

RE: PROPOSAL FOR ENERGY STORAGE FACILITY BY CAPITA PLC

ADVICE

INTRODUCTION

1. We are asked to advise Capita Plc (Capita) in respect of a proposal for a new form of energy related development comprising, in simple language, a series or an array of very large ‘battery type’ Energy Storage Facility (“ESF”) which could potentially each have a capability of up to 200MW on current estimates. It is to be noted however that our instructions are that the first ESF is intended to be limited to 49MW of capacity. The array is to be housed in a container or a shed of no greater height than 15 m and would most likely be connected to the high voltage transmission grid (based on a 400 kV output), but may alternatively be connected to the distribution network (based on 132 kV output).
2. The main purpose of the facility is to support National Grid in the efficiency and effectiveness of running the electricity transmission. The principal purpose of the ESF will be to provide Enhanced Frequency Response services to National Grid. This is to assist National Grid in maintaining the transmission system frequency within the required frequency range by exporting or importing active power as required within a very fast, sub-second, response time.
3. The principal reason behind Capita seeking advice is that this is a proposal which they are seeking to promote on National Grid’s (‘NG’) behalf and thereafter also to run any subsequent ESFs again on National Grid’s behalf. The central issue we are asked to advise upon is to identify the most appropriate and robust legal framework within which to ensure that any development carried out in relation to the development of any ESF is lawful and to be able to report that to NG as part of Capita’s bid to NG. Our advice also takes account of the aim to identify a consent framework that is likely to be the most efficient in terms of timing on the basis that NG are hoping to have the

first ESF (or ESFs) in place by the end of 2017. The implications of any requirement to comply with European Directive and Environmental Impact Assessment Regulations also need to be considered.

4. In addition, Capita have carried out a survey and planning appraisal of approximately 40 potential locations and sites to deliver an ESF. This assessment has led to the identification and selection of 3 sites as having the best potential to deliver an ESF. Advice is also sought on the implications and suitability any of these sites may have in the context of the different planning approval frameworks.
5. Capita is aware that there may well be competitors for the bid to NG for deployment of the same type of facility and that there is considerable interest.
6. This written advice follows advice provided in consultation on 14 January 2015 taking on board any additional instructions received during that consultation but in effect confirming our advice given at that time.

FACTS

Nature of ESF and likely built form

7. As set out in our instructions (see 'Capita Specification for Legal Review of Energy Storage Facility Planning Process' prepared by C. Stoyell) the ESF will comprise the following key components:
 - (i) Battery arrays: these house the individual battery units in a modular arrangement (we have examples of layouts comprising 26 or 50 racks each comprising a 4MW system per rack);
 - (ii) Power Conversion System ('PCS'): each battery array will be connected to a PCS, which will convert the direct current ('DC') power generated by the batteries into a 50 Hz alternating current ('AC') output;
 - (iii) Medium Voltage Transformers: the output from each PCS will be stepped up to a higher voltage, most likely 33kV, to allow for efficient collection and transmission, and greater safety, on site;
 - (iv) High Voltage Transformer(s) & Connection: the output from the ESF will need to be stepped up again to 132kV for a distribution network connection,

and most likely again to 400kV if connected to the National Transmission System

8. In terms of its proposed usage and how it is proposed to function and deploy the stored electricity the following is proposed:
 - (i) A capacity of up to +/-200 MW power, although this may be delivered in blocks of up to 50 MW (again the current proposal is limited to up to 49 MW);
 - (ii) Delivery of active power response within 500 milli-seconds of a +/-0.1 Hz variation from 50 Hz with full output delivered within 1 second;
 - (iii) Full power capability is delivered in response to any deviation on the electricity network of +/- 0.2 Hz;
 - (iv) The likely maximum continued battery response duration (either export or import) in one event will be 180 seconds
9. In particular, as described in the Mr Stoyell's report the facility is described as a "reactive service to stabilise the electricity network in periods where the normal operation of generation is mismatched with demand. As a result, the expected deployment profile of the ESF is intermittent and infrequent."
 - It is expected that the battery will be active (importing or exporting power) in response to the service requirements for only 10% of the time
 - For the rest of the time it will be idle or rebalancing its state of charge at low power levels
 - Consequently, for a 200 MW rated battery, the average (generation) output would be <25 MW when excluding idle time and <5 MW when including idle time"
10. We are instructed that Capita have been informed that the ESF will be required to have a licence in accordance with the Electricity Act 1989 and that it will need to be a 'generation licence' (as opposed to a transmission, supply, distribution or interconnector licence) and we return to this below. The ESF will however be a net energy consumer (due in part to it consuming energy in order to operate) as well as being idle for significant periods.

