteria under s.53(2)**

As the proposed application for Hinkley C nuclear power station is currently at the pre-application stage, the Commission must be satisfied that the criteria under s.53(2) have been met.

#### **S.53(2)(a)**

***The proposed applicant is considering a distinct project of real substance genuinely requiring entry onto the land***

*The proposed applicant is considering a distinct project of real substance*

S.46 notification was provided to the Commission dated 11 November 2009. This was accepted by the Commission. The s.46 notification letter states that the applicant for the proposed Hinkley C application is the Applicant. In their letter to the Commission dated 7<sup>th</sup> January 2011 they state that they are proposing to make an application for an order granting development consent and that they will also seek consent for associated development (Document 1).

The Project is listed in Commission's list of projects available on its website.

The letter of 7<sup>th</sup> January 2011 states that the Land "would be used as a campus (including accommodation living blocks and ancillary buildings) for the duration of the construction of Hinkley Point C". The Commission has provided s.51 advice without prejudice to any subsequent decision by the Commission, to the effect that accommodation campuses are not dwellings

within the meaning of s.115(2)(b) of the Act and can be considered to be associated development.

It appears that criterion (a) has been met.

*Genuinely requiring entry onto the land*

The Applicant has supplied details of the proposed surveys on the Land.

***Description of proposed surveys***

Please refer to Document 26, Enclosure 1 (Updated Table of Requested Surveys) and Schedule 1, Section A, paragraph 4.3.

***Location of proposed surveys***

Please refer to Document 26, Enclosure 1 (Updated Table of Requested Surveys) and Schedule 2, Section D, paragraph 2.3.

***s.53(2)(b)***

***The proposed application is likely to seek authority to compulsorily acquire the land or an interest in it or a right over it***

The Applicant explained its intention to compulsorily acquire the Land if it was not able to acquire the land by agreement in the initial request letter dated 7 January 2011 (Document 1).

The revised Plan A (Document 26, Enclosure 5) shows the Land as being within the proposed DCO application boundary.

The Applicant's s.42 consultation letters also refer to this intention (Document 26, Enclosure 2).

It appears that criterion (b) has been met.

***s.53(2)(c)***

***The proposed applicant has complied with section 42 in relation to the proposed application***

In satisfying this criterion, the Applicant need not have carried out all the consultation that needs to be done prior to the submission of an application for a Development Consent Order. Compliance with s.42 at this stage does not preclude further consultation in accordance with s.42 being carried out at a later date

S.46 notification must take place before S.42 consultation. The s.46 notification identifies the Applicant as the applicant of the Project. This is consistent with the s.53 authorisation request which identifies the Applicant as the applicant for authorisation under s.53 (please refer to letter dated 7 January 2011 (Document 1)).

The Applicant supplied the following on 7 January 2011 (Document1):

- 2 formal stages of consultation (Appendix A and B).
- S.42 letter sent to landowner (Appendix C and D). Appendix E is a response from landowner to consultation letters. The Commission requested further information for evidence of compliance with s.42 e.g. list of consultees and dates, in a letter dated 24 January 2011 to the Applicant (Document 8).

The Applicant has supplied the following dated 25 March 2011 (Document 26, Enclosure 2):

- Copies of Stage 2 and Stage 2 Update consultation letters (which has been undertaken since initial s.53 request)
- List of all persons identified and consulted in accordance with s.42 provided under separate letter (for data protection and confidentiality purposes). The s.42 list identifies consultees in separate tables as s.42(a) - (d) consultees (Document 27).

It appears that criterion (c) has been met.

### **CLG Guidance**

There is no statutory guidance in respect of the application of s.53 but DCLG have produced a guidance note on fees, The Infrastructure Planning (Fees) Regulations 2010: Guidance, which refers to s.53 paragraph 1 of this note states that it is non statutory and it is intended to aid interpretation of the Infrastructure Planning (Fees) Regulations 2010. It states at paragraph 3 of the Annex that the policy intention in respect of s.53 is that “where an applicant is refused information and / or access, and is genuinely considering a nationally significant infrastructure project which would require use of the land in question, they can submit a request to the IPC who can require the information or access to be provided”.

“Applicants are expected to act reasonably, first seeking to obtain relevant information or permission to access land directly before seeking authorisation under these provisions. Specifically, applicants should only submit requests for ..... access to parcels of land were they consider they have been reasonably refused that ..... access”.

Paragraph 6 of the main Guidance states that requests under s.53 should only be made “as a last resort”.

