

SUNNICA ENERGY FARM
REF: EN01016 DRAFT DEVELOPMENT CONSENT ORDER
PLANNING ACT 2008
INFRASTRUCTURE PLANNING (APPLICATIONS: PRESCRIBED FORMS AND
PROCEDURE) REGULATIONS 2009

ANSWER TO Q2.1.2 ON BEHALF OF
EAST CAMBRIDGESHIRE DISTRICT COUNCIL

INTRODUCTION & SUMMARY

1. The Examining Authority’s written questions and requests for information (ExQ2) included the following question.

*“Q2.1.2: **Battery energy storage system (BESS): COMAH and P(HS) regulations***

Please comment on the precise legal authority (if any) on which one might rely to exclude the scope of the COMAH and P(HS) Regulations 2015 from application to BESS.”

2. For present purposes, ECDC consider that the competent authority for the purposes of COMAH is the Health and Safety Executive and the Environment Agency.¹ On the present evidence, ECDC considers that BESS is likely to require hazardous substance consent, and therefore subject to the COMAH and P(HS) Regulations 2015. These comments should be read alongside ECDC’s comments on the revised draft DCO.² It would appear that the Applicant is simply seeking to hedge its bets.

¹ Guidance: Hazardous substances: Paragraph 079, Ref ID: 39-079-20161209:
<https://www.gov.uk/guidance/hazardous-substances#Deciding-hazardous-substances-consent>

² See paragraphs 1-4 of ECDC’s Deadline 5 comments on the Revised Draft DCO

3. Further, in so far as the Applicant wishes to pursue the argument that these regulations do not apply, it is entirely for them to demonstrate unequivocally why (and indeed how) this important piece of legislation ought to be excluded.

LEGISLATIVE FRAMEWORK

4. For present purposes, the Control of Major Accident Hazards Regulations 2015 (“COMAH”) provides the following in relation to application and exceptions.

3.— Application and exceptions

(1) These Regulations apply to any establishment which is either a lower tier establishment or an upper tier establishment.

(2) These Regulations do not apply to any of the following—

(a) an establishment which is under the control of—

(i) the Secretary of State for the purposes of the Ministry of Defence;

(ii) a headquarters or organisation designated for the purposes of the International Headquarters and Defence Organisations Act 1964 or the service authorities of a visiting force within the meaning of any of the provisions of Part 1 of the Visiting Forces Act 1952;

(b) hazards created by ionising radiation originating from substances;

(c) substances which create a hazard from ionising radiation if present on a nuclear establishment;

(ca) the transport of dangerous substances in pipelines, including associated apparatus, except where that activity takes place at a site which is an establishment despite that activity;

(cb) the transport of dangerous substances and directly related intermediate temporary storage by road, rail, internal waterways, sea or air, including loading and unloading and transport to and from another means of transport at docks, wharves or marshalling yards, except where that activity takes place at a site which is an establishment despite that activity;

(d) the exploitation, namely the exploration, extraction and processing, of minerals in mines and quarries, including by means of boreholes, except any of the following which involve dangerous substances—

(i) onshore underground gas storage in natural strata, aquifers, salt cavities and disused mines;

(ii) chemical and thermal processing operations and storage related to those operations;

(iii) operational tailings disposal facilities, including tailing ponds or dams;

(e) the offshore exploration and exploitation of minerals, including hydrocarbons;

(f) the storage of gas at underground offshore sites including dedicated storage sites and sites where exploration and exploitation of minerals, including hydrocarbons, are also carried out;

- (g) waste landfill sites, including underground waste storage, except—*
- (i) any of the following that involve dangerous substances—*
- (aa) chemical and thermal processing operations and storage related to those operations; or*
- (bb) operational tailings disposal facilities, including tailing ponds or dams*

5. For present purposes, the Planning (Hazardous Substances) Regulations 2015 (“**P(HS)**”) provides that Regulation 4 consider the exemptions as set out in ‘Schedule 2 Exemptions’. The list of exemptions set out does not indicate, explicitly or implicitly, the exemption of any battery energy storage system (BESS).

RESPONSE

6. ECDC’s response to Q2.1.2. is as follows. **First**, we are of the view that large scale battery facilities (BESS) are more than likely to require a hazardous substance consent and therefore be subject to the COMAH and P(HS) Regulations 2015.
7. **Second**, the large scale nature of the battery facilities proposed as part of the development is well known to the ExA. Li-ion batteries generating a great deal of MWh (stored) in capacity will always carry some risk. These batteries, given the risk they pose to human health, are more likely than not captured in both of the regulations.³
8. **Third**, the ExA has heard copious evidence around the potential failure of these batteries in the future (from Dr Fordham), the risks associated with it and how best to ensure local authorities and HSE take the necessary steps to safeguard public health. Part of this process is to ensure that the requisite consents are in place, once the necessary information is gathered and assessed by the consenting authority.

³ See Schedule 1 *Hazardous substances and controlled quantities* of P(HS) Regs and Schedule 1 *Dangerous substances*, para 1 of COMAH

9. Further, once further evidence is produced in relation to any dangerous substance, the storage and production of any such substances, and any potential fire risk or explosion, can a view to be taken as to any consent required. As matters currently stand, the Applicant has not, in any event, produced any evidence to demonstrate why the regulations should be *excluded*. Dr Fordham’s evidence is the only material on this currently before the examination.⁴
10. **Fourth**, whilst it is a different consenting body to the one relevant here, it is useful to note that the HSE for Northern Ireland seems to consider that consent may be required under the COMAH regulations.⁵ This is persuasive in so far as, at the very least, there is no evidence to suggest that it ought to be excluded at this stage.
11. **Fifth**, we have seen that the Applicant appears to pray in aid of a Parliamentary Answer dated July 2021 that BESS is exempt from COMAH Regs ⁶ on the basis, simply, that Li-ion batteries are considered to be ‘articles’ and therefore outside of the scope of the COMAH. We are of the view that this is not evidence to support such a conclusion. There is no legal case supporting this conclusion. The ExA simply does not have enough information to rely on such inference.⁷
12. In short, if the Applicant wishes to continue asserting that these Regs are excluded, then the ECDC reserves its position to respond at the next Deadline. Finally, this is an issue that requires resolution at the consenting stage rather than post consent.

⁴ See in particular REP4-090 and the attached Appendices

⁵ REP2-129q – precise wording they use states ‘*potential to require*’ – and this is a document dated 13.5.2022

⁶ REP4-090

⁷ The question posed by the ExA at Q2.1.3 on *BESS: design parameters* is quite telling and speaks to the simple fact that the Applicant is unable to ‘*describe clearly what is proposed*’ and therefore the ExA, the authorities and other participants are left completely in the dark.

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