11. We are also instructed that it will emit a constant low pitched hum which will get slightly higher when active as opposed to idle. There are existing facilities in the USA and Germany which can serve as good comparators for the levels of noise. There is no concern that the ESF is likely to cause any real or noticeable noise disturbance or pollution.
12. In terms of the building and infrastructure required, the rack of batteries and PCS will need to be housed in some form of structure for safety and operational reasons. There are 2 options with regard to the nature and form of this structure.
13. The first option comprises a building resembling a large light-industrial warehouse. The battery lines and PCS would all be housed in a single or multiple single-storey buildings, with the medium voltage transformers and high voltage cabling situated outside of the building in a similar fashion to a standard substation. The building may house air conditioning units on the roof
14. The second option would be a containerised solution with each battery line being housed in a standard shipping container of 40ft/53ft. Some equipment may be situated on top of the container, such as the PCS. Again, the HV cabling and medium voltage transformers would be outside of the containers.
15. For either configuration, there would be a perimeter security fence around the whole site, and the HV Transformer and connection equipment will be contained in its own perimeter fence. This will be situated close to the transmission grid connection point, which could be within the main perimeter fence or separate, depending on the site.
16. There would be no need for any form of chimney or outlet for smoke or steam as none is produced by the ESF. For safety measures, a small on-site generator will be required for use as an emergency power reserve, but is highly unlikely to be activated.
17. In either event the storage structure will be no more than 15m in height. It is also anticipated that there will be a vehicular means of access, up to 10 car parking spaces, together with a landscape scheme. The possibility of a small visitor centre has also

been discussed as forming part of the ESF, although any such facility would be ancillary to the ESF.

Ownership – operating structure

18. It was explained in consultation that Capita's role would be as licence holder but the asset (the machinery and buildings) would be owned by NG and that the land on which the ESF would be built and operate from is proposed to be leased from the relevant landowner.

Favoured Sites

19. The parameters guiding potential site selection and assessment are set out in Mr Stoyell's report and we do not repeat them here. The site and planning appraisals are set out in a separate desk based report dated 7 December 2015 entitled 'Project Triad – Planning Appraisal'. We understand this report is still in draft form.
20. The 12 potential locations some of which had a number of options for appropriate sites were following the appraisals divided into 'Green' locations representing areas likely to benefit from capacity within the network and 'Amber' locations representing areas that may benefit from capacity within the network.
21. Following a further appraisal three specific locations have now been selected as having potential to deliver an ESF. These are, in order of preference to Capita:
- (i) land adjacent to Willington Power Station (South Derbyshire District);
 - (ii) a vacant warehouse close to Didcot Power Station (Vale of White Horse District);
 - and
 - (iii) land adjacent to Eggborough Power Station (Selby District).

Willington

22. In February 2011, RWE npower was granted planning consent to develop up to 2,400MW of new power generation plant. The planning consent permits the phased construction of up to 2,000MW of Combined Cycle Gas Turbine (CCGT) plant and 400MW of Open Cycle Gas Turbine (OCGT) plant. If constructed, the new CCGT Power Station would be a compact industrial facility located on land occupied by the

former Willington A and B Power Stations which closed in 1995 and 1999 respectively.

23. It is understood that the appraisal identified five sites adjacent to the site of the former coal-fired Willington Power Station in South Derbyshire and that 2 of these fall outwith the flood plain. Three of them are identified as “potential operational land” and the other two are identified as “potential land”. The 2 sites to the centre and to north of the Willington PS were assessed as having reasonably strong prospects of securing planning permission, whereas the sites to the south and east of Willington would be heavily restricted due to flood risk and have been discounted.
24. By “potential operational land” it is understood this to be a reference to land either already owned by RWE npower which is either subject to the existing lawful use and land occupied by the former Willington A and B Power Stations or land which is the subject of the latest planning permissions.
25. However, in each case a totally new facility, including a new building would be required.
26. On the basis of the planning appraisal carried out against the relevant development plan and other relevant constraints (in other words on the basis of an application made in accordance with the 1990 Act and considered against s.38(6) of the Planning and Compulsory Purchase Act 2004) the conclusions drawn were, as noted above, reasonably strong in favour of this site.
27. We were instructed that of all the sites Willington is by far the most advanced and that the grid capacity is favourable as well.

Didcot Power Stations

28. Didcot Power Stations refers to an active natural-gas power plant (known as ‘Didcot B Power Station’) that supplies the National Grid, and a closed combined coal and oil power plant (known as ‘Didcot A’ Power Station). They are situated immediately adjoining one another in the civil parish of Sutton Courtenay, next to the town of

Didcot in Oxfordshire (formerly in Berkshire). Didcot 'A' Power Station closed in March 2013 with its towers and adjacent buildings now being demolished from 2014 to 2016. Didcot 'B', a gas-fired power station remains in operation but the closure of Didcot 'A' has released a large area of land for alternative uses.

