

# Further material evidence & consultation deficit; devolved jurisdiction matters and the dDCO; dDCO SPC and SPC Planning Application

## EN010007 ExA Deadline 5 Comment

Application by Horizon Nuclear Power Limited for an Order Granting Development Consent for the Wylfa Newydd Nuclear Power Station

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## 5.1 Equality of arms: capacity constraint

- 5.1.1 Inadequate resource capacity as lay Interested Party continues to hamper timeous appraisal of submissions from statutory bodies, non-governmental organisations and 30 new documents submitted by the Applicant under Deadline 4.

## 5.2 Errata in Deadline 4 Comment REP4-035

- 5.2.1 The ExA's attention is respectfully drawn to proofing errors in REP4-035.

Please delete"FWQ4.0.56" and replace with "FWQ20.0.2 and FWQ20.0.3" in the following two paragraphs:

4.9.2.3.3; and,  
4.9.2.3.4, respectively.

## 5.3 Further DCO public consultation deficit

### 5.3.1 dDCO Work No. 1D as "Associated Development": FWQ20.0.2 in REP2-375

- 5.3.1.1 Over the course of formal Pre-Application Consultations, the Applicant manifestly failed to:
- accurately and clearly identify proposed Work No. 1D under Development Consent Order as Associated Development in all published Public Notices;
  - describe, discuss and justify dDCO Work No. 1D *a priori*, as Associated Development in all relevant project documents; and,
  - evidently failed to consult the public expressly on dDCO Work No. 1D as Associated Development in particular, in contrast to all the other associated developments accompanying Wylfa Newydd: paras 5.5.3.4.1-5 inclusive, hereof, referring.

### 5.3.2 Socio-economic impact: Taxpayer bailout for Hitachi's proposed twin UKABWRs at Wylfa

- 5.3.2.1 Hitachi's decision on 17 January 2019 to suspend further work on the Wylfa Newydd Project<sup>1</sup>, and the UK Government's declared intention to continue negotiating with Hitachi<sup>2</sup> on support for project finance, is proof sufficient that the UK Government is struggling to solve a fundamental financial problem at the heart of the proposed nuclear power station in Anglesey (commercial unviability) by throwing £ billions of public money at it.

- 5.3.2.2 There has been no public consultation in Anglesey and North Wales to date,

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<sup>1</sup> According to Hitachi,  
"... it is now clear that further time is needed to develop a financial structure for the Horizon Project and the conditions for building and operating the nuclear power stations."  
Hitachi (2019) Hitachi Announces Suspension of UK Nuclear Power Stations Construction Project and Posting of Impairment Loss and Related Expenses on Consolidated Basis, Posting of Extraordinary Loss on Unconsolidated Basis, and Revisions to Full-year Consolidated Business Forecast. News Release. Tokyo, January 17, 2019 – Hitachi Ltd. (TSE:6501). Available at:  
[http://www.hitachi.com/New/cnews/month/2019/01/f\\_190117.pdf](http://www.hitachi.com/New/cnews/month/2019/01/f_190117.pdf)

<sup>2</sup> Commending the Nuclear Update Statement to Parliament, the UK Secretary of State stated:  
"We will work closely with Hitachi and the industry to ensure that we find the best means of financing these and other new nuclear projects."  
Hansard HC (2019) Nuclear Update. Statement by The Secretary of State for Business, Energy and Industrial Strategy. House of Commons Hansard Volume 652, 17 January 2019. Available at:  
<https://hansard.parliament.uk/Commons/2019-01-17/debates/9C841326-B63A-4790-867F-905DEDDDD8AC/NuclearUpdate#contribution-AB1CF541-F832-4465-A6BE-437CE42EB8C3>

- a. by the Secretary of State on justification, sustainability and opportunity cost assessment of the UK Government's novel intention and bespoke policy on public finance for the admittedly financially and commercially unviable proposal for a new Nuclear Generating Station at Wylfa; and,
- b. by the Applicant on the Applicant's express need for £ billions in public finance necessary to shore up the Applicant's finances critical to the delivery of all putative benefits, mitigation measures and section 106 Agreement commitments directly associated with the Applicant's proposed twin UKABWRs at Wylfa, the subject of the current Examination into the Applicant's Application for a Grant of DCO.

5.3.2.3 The ExA are respectfully requested to require the UK Secretary of State and the Applicant to rectify respective public consultation deficits above, prior to the closing date of the current Examination into the Applicant's Application for a Grant of DCO for Wylfa Newydd.

**5.4 Further DCO material evidence deficit:  
Socio-economic impact of Hitachi's Wylfa Newydd suspension decision on 17.01.2019**

**5.4.1 Material evidence from the Applicant**

5.4.1.1 In the wake of the decision by Hitachi Limited to suspend further work on the Wylfa Newydd Project beyond March 2019 (Horizon Letter dated 21 January 2019), there evidently arise direct socio-economic impacts on existing commitments entered into by the Applicant. The ExA are respectfully requested to require the Applicant to update the ExA in respect of the following basic data. This list is not meant to be exhaustive.

a. Direct employment by the Applicant

(i) At the close of day on 16 January 2019

Overall total number of employees engaged

Full time employment: numbers and contracts length  
job titles  
numbers in each salary band  
geographical location of each position  
residence location of each employee

Part time employment: numbers and contracts length  
job titles  
numbers in each salary band  
geographical location of each position  
residence location of each employee

(ii) Subsequent to 17 January 2019

Overall total number of employees laid off

full time employment termination: numbers  
job titles  
number in each redundancy package band  
number entitled only to statutory redundancy  
payment  
geographical location of terminated position  
residence location of each dismissal

part time employment termination: numbers  
job titles  
number in each redundancy package band  
number entitled only to statutory redundancy  
payment  
geographical location of terminated position  
residence location of each dismissal