### **Demonstrating reasonable efforts and that the request is a last resort**

#### ***The Applicant has supplied evidence of their request for access to the landowner***

Please refer to Document 26, Schedule 1, Section A, paragraph 4.1; and Schedule 2, Section A, paragraph 5.

There are discrepancies between the Applicant’s and Innovia’s records of correspondence and meetings. An updated Schedule of Correspondence was provided by the Applicant on 25 March 2011 (Document 26, Enclosure 3).

However, little detail is provided of letters / emails / meetings and no copies of additional correspondence are provided (Document 26, Enclosure 3).

***Evidence that the s.53 request is a “last resort”?***

Please refer to Document 26, Schedule 2, Section A, paragraph 5; and Schedule 2, Section B, paragraphs 2 and 3.

There is disagreement between the two parties as to whether the s.53 request is a last resort. Innovia state they are willing to negotiate reasonable access to their land, whilst the Applicant states access cannot be delayed any longer and efforts to negotiate to date have been unsuccessful.

**Proposed Conditions**

s.53(4)(c) provides that a person authorised by the Commission to enter any land “must comply with any other conditions subject to which the Commission’s authorisation is granted”.

Both the Applicant and Innovia have provided proposed conditions for consideration.

- *Dickinson Dees on behalf of Innovia proposed conditions enclosed in the letter dated 7 March 2011 (Document 19);*
- *The Applicant’s proposed conditions enclosed in the letter dated 25 March 2011 (Document 26);*
- *Draft Licence for Site Investigation Works enclosed in the Dickinson Dees letter dated 28 March 2011 (Document 29).*

**Human Rights Act 1998**

Article 1 of the First Protocol of the European Convention gives a right to protection of property. Any interference with this right should be lawful and proportionate so that the right of individuals to peaceful enjoyment of their property should be balanced against the public interest of facilitating applications for development consent under the Act. In this particular case it is considered that granting an authorisation which is in accordance with the provisions of s.53 (which includes a right to compensation for any damages caused to any land or chattels) and which is granted subject to conditions, would be justified and proportionate in the wider public interest.

**Other Issues Identified by the parties**

***Financial standing of the Applicant***

Dickinson Dees on behalf of Innovia have raised a concern over the financial soundness of the Applicant and its ability to meet any compensation obligations which may arise under s.53(7). Please refer Document 26, Schedule 2, Table A, paragraph 4.

S.53(7) Where any damage is caused to land or chattels—  
(a) in the exercise of a right of entry conferred under

subsection (1), or  
(b) in the making of any survey for the purpose of which any  
such right of entry has been conferred,  
compensation may be recovered by any person suffering the damage  
from the person exercising the right of entry.

The right to enter land for the purposes of s.53 differs in legal terms from the power to compulsorily acquire land or rights which may give rise to an obligation to pay where compensation. It is not considered that the financial standing of an applicant under s.53 is of relevance to the issue of whether the right of entry should be authorised. It is sufficient that the requirements of s.53, which makes no reference to financial standing, are met.

### ***Enforcement of any Conditions***

Dickinson Dees have questioned the Commission's ability to enforce any conditions which are attached to a s.53 application. Please refer to Document 26, Schedule 2, Section D, paragraph 1.3.

An authorisation granted under s.53 can be subject to conditions which could provide that if any of the conditions are breached, then the authorisation to enter will immediately cease.

### **The Habitats Regulations**

Under Regulation 9 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats Regulations"), the Commission is required to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of the Commission's functions. There is a system of strict protection under the Habitats Regulations, which transpose the Directive, for certain species known as European Protected Species. These include great crested newts and bats which are the subject of a number of the surveys which the Applicant proposes to carry out. Regulation 41 establishes that it is an offence to deliberately disturb wild animals or damage or destroy a breeding site or resting place of such an animal. A licence can be granted by Natural England to enable an activity, which might otherwise constitute an offence, to be carried out lawfully (Regulation 53). The licence can only be granted if a number of tests are met. Any authorisation which may be granted by the Commission under s.53 will not extend to authorising entry on to land for any activity which may lead to the committing of an offence under Regulation 41 of the Habitats Regulations. If an applicant wishes to carry out survey activities that may lead to an offence being committed it should first obtain a licence from Natural England and then request entry under s.53. In this case, there is no evidence that the Applicant has a licence from Natural England and therefore if authorisation is given it is suggested that for clarity a condition be imposed to the effect that the authorisation does not extend to authorising entry on to land for any activity which may lead to the committing of an offence under Regulation 41 of the Habitats Regulations.

**18 April 2011**