29. South Oxfordshire and The Vale of White Horse District Councils are working together with operators RWE Generation UK to plan the redevelopment of the Didcot 'A' site.
30. An application for outline planning permission for up to 400 homes, large and medium space for business, a 150-bed hotel, pub/restaurant, open space and infrastructure was submitted to both South Oxfordshire and the Vale in June 2015. This application is currently under consideration, with determination expected in February 2016.
31. This is an application submitted by Clowes Developments (UK) Ltd, and the description of development reads:
"Mixed use redevelopment comprising up to 400 dwellings (C3), 110,000ms of Class B2/B8 units, 25,000m2 of Class B1 units, 13,000m2 Class A1 units (includes 1,500m2 convenience food store), 150 bed Class C1 hotel and 500m2 of Class A3/A4 pub/restaurant, including link road, related open space, landscaping and drainage infrastructure, together with reservation of land for link road and Science Bridge. Cross boundary application Vale of White Horse and South Oxfordshire."
32. The remainder of the Didcot 'A' site (approximately 36 hectares) is retained by RWE Generation UK for potential future power generation development purposes, although nothing is currently planned.
33. The appraisal carried out by Capita identified and considered 9 sites. Of these, sites 1,5 and 9 were assessed as those with real potential and subsequently we are instructed that the preferred site for an ESF is a vacant warehouse although it is not clear which of the 9 sites this is.

34. The preferred site comprises land forming part of a Local Development Order created by the Vale of White Horse District Council in December 2012 (the Milton Vale LDO) ('LDO').
35. The purpose of the LDO is inter alia to “simplify planning control control to encourage growth in employment generating business at Milton Park” business park which together with Harwell Oxford, comprises the Science Vale UK Enterprise Zone.
36. The Science Vale UK Enterprise Zone has four key objectives:
- “1. Create high-value, high-tech jobs
 2. Contribute to the UK’s position as a world leader in science and technology, in line with Government strategy
 3. Attract international inward investment to complement the strengths of the existing cluster of science and technology businesses
 4. Leverage existing investment in science and assist in the translation of leading UK innovation in to market products for industry.”
37. The purpose of the LDO is also to “help to implement saved policy E5 of the Vale of White Horse Local Plan 2011 (adopted in 2006), which supports new business development and redevelopment in Use Classes B1, B2 and B8” (para 2.1.4 of the LDO). The LDO allows for principally employment generating uses falling within Use Classes B1, B2 and B8 of the Use Classes Order. The LDO otherwise confirms that an element of car showroom development, as a Sui Generis use, will also be permitted.
38. “Employment generating uses” are defined in the LDO as “uses that make a contribution to the number or range of job opportunities at Milton Park and predominantly come within Use Class B of the Use Classes Order 1987 (as amended), and exceptionally other employment generating uses, specifically identified in the LDO and strictly limited in floorspace and location, which come within other classes of the Use Classes Order.

39. “Other Uses” are defined as uses directly supporting the viability and sustainability of the business park: uses limited in the scale of their provision to ensure their main purpose is to complement and support the businesses at Milton Park and their staff, customers and visitors.
40. Para 3.3.1 of the LDO provides that LDO permits development “where it is in accordance with the defined parameters in (Table A) and permitted uses (Table B)”.
41. In terms of amending or revoking the LDO para 5.4.1 notes that the LPA has power to “amend or withdraw the Order...if it is satisfied that the Order has consistently failed to meet the objective of the LDO as set out in the statement of reasons, and it is considered that amendments to the Order would not overcome this or if changes in material considerations require the Order to be revoked, amended or revised. ”
42. In addition, para 5.4.2 states that in the event that “the local authority determine that the Order, in part or in whole, will be revoked or amended or revised, it will give the landowner(s) for the time being a minimum of twelve months notice prior to any such revocation, amendment or revision.”
43. We set below our views on the implications of the LDO for the promotion of the preferred site.

Land adjacent to Eggborough Power Station (Selby District).

44. Eight potential sites were identified in the Capita site appraisal at or adjacent to Eggborough power station is located off the A19, south of Selby.
45. Of these 8 sites one site, site 3, on the eastern side of the power station is assessed as being the most suitable site and with the greatest prospects of achieving either planning permission as a planning application. Sites 5 just to the south of site 3 and site 7 on the western side of the power station are also identified as potentially suitable on the basis of low impact of the landscape.
46. Site 3 is distinguished from the other 2 as being operational land or potential operational land whereas sites 5 and 7 are described simply as ‘other land’. It is again

understood that the description of operational land is based on the site being located within the existing power station site.