- b. Indirect employment data
- c. Existing supply chain contracts

- (i) At the close of day on 16 January 2019

- Overall total number of actually functioning contracts

- The following data for each area identified below:

- total number of functioning contracts
      - supply service and contract length
      - contract value bands
      - new employees engaged for supply contract

- Anglesey based Contracted suppliers

- Rest of North Wales based Contracted suppliers

- Rest of Wales based Contracted suppliers

- Rest of UK based Contracted suppliers

- Rest of EU based Contracted suppliers

- Non-EU based Contracted suppliers

- (ii) Subsequent to 17 January 2019

- Overall total number of contracts terminated early

- The following data for each area identified below:

- total number of supply contracts terminated
      - supply service & lost contract length
      - contract loss value bands
      - number of new employee contract terminations

- Anglesey based Contracted suppliers

- Rest of North Wales based Contracted suppliers

- Rest of Wales based Contracted suppliers

- Rest of UK based Contracted suppliers

- Rest of EU based Contracted suppliers

- Non-EU based Contracted suppliers

#### **5.4.2 Material evidence from the Welsh Government**

5.4.2.1 The ExA are respectfully requested to require the Welsh Government to provide the current Wylfa Newydd DCO Examination with the evidence identified below.

5.4.2.2 Objective evidence copy of public consultation on, and outcome of, the Devolved Administration's consistent endeavour at central government levels for taxpayer bailout for a

commercially unviable project (the proposed Wylfa Newydd Nuclear Generating Station) with the strategic objective of:

- a. creating employment opportunity in Anglesey and North Wales; and,
- b. developing and establishing new nuclear supply chains in Anglesey, North Wales and in the rest of Wales.

5.4.2.3 The Devolved Administration's opportunity cost assessments of:

- a. the level of taxpayer bailout expected from central government for the proposed Wylfa Newydd Nuclear Generating Station; and,
- b. the Welsh Government's own investments in supply chain development or facilitation:
  - (i) between 2012 and December 2018; and,
  - (ii) investment projections as at 16 January 2019, through to the DCO planned 2027 commissioning date for Wylfa Newydd.

### **5.4.3 Material evidence from the Host Local Authority/Local Planning Authority**

5.4.3.1 The ExA are respectfully requested to require the Isle of Anglesey County Council to provide the current Wylfa Newydd DCO Examination with the evidence identified below.

5.4.3.2 Regarding the Authority's fact finding visits to Japan.

For each visit to Japan arranged or undertaken by the Authority, between 2012 and 2018, inclusive, in connection with the Wylfa Newydd Project proposal:

- a. dates and designation of each delegate;
- b. evidence copy of the factual queries drafted at the outset, at the time of the Authority's decision to approve/authorise each visit;
- c. evidence copy of the due diligence undertaken by each delegation at meetings with Hitachi Limited, and/or Japanese commercial/industrial partners, and/or Government Departments in Japan, on financial aspects of the proposed project; and,
- d. evidence copy of evaluation of (b) and (c), above, back at base.

5.4.3.2 Evidence copies of the Authority's response to Recommendation 3 in REP2-101, and options evaluated between 2012 and 2018, inclusive: para.3.2.5.1 in REP3-057 referring.

5.4.3.3 Objective evidence copy of:

- a. public consultation on, and outcome of, the Authority's entitlement expectation on taxpayer bailout for a commercially unviable project (the proposed Wylfa Newydd Nuclear Generating Station) with the strategic aim of:
  - (i) creating much needed employment in Anglesey and North Wales; and,
  - (ii) developing and establishing new nuclear supply chains in Anglesey and North Wales; and,
- b. the Authority's opportunity cost assessments of:
  - (i) the level of taxpayer support anticipated, demanded or expected from central government for the proposed Wylfa Newydd Nuclear Generating Station; and,

- (ii) the level of investments to date by the Welsh Government for establishing, facilitating or establishing new nuclear supply chains in Anglesey and North Wales.

**5.5 Devolved jurisdiction and dDCO Work No. 1D Facilities for Interim Storage of higher activity radioactive waste at Wylfa REP2-020, and FWQ20.0.2 and FWQ20.0.3 in REP2-375**

**5.5.1 Arguably warrant deletion from the proposed Grant of DCO for Wylfa Newydd**

5.5.1.1 This section pulls together a scatter of observations noted to date (under tight serial ExA Deadlines, in conjunction with gross inequality of arms), under the following sub-headings in turn:

- a. Not essential aspects of the Power Station and not integral part of the NSIP;
- b. Questionable whether correctly “associated with” the proposed principal NSIP;
- c. Are the proposed dDCO Work No. 1D installations capable of constituting primary major standalone non-NSIP non-associated development projects in their own right, in Wales; and,
- d. Devolved Administrations and management of radioactive waste in the United Kingdom.

5.5.1.2 It appears arguable that, on the face of it, dDCO Work No. 1D Facilities (REP2-020) are in reality likely to constitute large/major primary standalone non-NSIP and non-Associated Developments in their own right. Development consents for these Facilities most probably fall to be determined under the devolved Town and Country Planning Act 1990 (TCPA 1990). To that extent, all Work No. 1D elements may properly warrant deletion from the Applicant’s Application for a Grant of DCO for Wylfa Newydd as currently being Examined by the ExA.

**5.5.2 Not essential aspects of the Power Station and not integral part of the NSIP**

5.5.2.1 The Applicant’s assertions in REP2-375 (responding to FWQ20.0.2 and FWQ20.0.3, under ExQ1), that the twin prolonged duration storage facilities comprising dDCO Work No. 1D:

“are essential aspects of the Power Station and therefore part of the NSIP. Neither structure requires a separate designation as a NSIP under section 14 of the Planning Act”,

appear arguably refutable as discussed under

para.2.3.a in RR-087;  
paras 2.4.1.1-8, inclusive, in REP2-305; and,  
paras 4.9.2.3.1-5, inclusive, in REP4-035, respectively.

