Kate Mignano
Operations Manager
National Infrastructure and Environment
National Infrastructure Planning

via email only

20th April 2022

Dear Kate

Larkshall Mill Aggregate Manufacturing and Carbon Capture Facility NSIP - O.C.O Technology Ltd.

We note in the meeting note of 17th February that the query was raised as to whether O.C.O is certain that the Larskhall Mill Aggregate Manufacturing and Carbon Capture Facility (the Project) is a nationally significant infrastructure project (NSIP) for which development consent is required under the Planning Act 2008 (the Act) and in relation to which PINS may lawfully accept an application for such consent. We said, at the meeting, we would come back to you on this. We understand your concerns, and as we have always said, we would prefer not to be an NSIP, but unfortunately the advice we have received (and shared) strongly concludes the Project is.

You have requested further information on this, and consequently we went back to our legal team to ask if they could summarise the position.

The advice received again supports the position we have outlined to date that the Project is an NSIP and for the reasons set out previously. To illustrate this we have provided below a summary of the advice received, which concludes that we remain certain that it is lawful and appropriate for our Project to be considered as a NSIP by PINS.

We would welcome further dialogue on this in due course but need to ensure that PINS will accept jurisdiction of our application sooner rather than later so O.C.O do not expend unnecessary time and further significant financial input.

To summarise the advice received thus far is:

1 The main purpose of the Project, being a proposed hazardous waste facility to be located in England, is the recovery (our emphasis) of hazardous waste at a capacity of more than 30,000 tonnes per year (in fact up to 100,000 tonnes per year). The operations to be carried out at the Project fall within the definition of "recovery" in the Act by reference to the Hazardous Waste (England and Wales) Regulations 2005 (the

2005 Regulations), i.e. any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or the wider economy.

2 As set out more particularly in the Opinion of Alexander Booth QC (the Opinion) provided to PINS , the operation to be carried out, as the main purpose of the Project, would entail using Accelerated Carbonation Technology to process more than 30,000 tonnes per annum of Air Pollution Control residues (APCr) (a defined hazardous waste) by combining it with four other materials (sand, cement, water and carbon dioxide) to produce manufactured limestone.

3 This operation constitutes the "recovery" of APCr, and the Project is therefore an NSIP and that the converse is, our advice states, unarguable and vulnerable to challenge by way of judicial review. The query raised by PINS is whether the main purpose of the Project is to produce manufactured limestone or to process APCr. This, as a matter which might inform the status of the Project as an NSIP, is in our lawyers view misjudged. Processing APCr to produce manufactured limestone at the Project is one and the same "operation", as a question of fact and of law for the purposes of the 2005 Regulations, which falls squarely within the definition of "recovery" given above. It is that "recovery" which is the "main purpose" of the facility, rendering it an NSIP on the terms of section 30 of the Act.

4 Unfortunately we cannot prudently progress the Project by way of an application to the local planning authority, Norfolk County Council, under the Town and Country Planning Act 1990 (TCPA). PINS will be aware that it is an offence under the Act to carry out development for which development consent is required unless you have the necessary development consent. The points raised above would prevent the progressing of any TCPA application for the project and hence its construction and operation. In other words, if PINS do not continue to process the Project under the Act it would simply not be progressed at all. It should be noted that Norfolk County Council has, in any event, previously confirmed that it would decline a TCPA application given that, in their view, it is an NSIP.

5 It is appreciated that PINS will have experience of schemes which are not NSIPs in respect of which applications under section 35 were used to enable them to engage the NSIP regime. However, in the above context, it is important to appreciate that O.C.O could only apply to the Secretary of State for a direction under section 35 of the Act for the Project to be treated as such, if the project was not an NSIP. Our legal team have said a scheme either is or is not an NSIP for the purposes of section 30 of the Act. If it is an NSIP section 35 cannot apply. As set out above, our advice is that the Project is

an NSIP and consequently, a section 35 application cannot be made, so there is no option under the Act for the Project other than for it to be progressed as the NSIP.

6 We would also take this opportunity to reconfirm that although the Opinion of Alexander Booth QC refers to a proposed site in Cheshire (Protos) rather than the Project site nothing turns on this for the above purposes. All aspects of the nature and scale of the operation described by the Opinion in respect of Protos are the same for the Project and its legal conclusions remain apposite for the Project.

We note that the summary of the meeting includes the comment that PINS would not make a judgement on whether the Project was an NSIP until an application for a Development Consent Order is submitted to PINS. On a practical basis we cannot prudently progress the Project to an application for development consent if this is the case given the abortive cost that might be incurred in preparing an application which PINS might ultimately decline to accept. We need certainty that PINS accepts the Project is an NSIP.

7 O.C.O has, pursuant to Regulation 10 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, requested a scoping opinion from PINS on behalf of the Secretary of State in respect of the environmental statement to be comprised in that application. PINS is progressing that request for the scoping opinion as it is out for consultation. It would not have jurisdiction to progress that request if the Project were not an NSIP. The advice we have been given is that PINS can be entirely satisfied it has lawfully accepted the request and has now assumed jurisdiction for the Project by acting on this Scoping request.

The summary of the meeting suggests that PINS might have unspecified residual concerns that the Project is not an NSIP, albeit it is not clear what these are. A compelling case has been put forward in the Opinion, which is supported by our Project solicitors (Bryan Cave Leighton Paisner LLP), that the Project is an NSIP and must be determined as such pursuant to the Act. We have also set out the practical implications for the Project described in this letter if it is not progressed by way of a DCO application – it simply cannot be progressed in any other way.

Our view is that there would need to be extremely robust legal and technical advice disclosed by PINS supporting a contrary position to that which we have set out in this letter, although our legal team cannot see how such a contrary position could be supported.

We would therefore like to take this opportunity to request that PINS confirm by way of formal advice under section 51 of the Act that it is content to continue progressing the Project as a NSIP by way of the process prescribed by the Act as it has done to date, which we consider to

be entirely lawful and appropriate. We would be happy to discuss any matter relating to this letter or the Project in advance of any formal response if PINS would consider it helpful.

Yours sincerely,

Andrew Short