47. The planning context in particular includes SP17 a generic Low Carbon and Renewable Energy policy and Policy EMP10 which seeks to promote similar uses on the Eggborough power station site as follows:

‘Additional industrial/business development may be permitted at or close to Drax and Eggborough power stations provided the proposal is directly related to the process of generating electricity, either by making use of by-products from the power station or utilising a direct source of electricity; and that proposals would not create environmental problems associated with noise, smell or water pollution or dust emissions’.

LAW: Potential Planning Framework Options and relevant definitions

48. As correctly identified within our instructions there are 3 potential framework options for permitting the development –

- (i) The General Permitted Development Order (SI 2015/596) (‘the GPDO’)
- (ii) The Town and Country Planning Act 1990
- (iii) The Planning Act 2008

(i) GPDO (the full provisions are appended to this advice)

49. GPDO Sch 2 PART 15 Class B addresses “Power related development”. Class B grants permission for “Development *by statutory undertakers for the generation, transmission, distribution or supply of electricity for the purposes of their undertaking of...*

(d) the extension or alteration of buildings on operational land;

(e) the erection on operational land of the undertaking of a building solely for the protection of plant or machinery;

(f) any other development carried out in, on, over or under the operational land of the undertaking.”

50. Para B.1 thereafter sets out the limitations in respect of the above permitted development.

51. With regard to Class B(d) various limitations are provided relating to height; the cubic content or floor space compared with the size of the original building.
52. With regard Class B(e), B.1 prevents any building being erected which would exceed 15 metres in height.
53. With regard to Class B(f) development, para B.1 provides limitations “(i) *the erection of a building, or the reconstruction or alteration of a building where its design or external appearance would be materially affected, or (ii) the installation or erection by way of addition or replacement of any plant or machinery exceeding 15 metres in height or the height of any plant or machinery replaced, whichever is the greater*”.
54. Para B.2 makes it a condition that Class B(e) development is subject to prior approval from the relevant planning authority.

Statutory Undertakers

55. Section 262(6) and (7) TCPA 1990 deems “*Any holder of a licence under section 6 of the Electricity Act 1989... to be a statutory undertaker*”

Generation, transmission, distribution or supply of electricity

56. With regard to “*the generation, transmission, distribution or supply of electricity*” s.64 the Interpretation section of the Electricity Act 1989 refers to the term ‘generate’ and “*generating station*”.
57. “*Generate*” is defined under s.4(4) of the EA 1989 as “*in relation to electricity, means generate at a relevant place;*” and a relevant place is defined in s.4(5) “*a place in Great Britain, in the territorial sea adjacent to Great Britain or in a Renewable Energy Zone*”.
58. In terms of “*generating station*” s.64 provides “*in relation to a generating station wholly or mainly driven by water, includes all structures and works for holding or*

channelling water for a purpose directly related to the generation of electricity by that station”.

59. With regard to “*transmission*” again s.64 refers back to s.4(4) which states “*in relation to electricity, means transmission by means of a transmission system;*” and a “*transmission system*” means a system which—

- (a) consists (wholly or mainly) of high voltage lines and electrical plant, and*
- (b) is used for conveying electricity from a generating station to a substation, from one generating station to another or from one substation to another”*

60. With regard to “*distribution*” s.64 cross referencing s.4(4) defines “*distribute...in relation to electricity*” as meaning “*distribute by means of a distribution system, that is to say, a system which consists (wholly or mainly) of low voltage lines and electrical plant and is used for conveying electricity to any premises or to any other distribution system;*”

61. In terms of “*supply*” s.64 and s.4(4) provides “*in relation to electricity, means its supply to premises in cases where—(a) it is conveyed to the premises wholly or partly by means of a distribution system, or (b) (without being so conveyed) it is supplied to the premises from a substation to which it has been conveyed by means of a transmission system, but does not include its supply to premises occupied by a licence holder for the purpose of carrying on activities which he is authorised by his licence to carry on*”.

Types of licence - EA 1989

62. In line with the above s.6 of the EA1989 sets out licensable activities under the EA 1989.

63. A “*generation licence*” is “*a licence authorising a person to generate electricity for the purpose of giving a supply to any premises or enabling a supply to be so given*”.

64. A “*transmission licence*” is “*a licence authorising a person to participate in the transmission of electricity for that purpose*”.