5.5.2.2 In brief, the Applicant apparently has failed to date to adduce objective evidence in support of the contention quoted above in para.5.5.2.1:

- a. showing dDCO Work No. 1D elements are statutorily designated as section 14 NSIP developments, under the PA2008 as applying in Wales;
- b. establishing that the functional need for dDCO Work No. 1D elements expires in step with permanent shutdown, complete dismantlement and removal of the NSIP Nuclear Generating Station itself;
- c. validating that functionally and purposively, dDCO Work No. 1D elements are not expressly predicated on separate governing objectives, principles, policy and framework strategy for the safe management of radioactive waste in the UK (paras 2.4.1.4-5 in REP2-305, referring); and,

- d expressly excluding dDCO Work No. 1D elements from the default devolved development consents determination, under requisite provisions of the Town and Country Planning Act 1990 (TCPA 1990), pursuant to the devolution settlement in Wales.

5.5.2.3 Moreover, the Applicant fails to substantiate an assertion that dDCO Work No. 1D elements do not require separate NSIP designation under section 14 of the PA2008.

5.5.2.4 It would appear from REP2-375 (FWQ20.0.2 and FWQ20.0.3 responses to ExQ1) that the Applicant is evidently unable to argue a proper detailed case for dDCO Work No. 1D constituting “part of the NSIP” *per se*.

5.5.2.5 In nutshell, while there exists unequivocal direct functional and purposive relationship between dDCO Work No. 1D surface storage Facilities and an eventual Geological Disposal Facility (GDF), there does not exist an unequivocal direct functional and purposive relationship with the twin UKABWRs at Wylfa. The on-site installations constituting dDCO Work No. 1D are no more an integral part of an onshore generating station in Wales than an on-site GDF in Wales could be an integral part of an onshore generating station.

### **5.5.3 Questionable whether in reality correctly “associated with” the proposed principal NSIP**

5.5.3.1 These observations supplement para.4.9.2.3.6 in REP4-035, stemming from the Applicant’s sudden resort to Associated Development in REP2-375. Lack of timeous capacity under ExA Deadline 4 hampered earlier appropriate drafting.

5.5.3.2 Regarding the installations comprising dDCO Work No. 1D, the Applicant claims in REP2-375 (under FWQ20.0.2) that,

“Even if they were not part of the NSIP they would be associated development. As a result of the Wales 2017, “associated development” can now be consented under a DCO in Wales.”

Is the Applicant’s contention soundly founded? At least four considerations would appear relevant. Namely,

- a. do the proposed dDCO Work No. 1D installations constitute “part of the NSIP”;
- b. has the Applicant moved the goal posts by opportunistically re-classifying dDCO Work No. 1D installations as associated development;
- c. has the Applicant discharged the burden of proof under paras 5, 6 and 12, respectively, of the DCLG Guidance on associated development; and,
- d. are the proposed dDCO Work No. 1D installations capable of constituting primary major standalone non-NSIP non-associated development projects in their own right, in Wales?

These considerations are explored below, in turn.

### **5.5.3.3 Do the proposed dDCO Work No. 1D installations constitute “part of the NSIP”?**

5.5.3.3.1 In the first instance, the Applicant has argued neither the details nor proper justification in the response to FWQ20.0.2 in REP2-375.

5.5.3.3.2 In the second instance, dDCO Work No. 1D installations arguably would not appear to constitute “essential aspects of the Power Station and therefore part of the NSIP part of the NSIP”, as summarised in paras 5.5.2.1-5, inclusive, above.

**5.5.3.4 Has the Applicant moved the goal posts by opportunistically re-classifying dDCO Work No. 1D installations as associated development?**

5.5.3.4.1 The Applicant evidently latched on to re-classifying the twin exceptionally long duration Higher Activity Radioactive Waste Storage Facilities comprising dDCO Work No. 1D as Associated Development, in the alternative, when responding to FWQ20.0.2 (REP2-375). The impromptu classification seemingly does not appear elsewhere in Application documents. This manoeuvre displays the hallmarks of opportunism.

5.5.3.4.2 The Applicant published a number of Public Notices in local and national newspapers, commencing around 2014 if not earlier, summarising the particulars of the proposed Wylfa Newydd Project.

- a. The Applicant manifestly failed to identify dDCO Work No. 1D elements as constituting Associated Development in any Public Notice: para.2.3.d in RR-087, referring.
- b. Despite being alerted to concealment initially during the Third Pre-Application Consultation (regarding a Public Notice published on 19 May 2017), the Applicant's last Section 56 Public Notice (published on 6 July 2018) blithely perpetuated conscious concealment from the public. Ironically, the last Section 56 Public Notice was published following a ruling by PINS on 28 June 2018 that the Applicant's Application for a Grant of DCO for Wylfa Newydd was "of a satisfactory standard": paras 2.2.3 and 2.3.3 in REP1-038 referring.

5.5.3.4.3 The implication of seemingly conscious concealment morphing into opportunism may not be dismissible as inconsequential.

- a. In contrast with all the other Associated Development elements of the proposed Wylfa Newydd Project, the Applicant would not appear to have published planning and other substantive details on dDCO Work No. 1D as Associated Development, at any time during Pre-Application Consultations with the public.
- b. In turn, that means the Applicant did not conduct express Public Consultation on dDCO Work No. 1D as Associated Development. The public remained effectively ignorant and were not afforded open opportunity to comment on this Associated Development in particular, unlike the other Associated Developments.

