

APPLICATION BY HORIZON NUCLEAR POWERS FOR A DCO FOR WYLFA NEWYDD NUCLEAR POWER STATION

WELSH GOVERNMENT – KEY POINTS ON THE DRAFT DCO

We set out in this note the key points the Welsh Government (“WG”) wishes to raise in advance of the Issue Specific Hearing to be held on 24 October in respect of the draft DCO. These comments are based on a preliminary review of the draft DCO and WG reserves the right to raise further detailed comments throughout the examination process.

We are more than happy to discuss these points in advance of the hearing.

1. Marine Requirements – Discharging and Enforcing Authorities

In principle, WG agrees with the proposed approach of the applicant for NRW to be discharging authority in respect of those DCO requirements relating to the marine works so as to avoid potential conflict with the marine licence.

WG’s position is that Welsh Ministers should be the enforcing authority in respect of such DCO requirements. This approach is consistent with that adopted for the discharge and enforcement of conditions attached to any marine licence granted. WG agrees in principle that this should be achievable by:

- a. amending section 173(2) PA2008 to include Welsh Ministers in respect of any land and sea below the mean high water springs; and
- b. amending the definition of “Discharging Authority” to refer to NRW in respect of the Requirements of the order relating to land below the MHWS and Marine Works until such time as those works have been completed

The support for the above approach is conditional on the following:

- a. A new article 43 being inserted as set out below for clarity (see point 2 below).
- b. That Welsh Ministers are named as the appeal authority in respect of all DCO requirements under Schedule 18 (see point 3 below); and
- c. We reserve WG’s position pending further detailed discussions with NRW, the applicant and IoACC over the detailed drafting of the order

2. Application of the Marine and Coastal Act 2009

WG request that the following wording is included in the order so as to clarify that nothing in the order will obviate the need for a marine licence or in any way restrict enforcement of such licence. The wording of the below is based on that used within the Swansea Bay DCO.

“Application of Marine and Coastal Access Act 2009

[43].—(1) This Order is subject to the provisions of Part 4 of the 2009 Act and any licence granted pursuant to that Part and is without prejudice to the powers of the Welsh Ministers under that Part.

(2) No provision of this Order obviates the need to obtain a marine licence under Part 4 of the 2009 Act or to comply with the conditions of any marine licence and nothing in this Order in any way limits the enforcement powers in respect of a marine licence

(3) In the event of any inconsistency between the provisions of this Order and a marine licence, then the terms of the marine licence shall take precedence.”

3. Appeal Authority

The current drafting of Schedule 18 does not respect the devolution settlement as the person to determine appeals pursuant to DCO requirements is to be named by the Secretary of State rather than Welsh Ministers.

This is inappropriate for a DCO in Wales. Welsh Ministers should be the appeal authority or at the very least appoint the person to determine any appeal.

WG therefore requests that the provisions of article 79/ Schedule 18 relating to appeals are replaced with the wording used in article 48 of the Swansea Bay DCO. The latter ensures that any appeals are in accordance with the 1990 Act, thereby respecting the devolution settlement with Welsh Ministers as appeal authority.

4. Deemed Approval (Schedule 18)

WG has concerns over the current drafting of the deemed approach provisions. Whilst it is accepted that deemed approval mechanisms are commonly used in DCO's, the timescales are too short for a project of this scale. This is particularly the case as it is likely that the relevant discharging authority will wish to consult with other authorities. WG therefore request that the time periods are extended.

5. Statutory Nuisance (Article 10)

The Environmental Protection Act 1990 is devolved in Wales. WG note that the immunity granted under article 10(1)(a)(iii) goes beyond that used in other DCOs. WG is considering this in further detail, but is concerned to ensure that any DCO to be granted by the Secretary of State does not go too far in providing immunity under the Environmental Protection Act 1990. As noted below, WG also currently has concerns over the high level nature of key documents such as the CoCP which would provide immunity under article 10 based on the current drafting.