65. Similarly, “a distribution licence” is “*a licence authorising a person to distribute electricity for that purpose*” and “a supply licence” is “*a licence authorising a person to supply electricity to premises*” (see s.6(1))

66. It should be noted that S.6(2) and (2A) prevents a holder of a distribution licence from also holding a generation licence; or a supply licence and there are further restrictions on holders of interconnector licence. There do not however appear to be provisions preventing the same person holding a generation licence and a supply licence and/or a transmission licence.

Plant

67. S.64 of the EA 1989 defines “electrical plant” as “*plant equipment, apparatus or appliance used for, or for purposes connected with the generation, transmission, distribution or supply of electricity, other than—*
(a)*an electric line;*
(b)*a meter used for ascertaining the quantity of electricity supplied to any premises;*
or
(c)*an electrical appliance under the control of a consumer;”*

Operational land

68. Ss ss263 and 264 of the 1990 Act deal specifically with the meaning of “*Operational land*” in the context of the special provisions applicable to statutory undertakers.

69. The general rule as set out in S.263 (1) is that there are two categories of operational land. Land may be operational land if it is used for the purposes of the undertaking concerned, or if an interest is held in it for that purpose by the undertaker. Thus it includes land which the undertaker now owns for future operational use. Neither category includes land which “*is comparable rather with land in general*” than with land used for statutory undertakings (subs. (2)). This exclusion is understood to be intended to rule out premises such as shops, offices, showrooms and dwelling-houses owned by a statutory undertaker, even if used in some way for the undertaking.

70. It is said to be in each case a question of fact: R. v Minister of Fuel and Power Ex p. Warwickshire County Council [1957] 1 W.L.R. 861; 8 P. & C.R. 305. Some

information as to the meaning of the term in relation to the land of railway undertakers may be gathered from East Barnet Urban District Council v British Transport Commission [1962] 2 Q.B. 484; 13 P. & C.R. 127. Land held purely for investment is clearly not operational land.

71. By virtue of s.264, land acquired since 1968 is excluded from being treated as operational land unless it satisfies certain planning requirements. Prior to the Town and Country Planning Act 1968, where statutory undertakers acquired land with the intention of using it for the carrying on of the undertaking, or at any time formed such intention in relation to land already owned by them but previously not intended for such use, the land became operational land. But the 1968 Act then restricted that entitlement.
72. Land can now be regarded as operational land only if it satisfies the planning requirements of s.264 (3) namely where “(a) *there is, or at some time has been, in force with respect to it a specific planning permission for its development; and (b) that development, if carried out, would involve or have involved its use for the purpose of the carrying on of the statutory undertakers’ undertaking*” unless the land was held by the statutory undertaker before December 6, 1968 and was operational then; or the land was transferred from other statutory undertakers under any of the reorganisation/privatisation legislation specified in subs. (4) and was operational land of the other operators immediately before the transfer (subs. (4)).
73. With regard to the requirement of a specific permission this must be granted on an application and applies even to a temporary permission (see Adur District Council v Secretary of State for Environment, Transport and the Regions [2000] 1 P.L.R. 1 (Court of Appeal)). A specific permission also applies to permission under the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596), Sch.2, Pt 18, Class A (permission for development authorised by private or local Act of Parliament or Parliamentary order); to specific permission granted by special development order; and permission deemed to be granted under s.90 upon the granting of an authorisation by a Government department.

74. It may be noted that the special regime applicable to statutory undertakers under Pt III of the 1990 Act (development control) applies not only to “operational land”, but also to land in which statutory undertakers hold or propose to acquire an interest with a view to its being used for the purpose of carrying on their undertaking where the planning permission would be for development involving the use of the land for that purpose (s.266(2)). The relevant provisions of Part 15 of the GPDO however apply only to operational land.

75. Any question arising as to whether land of a statutory undertaker is operational land is to be determined by the appropriate Minister (see s.265) for the undertaking (s.336(3)).

“building”

76. The statutory definition of “building” is set out in s336 of 1990 Act and *“includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building;”*

77. In addition the Courts have determined that in assessing whether a particular form of development or structure is a building for the purposes of building control there are three criteria to apply - size, permanence and degree of physical attachment. This 3 part test derives from the cases of Cardiff Rating Authority v Guest Keen Baldwin Iron and Steel Company Limited [1949] 1 KB 385 and Skerrits of Nottingham Limited v Secretary of State for Environment, Transport & Regions and Another[2000] 2 PLR 102 . These three criteria raise questions of fact and degree.