5.5.3.4.4 Taken together, these could be said to comprise serious failings: deliberate publication of misleading and inaccurate Public Notices; seemingly conscious concealment of this category of associated development from the public; manifest failure to describe, discuss and fully justify these works *a priori* in formal Pre-Application Consultation documents; and, denying the public equal opportunity to comment on dDCO Work No. 1D as Associated Development throughout the Pre-Application Consultation period.

5.5.3.4.5 Further, these failings would appear seemingly capable of bringing into question,

- a. the standing of apparently inaccurate and deliberately misleading Public Notices published by the Applicant; and,
- b. a ruling by PINS on 28 June 2018 that the Wylfa Newydd DCO Application had been found to be "of a satisfactory standard", paving the way for the Application's admission into Examination.

**5.5.3.5 Has the Applicant discharged the burden of proof under paras 5, 6 and 12, respectively, of the DCLG Guidance on associated development?**

5.5.3.5.1 Section 115 of the PA 2008 sets out the statutory provisions for "associated development". Sub-section (1)(b) permits the inclusion of development consent for an associated development in a DCO Application for a principal NSIP. Following amendment under Section



43 of the Wales Act 2017<sup>3</sup>, inserting a new sub-section (4A) in section 115 of the PA2008, sub-section (1)(b) now extends to associated development accompanying a section 14 NSIP in Wales. Sub-section (6) of the PA2008 requires the National Infrastructure Planning Inspectorate (PINS) to have regard to the Secretary of State's guidance on the operation of section 115. According to paragraph 5 in the updated April 2013 DCLG Guidance<sup>4</sup>,

"It is for the Secretary of State to decide on a case by case basis whether or not development should be treated as associated development."

The Guidance requires the Secretary of State to determine relevant classification based on four core principles<sup>5</sup>. Under the National Policy Statements, PINS acts as proxy for the Secretary of State, in the first instance, in its function as the DCO Examining Authority.

- 5.5.3.5.2 In addition, under paragraph 12 of the DCLG Guidance, it is for the Secretary of State to determine whether any waste storage facility listed in Annex B of the Guidance constitutes associated development or integral part of the NSIP, or a development in its own right<sup>6</sup>. In other words, an installation even on an NSIP site cannot be an associated development if it is either integral to the principal NSIP or a standalone development in its own right.
- 5.5.3.5.3 Despite referring in REP2-375 (FWQ20.0.2) to DCLG Guidance para.5.(i) and para.6, respectively, the Applicant plainly fails to detail a convincing case as to why and the basis on which dDCO Work No. 1D merits re-classification as associated development for the proposed Wylfa Newydd NSIP. Merely quoting DCLG Guidance could not be held sufficient to discharge the burden of proof.
- 5.5.3.5.4 Further to para.2.3.c in RR-087, for the avoidance of doubt, of the total six radioactive waste facilities proposed under the Applicant's Application for a Grant of DCO for Wylfa Newydd, four facilities would appear associated with the principal NSIP and destined to be decommissioned, dismantled and permanently removed from the Wylfa Newydd site at the same time as the principal NSIP electricity generating station (which has an operating life span of 60 years). The remaining two facilities, comprising Building 201 (the Spent Fuel Storage Facility: SFSF) and Building 202 (the Intermediate Level Radioactive Waste Storage Facility: ILWSF) constitute the twin installations under Work No. 1D in the dDCO REP2-020. dDCO Work No. 1D buildings are categorised as Interim Storage Facilities, each engineered for a life span of up to 140 years beyond the permanent cessation of electricity generation by the principal NSIP.

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<sup>3</sup> An intriguing example of the National Assembly for Wales voluntarily giving up long held devolved power to determine land use planning issues involving associated developments, albeit only in relation to Nationally Significant Infrastructure Projects in Wales.

<sup>4</sup> DCLG (2013) Planning Act 2008: Guidance on associated development applications for major infrastructure projects. Department for Communities and Local Government, April 2013. Available at: <https://www.gov.uk/government/publications/planning-act-2008-associated-development-applications-for-major-infrastructure-projects>

<sup>5</sup> *ibid.* The four core principles in paragraph 5 may be summarised as follows:

- (i) a direct relationship between associated development and the principal development: it should therefore either support the construction or operation of the principal development, or help address its impacts;
- (ii) associated development should not be an aim in itself but should be subordinate to the principal development;
- (iii) if part of a proposal is only necessary as a means of cross-subsidising the principal development then that part should not be treated as associated development; and,
- (iv) associated development should be proportionate to the nature and scale of the principal development. For example, the Secretary of State will have regard to all relevant matters including whether a future application is proposed to be made by the same or related developer as the current application, the degree of physical proximity of the proposed application to the current application, and the time period in which a future application is proposed to be submitted.

<sup>6</sup> *ibid.* Paragraph 12 refers to examples of associated development listed in Annexes A and B, subject to the following caveats:

Examples of associated development

12. Annexes A and B provide examples of the type of development that may qualify as associated development. These annexes are illustrative only. In particular the following should be noted:

- These annexes are not intended to be exhaustive. For example, technological progress may mean that some types of associated development could not have been foreseen when this guidance was written.
- These annexes should not be read as a statement that the development listed in them should be treated as associated development as matter of course; these lists should be read together with the core principles.
- These annexes should not be treated as an indication that the development listed in them cannot in its own right constitute a project, or an integral part of a project, for which obtaining development consent is mandatory under the Planning Act.