6. Hedgerows (Article 75(4))

Powers under the Hedgerow Regulations 1997 are devolved to Welsh Ministers. Whilst the applicant's desire to include as many consents as possible in the one order is noted, WG are not currently satisfied that disapplication of the requirements under these regulations by the Secretary of State is justified. The wording is not in the model provisions and there has been no prior engagement with WG on this issue.

7. DCO Requirements – Tailpieces

WG is concerned by the number of tailpieces included within the draft DCO requirements which have the potential to take the project beyond the parameters assessed within the ES. For example, DCO Requirement WM15 limits the number of parking spaces during construction to 1,900. This is consistent with the maximum parameter assessed in the ES and is fundamental to the assessment of impacts and mitigation required. It is not appropriate for a DCO requirement to allow for the possibility of this to be increased informally through tailpiece “unless otherwise agreed” wording. There is a statutory process should future amends be required to the DCO.

8. DCO Requirements reliant on inadequate application documents

Many of the DCO requirements refer to and rely upon specific documents/ schemes submitted with the application. Key mitigation is proposed to be secured this way.

Generally though the application documents relied on are currently drafted at a very high level and cannot currently be agreed as being final form documents as they either contain a lack of detail and/ or clearly enforceable obligations and trigger points. For example, the CoCP is intended to secure the Wylfa Newydd Major Permissions Oversight Panel. The purpose of the panel is to monitor impacts and manage the release of capped contingency funds under the section 106 agreement, scrutinise and approve mitigation recommended by sub-groups.

However, there are a number of concerns with this approach as set out in our letter of 9 October 2018 to the applicant's solicitor. Key issues include:

- a. There are no clear triggers or obligations relating to establishment, conduct, terms of reference or funding for the panel. Similar concerns also arise in respect of the marine sub-code;
- b. The document cannot be reviewed in isolation and depends on the contents of the section 106 agreement, which we are still yet to see (or any detailed heads of terms).

9. Additional necessary DCO Requirements

There is a need for a number of additional DCO Requirements. We reserve WG's right to raise other comments on the requirements throughout the examination. WG requests the following additional DCO requirements:

- Requirement that sets a maximum limit of HGV movements per day based upon that assessed in the ES.
- Requirement that sets the maximum number of workers allowed on site at any one time (in accordance with the ES). The DCO should define "worker" and "visitor" for clarity and monitoring purposes.
- A DCO Requirement requiring compliance with key travel plan commitments on which the ES and mitigation plan are based. The commitments in the current travel plan are not considered sufficiently precise and enforceable. The DCO requirements should either therefore require approval of a new travel plan and detail the specific obligations to be included and/ or set out key obligations which must in any event be complied with on the face of the DCO requirement. One of these key commitments should be to limit access to on-site construction car parking unless there are at least 3 "workers" per vehicle. This is consistent with the submitted Travel Plan but the wording of the requirement needs to be much more precise and enforceable.
- Temporary Worker Accommodation – a DCO requirement is necessary to commit HNP to constructing all 4,000 bed-spaces. This needs to be linked to either phases in construction programme and/ or number of workers employed, with clear enforceable triggers.

10. Minor drafting points and other client comments on the draft DCO Requirements

Definition of "Welsh Ministers" – after "Wales Act 2006", please insert "as amended by the Wales Act 2017"

Article 22– Discharge of Water – WG's initial view of that a new sub-para (11) should be inserted providing that the article does not authorise any groundwater or water discharge activity within the meaning of the Environmental Permitting (England and Wales) Regulations 2010. Land drainage consent is a devolved function.

WN16 – if there are 850 operational staff then why are 1,100 permanent parking spaces, plus 650 temporary spaces required?

WN18 – for clarity, the requirement should also control occupancy until health facility is actually provided not just that details have to be submitted.

Table WN20 – query the 32m height parameter of accommodation block. Understand from ES that maximum would be 7 storeys. Therefore 7x3 metres would equal a height of 21m.

LC7 – as retaining the view is important consideration for decommissioning then WG suggest this should also be an important consideration when submitting detailed plans for layout and construction of logistics centre.

PW3 – replace “general accordancy” with “accordancy”.

Weightmans LLP

23 October 2018

Ref: Lee Gordon