78. The test has more recently been considered by Lang J in R.(oao Save Woolley Valley Action Group Ltd) v Bath and North East Somerset Council [2012] EWHC 2161 (Admin); [2013] Env. L.R. 8; [2012] A.C.D. 124 where mobile poultry units were being considered. In particular, with regard the test of permanence Lang J stated as follows:

“Permanence has to be construed in terms of significance in the planning context. In Skerrits Schiemann LJ said of permanence: ‘in situ for how long, to which I would answer: for a sufficient length of time to be of significance in the planning context’ (at 1034). For the polytunnels in Hall Hunter ([2007] 2 P. & C.R. 5) to remain in one

particular location for three months was found by the Inspector to be sufficient to be of consequence in the planning context (at [19]). In this case, the units were permanently in their field, and there was no limit on the length of time they would remain there – they could be there for years. The ability to move them around the field did not remove the significance of their presence in planning terms. The visual and landscape impact of the units was not affected to any material extent by any periodic changes to their position in the field

(ii) Town and Country Planning Act 1990 – Use Class and EIA

79. The principal question as to what amounts to development and also development which is required to be the subject of development control is to be addressed by the application of s.55 of the 1990 Act.

80. As also mentioned in the Save Woolley Valley case above, in terms of what amounts to “building operations” Lang J rejected the argument that submitted that the because each of the poultry units was “*prefabricated and easily assembled so its construction was not an operation “normally undertaken by a person carrying on business as a builder” (s.55(1A)(d)). It followed that constructing the units was not a “building operation” within the meaning of s.55 TCPA 1990*”. In her judgment Lang J held that “*s.55(1A) is inclusive: it is not intended to be an exhaustive definition of “building operations. In any event, I accept the submission made on behalf of the Secretary of State that the works carried out to construct and install the units were capable of coming within s.55(1A)(d) “.*

81. In terms of identifying whether what is proposed falls within a specific use class as set out in Class B1 Business of the Use Classes Order 1987 (‘the UCO’) provides:
“*Use for all or any of the following purposes—*
(a) as an office other than a use within class A2 (financial and professional services),
(b) for research and development of products or processes, or
(c) for any industrial process,
being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.”

82. Class B.2 is “*Class B2. General industrial - Use for the carrying on of an industrial process other than one falling within class B1 above*”.

83. With regard to what amounts to an “industrial process” Art 2 of the UCO defines it as follows:

““*industrial process*” means a process for or incidental to any of the following purposes: —

(a) *the making of any article or part of any article (including a ship or vessel, or a film, video or sound recording);*

(b) *the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article; or*

(c) *the getting, dressing or treatment of minerals;*

in the course of any trade or business other than agriculture, and other than a use carried out in or adjacent to a mine or quarry”.

EIA and cumulative test at screening stage

84. Reg 7 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) (‘the EIA Regulations’) requires a local planning authority to consider when they receive an application whether it appears to be development under either Schedule 1 or Schedule 2, and if so to screen the development to see whether Environmental Impact Assessment is required.

85. We do not consider that the proposed ESF could fall within Schedule 1 but the question may be raised as to whether it could fall within Schedule 2. Schedule 2 development “*means development other than exempt development of a description mentioned in column 1 of the table in Schedule 2 where (a) where any part of that development is to be carried out in a sensitive area, or (b) any applicable threshold or criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development.*”

86. The table in Sch 2 at 3 Energy Industry (a) refers to “*Industrial installations for the production of electricity, steam and hot water (unless included in Schedule 1)*” and

the applicable threshold or criterion is where *“The area of the development exceeds 0.5 hectare”*.;

87. If it were to fall within the above description then it would have the potential to fall within the definition of regulation 2 of Environmental Impact Assessment development which means:

“Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location”

88. The assessment at the screening stage as to whether or not a Sch2 development is likely to have significant environmental effects has to be made taking account of the factors which are set out in Schedule 3 of the 2011 Regulations. Those include, for instance, the environmental qualities of the development and the area within which it is to occur, together with an assessment of the cumulative effect of the proposal with other development.

89. In approaching the question of whether or not the development falls within a category of Sch 2 the Courts have held (e.g. McPhee-v-South Downs National Park Authority [2015] EWHC 1661) there are two matters of approach which are important. Firstly, in R V Swale Borough Council (ex p Royal Society for the Protection of Birds) [1991] 1 PLR 6 Simon Brown J drew an important distinction between the stage of determining whether a development fell within Sch 2 and the subsequent stage of undertaking a screening opinion if it did. He observed as follows:

“3. The question whether the development is of a category described in either schedule must be answered strictly in relation to the development applied for, not any development contemplated beyond that. But the further question arising in respect of a Schedule 2 development, the question whether it ‘would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location’ should, in my judgment, be answered rather differently. The proposal should not then be considered in isolation if in reality it is properly to be regarded as an integral part of an inevitably more substantial development. This approach appears to me appropriate on the language of the regulations, the existence of the smaller development of itself promoting the larger development and thereby likely to carry in its wake the environmental effects of the latter. In common sense, moreover,

developers could otherwise defeat the object of the regulations by piecemeal development proposals.”