- a. Both Interim Storage Facilities under dDCO Work No. 1D have a distinct primary function and primary purpose in accordance with UK's adopted radioactive waste management strategy (paras 2.4.1.4-5 in REP2-305, referring). Both are manifestly distinguishable from the other on-site waste storage facilities, thus:
- Primary function: To ensure extended safe and secure surface based storage of intermediate level radioactive waste and spent nuclear fuel, respectively, for as long as necessary, following permanent removal and transfer from the other principal NSIP associated waste storage buildings.
  - Primary purpose: Bridge a time gap (an interim storage period) between the production of intermediate level radioactive waste and spent nuclear fuel by the proposed Wylfa Newydd nuclear reactors, and their eventual removal for permanent disposal somewhere in a purpose built underground geological disposal facility (GDF), as and when a GDF becomes available and ready to receive the entire content and inventories of the ILWSF and the SFSF at Wylfa.
- b. In terms of operating life spans, both Interim Storage Facilities under dDCO Work No. 1D are engineered to outlast the principal NSIP and the other four waste storage facilities by up to a century or more. The ILWSF (Building 202) and the SFSF (Building 201) are destined to be dismantled and removed from the site well after the principal NSIP Nuclear Generating Station has long been dismantled, and then only after their entire contents have been despatched to a GDF. These two Facilities could thus each have a cumulative life span of up to 200 years<sup>7</sup>, from commencement of electricity generation at Wylfa Newydd.

5.5.3.5.5 It appears highly doubtful the impromptu reclassification of the two Interim Storage Facilities under dDCO Work No. 1D is capable of satisfying adequately the four core principles and other tests in the updated April 2013 DCLG Guidance, as explored below.

5.5.3.5.6 Consider the first core principle under Guidance para.5.(i): footnotes to para.5.5.3.5.1, above, referring. Two tests appear to apply.

- a. Is there a direct relationship between the alleged associated development and the principal NSIP development?
- (i) On the face of it, both Interim Storage Facilities in dDCO Work No. 1D appear to fail this test under the first core principle. There is no direct purposive and technical relationship between primary requirement for Interim Storage Facilities and the electricity generating principal NSIP.
  - (ii) The primary purpose of an interim surface storage facility anywhere for radioactive waste is to bridge a crucial time gap (of indeterminable length, at present) between the production of its respective radioactive contents and the availability of a Geological Disposal Facility (GDF), somewhere, ready and able to receive its entire contents and inventories for permanent underground disposal.
  - (iii) Para.B.4.4 in Annex B of EN-6 Volume 2 appears germane<sup>8</sup>, and warrants consideration: para.2.4.1.2 in REP2-305 referring as well. If the Facilities

<sup>7</sup> The UK Government considers a cumulative lifespan of 160 years as a conservative baseline assumption, inclusive of reactor start up date. See paragraph 2.14, in: BEIS (2018) Government Response: Consultation on the Siting Criteria and Process for a New National Policy Statement for Nuclear Power with Single Reactor Capacity over 1 Gigawatt beyond 2025. Department for Business, Energy & Industrial Strategy, July 2018. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/727628/NPS\\_Siting\\_Criteria\\_Consultation\\_-\\_Government\\_Response.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727628/NPS_Siting_Criteria_Consultation_-_Government_Response.pdf)

<sup>8</sup> DECC (2011) National Policy Statement for Nuclear Power Generation (EN-6). Volume II of II – Annexes. Presented to Parliament pursuant to section 5(9) of the Planning Act 2008. URN 11D/717. Department of

comprising dDCO Work No. 1D could in principle be sited elsewhere, they could not at the same time constitute development associated with the NSIP Nuclear Generating Station itself.

- (iv) Nothing in para.2.11.5 of En-6 Volume 1 either commands or deems that every type of radioactive waste storage facility on the site of a nuclear NSIP constitutes associated development as a matter of course.
  - (v) In other words, para.2.11.5 could not be held to mandate or justify dDCO Work 1D on-site Interim Storage Facilities as associated development. Nor does the paragraph amount to a requirement for dDCO Work No. 1D on-site Facilities to constitute associated development.
  - (vi) If in principle the two Interim Storage Facilities under dDCO Work No. 1D were located elsewhere on suitable nuclear licensable site (in other words, off-site), these could not in principle constitute associated development for Wylfa Newydd in planning terms. By the same token, neither could the same dDCO Work No. 1D Facilities when located on the Wylfa Newydd site itself. By way of illustration, consider the example of dDCO Work No. 1D Interim Storage Facilities being located at Trawsfynydd or Sellafield, for the express purpose of receiving and storing all or any Intermediate Level Radioactive Waste and Spent Fuel originating from the twin Wylfa Newydd UKABWRs for the entire or partial duration of interim storage period.
- b. Do the ILWSF and the SFSF comprising dDCO Work No. 1D either support the construction or operation of the principal development, or help address its impacts?
- (i) The ILWSF and SFSF are pivotal to the UK radioactive waste management policies and strategy (paras 2.4.1.4-5 inclusive in REP2-305, referring). Functionally, operationally and technically, the twin Facilities constituting dDCO Work No. 1D are required expressly for an interim period linked directly and solely to the availability date of a GDF for permanent disposal of their entire contents.
  - (ii) First and foremost, these structures are self evidently waste storage facilities. These facilities could be located on any suitable nuclear licensable site in the UK, independent of the siting of the proposed twin UKABWRs at Wylfa: para.B.4.4 in Annex B of EN-6 Volume 2, referring (see as well footnote to sub-para.a.(iii), hereof).
  - (iii) In the final analysis, these buildings are by definition, function and purpose waste storage facilities, expressly engineered to operate for significantly prolonged periods, wholly independent of the purpose and operating life span of the principal NSIP Nuclear Generating Station.

5.5.3.5.7 Consider, next, the second core principle in Guidance para.5.(ii):

Is the alleged Associated Development an aim in itself? Is it subordinate to the principal development?