90. In addition, further guidance in relation to the correct approach to considering whether development falls within Sch 2 was provided in the case of R (on the application of Goodman) v The London Borough of Lewisham and Big Yellow Property Co. Ltd [2003] EWCA Civ 140 Giving the leading judgment at the Court of Appeal Buxton LJ observed:

“7. The first question for a planning authority is, therefore, to determine whether the application before it is a ‘Schedule 2 application’: that is, in terms of the definition set out in paragraph 5 above, whether the development falls within the descriptions and limits set out in Schedule 2. Although the application becomes a Schedule 2 application by decision of the authority; and does not thereafter become an application for EIA development unless the authority further so decides; the authority cannot avoid the implications of the application being for EIA development simply by not taking the preliminary decisions at all. That is clear from the observations of Lord Hoffmann (albeit in relation to the obligations of the Secretary of State under an earlier version of the Regulations, the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988) in Berkeley v Secretary of State for the Environment [2001] 2 AC 603 at pp 614G-615A. The authority is bound to enter upon consideration of whether the application is for Schedule 2 development unless it can be said that no reasonable authority could think that to be the case: Berkeley, loc.cit. . If the development is found to be a Schedule 2 development, responsibilities of the same order attach to the authority's consideration of whether it is an EIA development.”

91. Following consideration as to whether the development is a Schedule 2 development, if the authority concludes that it is such, it then has to go on and decide whether that Schedule 2 development is also an EIA development, by determining whether it is likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

(iii) Planning Act 2008

92. S.14(1) of the PA 08 headed “*Nationally significant infrastructure projects: general*” states that :

(1) In this Act “nationally significant infrastructure project” means a project which consists of any of the following—

(a) the construction or extension of a generating station;

(b) the installation of an electric line above ground;

(c).....”

93. Thereafter S.15(2) provides for the limitations for generating stations (construction or extension) namely that they should not be offshore and over 50 MW.

94. Under s.235 of the PA 08 the definition of “generating station” is as under EA 1989 and referred to above.

95. With regard to any relevant content of National Policy Statements - NPS EN-1 the Overarching NPS on energy infrastructure makes reference back to 2008 Act at para 4.1 and at para 4.1.3 confirms the NPS and the regime applies to “*electricity generating stations generating more than 50 megawatts onshore and 100 megawatts offshore. This includes generation from fossil fuels, wind, biomass, waste and nuclear. For these types of infrastructure, the Overarching NPS (EN-1) in conjunction with the relevant technology- specific NPSs (EN-2 on fossil fuel generating stations, EN-3 on renewable energy infrastructure or EN-6 on nuclear power generation as appropriate) will be the primary basis for IPC decision making*”; and to “*electricity lines at or above 132kV. For this infrastructure, EN-1 in conjunction with the Electricity Networks NPS (EN-5) will be the primary basis for IPC decision making*.”

96. The NPS also states at para 4.1.5 “*The generation of electricity from renewable sources other than wind, biomass or waste is not within the scope of this NPS. Insofar as this NPS relates to the development of new nuclear power stations, it only has effect in relation to applications for the development of new nuclear power stations on the sites listed in EN-6.*”

97. NPS EN-5 thereafter relates to “Infrastructure for electricity networks generally”.

Para 1.8.1 states that this “*can be divided into two main elements:*

- *transmission systems (the long distance transfer of electricity through 400kV and 275kV lines), and distribution systems (lower voltage lines from 132kV to 230V from transmission substations to the end-user) which can either be carried on towers/poles or undergrounded; and*
- *associated infrastructure, e.g. substations (the essential link between generation, transmission, and the distribution systems that also allows circuits to be switched or voltage transformed to a useable level for the consumer) and converter stations to convert DC power to AC power and vice versa.*

98. Para 1.8.2 of EN-5 then confirms the NPS covers “*above ground electricity lines whose nominal voltage is expected to be 132kV or above. Any other kind of electricity infrastructure (including lower voltage overhead lines, underground or sub-sea cables at any voltage, and associated infrastructure as referred to above) will only be subject to the Planning Act 2008 – and so be covered by this NPS – if it is in England, and it constitutes associated development for which consent is sought along with an NSIP such as a generating station or relevant overhead line*”.

99. The other 4 Energy NPS relate to Renewable energy; Fossil Fuels; Oil and Gas Supply and Storage and Nuclear Power.

100. In terms of any changes to the regime S.14 (3) of PA 08 provides the SofS with the power to amend S.14 (1)” *to add a new type of project or vary or remove an existing type of project*” or “*make further provision, or amend or repeal existing provision, about the types of project which are, and are not, within subsection (1)*” by order.