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Energy and Climate Change. July 2011. Available at:  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/47860/1943-nps-nuclear-power-annex-vol11.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/47860/1943-nps-nuclear-power-annex-vol11.pdf)

The second and third sentences in paragraph 2.11.5 of EN-6 Volume 1, respectively, evidently countenance possibility of alternatives to on-site interim storage. Notably, the expectation on on-site location in the final sentence is not contingent on any on-site Interim Storage Facility forming an integral part of the NSIP or an associated development. The expectation is contingent instead on the lack of availability of alternative option. The second sentence refers to Annex B. Para.B.4.4 in Annex B, in Volume 2 of EN-6, does not preclude other Interim Storage Facilities on alternative site(s) to a facility located on a proposed NSIP site. In summary, Annex B characterises Interim Storage Facilities in the following terms:

- the likely length of time for on-site interim storage (para.B.4.2);
- an assumption that interim storage would be on-site (para.B.4.3);
- that interim storage need not necessarily be on-site for the entire duration of wait for a Geological Disposal Facility, as alternative arrangements could not be precluded (para.B.4.4);
- the stores could be periodically refurbished wherever located and new stores built if need be (para.B.4.5); and,
- that there may arise planning issues for PINS to consider, referring back to Section 2.11 in EN-6 Volume 1 (para.B.5.1).

- a. The primary function and primary purpose of both Facilities under dDCO Work No. 1D constitute express aims and objectives by themselves, under Britain's radioactive waste management policy and strategy (paras 2.4.1.4-5 in REP2-305, referring). These aims and objectives are manifestly independent of the principal NSIP Nuclear Generating Station: para.5.5.3.5.4, above, referring.
- b. Neither Facility could be considered subordinate to the principal NSIP, arguably failing the second core principle. A question of hierarchy is inapplicable, if not irrelevant, in the instance. The twin Facilities comprising dDCO Work No. 1D are arguably capable of constituting large/major standalone development projects in their own right.

5.5.3.5.8 The third core principle (Guidance para.5.(iii): is the alleged Associated Development a means of cross-subsidising the principal NSIP?

Not applicable in this instance.

5.5.3.5.9 Both Facilities under dDCO Work No. 1D appear to fail the fourth core principle as well (Guidance para.5.(iv)), regarding a test of proportionality vis-à-vis the nature and scale of the principal NSIP.

- a. Each Facility is a significant large structure in its own right.
- b. Both Facilities are engineered installations, each designed to ensure safe and secure surface storage of designated higher activity radioactive waste materials for anything up to 160-200 years. That contrasts with the 60-year operating design life of the principal NSIP Nuclear Generating Station. The operating life span, the primary function and primary purpose of both Facilities is independent of the NSIP Nuclear Generating Station.
- c. The timing of decommissioning both Facilities, and their complete dismantlement and permanent removal from the site, is driven inexplicably by the operating factors of a suitable GDF, not the operating factors of the NSIP Nuclear Generating Station.

5.5.3.5.10 Regarding a general rule in Guidance para.6:

Is the alleged associated development typical of development brought forward alongside the relevant type of principal development or of a kind that is usually necessary to support a particular type of project, for example (where consistent with the core principles above), a grid connection for a commercial power station?

- a. On-site location of Interim Storage Facilities is not typical of nuclear generating sites developed to date in the UK since the 1960s, as exemplified by all seven sites for Advanced Gas Cooled Reactor nuclear power stations<sup>9</sup>.
- b. In principle, on-site location would render an Interim Storage Facility no more an associated development than would an Interim Storage Facility located elsewhere: para.B.4.4 in Annex B of EN-6 Volume 2; and, para.5.5.3.5.6.a, above, referring, respectively.

5.5.3.5.11 Consider, lastly, the illustrative example of waste storage facilities in Annex B under Guidance para.12.

- a. Not every manner of radioactive waste storage facility could be said to be specific to an on-shore NSIP nuclear generating station.

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<sup>9</sup> Following the cessation of reprocessing of spent Oxide fuels in the Thermal Oxide Reprocessing Plant (THORP), at Sellafield (Cumbria) in 2018, spent fuel from the fleet of operating Advanced Gas Cooled Reactors (AGR) in Britain will instead be held in long-term interim storage at Sellafield. "The fuel will be stored here on an interim basis up until the 2080s, pending packaging and disposal in a Geological Disposal Facility." There are currently 14 AGRs altogether, operating at five sites in England and two sites in Scotland. These are all scheduled to close permanently between 2023 and 2030. Source: NDA (2017) Sellafield Context Plan 2017-2026. Issue 2, May 2017. Nuclear Decommissioning Authority & Sellafield Limited. Available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/649731/Context\\_Plan\\_Issue\\_2\\_May\\_2017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649731/Context_Plan_Issue_2_May_2017.pdf)

- b. Likewise, not every manner of radioactive waste storage facility accompanying an on-shore NSIP generating station could be held capable of constituting associated development as a matter of course. Each facility needs to be assessed case by case, having regard to its primary function and purpose (para.5.5.3.5.4, above, referring) in conjunction with the four core principles under para.5 of the DCLG Guidance: paras 5.5.3.5.6-9 inclusive, above, referring.
- c. As discussed here, applying the DCLG Guidance para.5 core principles, the two Interim Storage Facilities under dDCO Work No. 1D appear manifestly distinguishable from the kind of associated development that typically accompany or are usually necessary to support a nuclear generating station. It is highly doubtful the twin Interim Storage Facilities could reasonably be said capable of constituting associated developments with the proposed principal NSIP Nuclear Generating Station at Wylfa. The two Facilities under dDCO Work No. 1D are evidently plainly necessitated by lack of ready availability of a GDF for permanently housing their entire contents.

5.5.3.5.12 In nutshell, while there exists unequivocal direct functional, purposive and technical relationship between dDCO Work No. 1D surface storage Facilities and an eventual Geological Disposal Facility (GDF), there exists no unequivocal direct functional, purposive and technical relationship with the proposed twin UKABWRs at Wylfa: para 2.4.1.2 in REP2-305, referring. The on-site installations constituting dDCO Work No. 1D are no more capable of constituting associated development for an onshore generating station in Wales than an on-site GDF in Wales could be an associated development for an onshore generating station.

#### **5.5.4 Are the proposed dDCO Work No. 1D installations capable of constituting primary major standalone non-NSIP non-associated development projects in their own right, in Wales?**

5.5.4.1 These observations supplement:

para.2.3.b in RR-087;  
para.1.5.1 in REP1-038; and,  
para.2.4.1.8 in REP2-305, respectively.

5.5.4.2 Further to para.1.4.5 in REP1-038, para.2.11.5 in EN-6 Volume 1 in effect tells the ExA that Interim Storage Facilities could be expected to be located on-site if no other options were available capable of fulfilling the primary purpose and function of interim storage. The fact that “para.B.4.4 other option” is not available does not automatically mean the Interim Storage Facilities become classified as integral part of the principal NSIP (paras 5.5.2.1-5, above, referring) or associated development with the principal NSIP. In respect of the latter, it falls to the Applicant to discharge a two fold burden of proof. Namely, the updated 2013 DCLG Guidance on associated development with an NSIP (paras 5.5.3.5.6-12 inclusive, above, referring), and para.B.4.4 in Annex B of EN-6 Volume 2.

5.5.4.3 Under the burden of proof, there is no escaping the fact that interim storage could in principle be located anywhere suitable, for part or entire duration of the wait for available capacity in a suitable GDF. A number of implications follow from that guiding principle.

- a. In planning terms, if alternatively sited ILWSF and SFSF are more likely than not to constitute large primary standalone non-NSIP non-associated developments, so arguably could any ILWSF and SFSF located on the site of a nuclear NSIP.
- b. If in principle, requisite storage capacity could be contracted elsewhere or constructed anywhere suitable (see, for example, the footnote to para.5.5.3.5.10.a, above), it could not therefore also be claimed to be integral part of an NSIP power station or associated development for a proposed new nuclear power station merely by virtue of its location on the site of an NSIP.

5.5.4.4 The burden of proof implications reasonably suffice to categorise Interim Storage Facilities comprising dDCO Work No. 1D as primary standalone non-NSIP non-associated developments in their own right, subject to determination of development consents in Wales in accordance with requisite provision under the devolved TCPA 1990, albeit located on a nuclear licensable site.

5.5.4.5 Thus, the construction and operation of these installations is arguably capable of constituting primary standalone non-NSIP non-associated TCPA developments. To that extent, all elements under dDCO Work No. 1D may therefore *prima facie* warrant deletion from the dDCO REP2-020.

## 5.5.5 Devolved Administrations and management of radioactive waste in the United Kingdom

5.5.5.1 These observations supplement paras 4.9.1.5-9, inclusive, in REP4-035.

5.5.5.2 According to Radioactive Waste Management Limited<sup>10</sup>,

“In the UK, radioactive waste management is a devolved matter. This means that different Government policies may apply in England, Northern Ireland, Wales and Scotland.”<sup>11</sup>

5.5.5.3 This statement suffices to confirm implicitly that development consents for Facilities for the Interim Storage of Higher Activity Radioactive Waste in Wales, of the type proposed under Wylfa Newydd dDCO Work No. 1D, are devolved matters under the UK radioactive waste management framework strategy.

- a. It implies that development consents for the twin Facilities comprising dDCO Work No. 1D therefore fall to be determined under the devolved provisions of the TCPA1990, irrespective of whether the Facilities are located on-site at a nuclear licensed site or elsewhere in Wales. The example cited in para.4.9.2.3.5.d in REP4-035, referring, as well.
- b. It highlights the relevant policy drivers. Namely, the central role of interim storage of higher activity radioactive waste in established strategic framework for the safe management radioactive waste in the UK (paras 2.4.1.4-5 in REP2-305 referring), pending eventual removal for permanent disposal in a suitable GDF at some point in the future: paras 2.4.1.5 and 2.4.1.7 respectively in REP2-305, referring.
- c. Thus, Buildings 201 and 202 comprising dDCO Work No. 1D (REP2-020) could arguably be said to constitute major primary standalone non-NSIP non-associated developments that properly warrant determination of development consents separately from the Wylfa Newydd NSIP DCO, under the provisions of the devolved TCPA 1990.

5.5.5.4 It is therefore highly doubtful, even on the basis of relevant policy drivers alone (paras 2.4.1.2 and 2.4.1.4-5 in REP2-305, referring), whether the installations comprising dDCO Work No. 1D could correctly be held to belong in a DCO for Wylfa Newydd, and may not properly be authorised under the PA2008 as applying in Wales.

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<sup>10</sup> Radioactive Waste Management Limited is a wholly owned subsidiary of the Nuclear Decommissioning Authority. The latter, in turn, is a UK-wide non-departmental public body, operating under the aegis of the Department for Business, Energy & Industrial Strategy.

<sup>11</sup> The role of Government, in: RWM (2018) Communities and GDF. Guidance. Radioactive Waste Management. Radioactive Waste Management Limited, 25 January 2018. Available at: <https://www.gov.uk/guidance/communities-and-gdf>

## **5.6 REP2-020 dDCO SPC Work No. 12 and the SPC Planning Application**

### **5.6.1 The Applicant's withdrawal of SPC Planning Application 38C310F/EIA/ECON from devolved development consent jurisdiction**

5.6.1.1 In a Houdini like manoeuvre, the Applicant has engineered escape from devolved jurisdiction by withdrawing the above original Planning Application for Site Preparation and Clearance (SPC) proposals. The withdrawal is the Applicant's direct response to the Welsh Government's Call In decision of 13 December 2018 (issued under section 77 of the Town and Country Planning Act 1990). The manoeuvre effectively snubs and blows apart devolved planning jurisdiction. The Applicant now expects much the same SPC works (identified as SPC Work No. 12 in the dDCO) to be determined by the UK Secretary of State under the non-devolved Planning Act 2008.

5.6.1.2 The activation of primary devolved jurisdiction had commenced on 10 November 2017 when the Applicant lodged the SPC Planning Application with the Isle of Anglesey Local Planning Authority<sup>12</sup>, under the Town and Country Planning Act 1990. Clearly, the relevant determination provisions of the 1990 Act were thus duly triggered well before the Applicant lodged a DCO Application with the Planning Inspectorate on 1 June 2018. The DCO Application included virtually identical SPC proposals under dDCO Work No. 12.

5.6.1.3 In ditching the activated primary land use planning jurisdiction mid-stream and resorting to refuge in secondary planning jurisdiction for materially the same development proposal, the Applicant (a private developer) has managed to make a laughing stock of the Welsh Government's devolved function and a laughing stock of received wisdom that land use planning in Wales is devolved. The snub may also set a precedent for devolved function in respect of future NSIP proposals in Wales.

### **5.6.2 Potential issues for the Decision Making Secretary of State**

5.6.2.1 The Decision Making Secretary of State might, with respect, be mindful of worrying constitutional implications of a developer's manipulative behaviour, including:

- a. the ease with which a developer is readily able to cherry pick secondary planning jurisdiction post-hoc, should the outcome in the primary devolved planning jurisdiction not go the developer's way on publicly controversial planning matters;
- b. the potentially corrosive effect of a developer getting away with moving the goal posts, on constitutional devolution and trust in devolved institutions;
- c. the developer's casual disregard of public interest in, and public perception of, proper functioning of the primary devolved statutory planning system in Wales and risk of offending against principles of fairness and due process;
- d. a developer's ready ability to render the operation of primary statutory devolved power in Wales dysfunctional at the stroke of a pen, engendering an impression of abuse of process and privilege;
- e. a developer bringing central and primary devolved planning jurisdictions into disrepute, with consequential risk of erosion of public trust in statutory procedures;
- f. a developer making a mockery of ethos, practice and principles of subsidiarity; and,
- g. undermining the devolution settlement and alienating the public could not be conducive to instilling public confidence in devolution, devolved function and the planning system in Wales.

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<sup>12</sup> IACC (2017) Application for Planning Permission. Town and Country Planning Act 1990. Application Form and Certificates, dated 10 November 2017.

5.6.2.2 The Decision Making Secretary of State might perhaps be mindful as well of the constitutional implication of aiding and abetting a developer game the planning jurisdictions in the UK. It is a mischievous beast that enables a developer to pursue an application for development consents for virtually identical SPC proposals under a secondary jurisdiction as the proposals withdrawn from a fully activated primary jurisdiction.

### **5.6.3 Clarification from the DCO ExA**

5.6.3.1 Following the Applicant's withdrawal of the SPC Planning Application 38C310F/EIA/ECON from the fully activated primary devolved land use planning jurisdiction, under what equity, fairness and public interest principle is the ExA able to continue examining materially virtually identical SPC proposals under the guise of dDCO SPC Work No. 12?

5.6.3.2 Is the ExA minded instead to examine exclusively materially different SPC proposals from the Applicant under the continuing Wylfa Newydd DCO Examination?

5.6.3.3 The ExA are respectfully requested to clarify.

### **5.6.4 Clarification from the Applicant**

5.6.4.1 The ExA are respectfully requested to require comprehensive explanation from the Applicant on an impression of gaming the planning jurisdictions in the UK, including full evidence and reasons for cancelling the SPC Planning Application ahead of appointment by the Welsh Government of a devolved Public Local Planning Inquiry Inspector to look into the Planning Application.

## **5.7 PD-013 Q2.4.42: dDCO REP2-020 and Application of Marine and Coastal Access Act 2009**

5.7.1.1 This is a general observation due to lack of capacity for tracking down the WG representation in question: regrettably, PD-013 provides neither Library Document Reference nor direct link to the document.

5.7.1.2 The proposal by WG seemingly makes a fair case for deletion of all devolved jurisdiction matters from the Wylfa Newydd dDCO. The Applicant's "twin tracking",

- a. appears inappropriate, is cumbersome and seemingly promotes confusion (legal, administrative, liability, and quite possibly over mitigation delivery), to say the least, in the instance of the PA2008 as applying in Wales;
- b. imposes layers of complex weave between jurisdictions, potentially blurring lines of legal certainty and clarity; and,
- c. plainly amounts to sufficient material transgression on devolved jurisdiction as to seemingly cause the Devolved Administration to invoke "without prejudice" caveat.

It is questionable whether maintenance of such state of affairs could be in the public interest in a devolved administration.

5.7.1.3 In the interest of legal certainty and clarity (if nothing else), the dDCO arguably warrants de-cluttering on devolved jurisdiction matters. The subsidiarity principle needs to be seen to be fully, lawfully and properly practiced. The primacy of devolved jurisdiction ought to be recognised in the Wylfa Newydd dDCO. Clear lines are warranted.

5.7.1.4 The Model DCO is a complex enough instrument as it stands. It is important to ensure the proposed Wylfa Newydd DCO leaves the determination of devolved jurisdiction matters in the hands of statutory devolved authorities. The issue of exercise of devolved power and



ownership of devolved determinations is critical to a healthy democratic society. Appearance of colonisation of devolved power ill serves the public interest.

- 5.7.1.5 The ExA are respectfully requested to consider deletions from the dDCO of all devolved jurisdiction matters. Maybe, for example, along the lines mentioned under section 4.9.2 in REP4-035.

J Chanay  
12.02.2019