101. Under S.35 the SofS can also may also “give a direction for development to be treated as development for which development consent is required” and the procedural requirements are set out in s.35ZA.

ANALYSIS and RECOMMENDATIONS:

102. Having considered all the above we consider that there are a number of matters that are palpably clear, first the setting up and installation of the ESF, whether it take the form of the battery array being housed within a simple structure constructed on the site, or indeed within containers brought onto the site , would fall within the definition of a “building” within the meaning of s.336 of the 1990 Act and secondly also would involve "building operations" under s.55 and would therefore amount to “development” under the 1990 Act.
103. As such, it is also very clear that unless this development can be treated as permitted development within the GPDO or somehow falls within the PA 2008, the procedures under the 1990 Act will be the relevant means by which permission should be sought.
104. Turning then to Part 15 of the GPDO, whilst Capita are understood to be intended to be the future licence holders and therefore will be deemed to be statutory undertakers in accordance with s.6 of the EA 1989 they would not be the licence holders at the time of any prior approval application (in the event that PD rights can apply) nor would they be owners of the proposed site or have an interest in the site as licence holders/statutory undertakers at the time of any prior approval application .
105. It is also our view that where the provisions relate to plant the ESF does fall within the definition in S.64 of the EA 1989 definition of “electrical plant”.
106. This latter conclusion flows also from analysing whether the ESF fits the description under the EA 1989 of “purposes connected with the generation, transmission, distribution or supply of electricity”. It is in our view arguable that this facility potentially fits within all of the above purposes. It is noted that DECC have indicated that it considers a generation licence under s.4 and 6 of the EA 1989 would be the relevant licence however given that the ESF does not create the energy but

receives and stores it thereafter transmitting it onwards and given the rather opaque definition of generate within s.64 of the EA 89 and given that the ESF clearly is not a 'generating station' we would question this. This issue is nevertheless not material to the following analysis.

107. The key question as a consequence of the above is whether the sites identified for the proposal by Capita can properly fall within the requirement that Part 15 applies to 'operational land'.

108. 'Operation land' cannot in our opinion be something generic. In other words, it is not simply a question of identifying land which is currently incorporated into an existing energy related development or a previous energy related development. There are specific legislative criteria or conditions that have to be met in order for land to be 'operational land'.

109. It is understood that the preferred sites identified were not acquired before 1968 but in any event would not fall within the relevant definition because it need to be "land which is used for the purpose of carrying on their undertaking; and land in which an interest is held for that purpose".

110. With regard to land acquired by the relevant statutory undertaker after 1968 again it is difficult to see how Capita could rely upon such land as being operational land for their purposes of the purpose of the ESF because of the specific planning requirements under s.264 that *"(a)there is, or at some time has been, in force with respect to it a specific planning permission for its development; and (b)that development, if carried out, would involve or have involved its use for the purpose of the carrying on of the statutory undertakers' undertaking"*.

111. In the hypothetical circumstances, where one might identify a site which is owned by NG and meets the relevant criteria with regard to an existing undertaking for their purposes and one could therefore also construct a set of circumstances where NG is the identified statutory undertaker, issues would still arise in terms of 'fit' within Part 15 of the GPDO in our view for the reasons set out below.

112. Part 15 Class B(d) applies only to the extension or alteration of buildings on operational land. It does not apply to additional development involving the installation of electrical plant. It does not therefore encompass the proposed development. Similarly, Class B (e) applies only to the erection on operational land of the undertaking of a building solely for the protection of plant or machinery – it does not apply to the installation of the plant or machinery as well. In other words, the plant or machinery need to be in place before reliance can be made on the provisions of Class B (e).
113. Part 15 Class B(f) is wider as it applies to “*any other development carried out in, on, over or under the operational land of the undertaking.*” It does not however, given the scheme of Part 15, simply act as a sweeping up provision. It cannot be interpreted in our view as permitting a building together with the installation of the plant.
114. Equally consideration was given as to whether it would be appropriate and lawful under Part 15 to construct 2 planning permissions and install the relevant plant under B(f) first. The question then arises as to whether Class B(e) thereafter could be relied upon to argue that permission is granted for a building solely for the protection of that plant or machinery.
115. The view we formed (however attractive an argument) is that this approach, in all the circumstances, would not only be evidently contrived it would also be open to challenge based on the way that Part 15 is drafted. What is more, the issues with regard to meeting the requirement for development to be in relation to “operational land”.
116. Whilst a route that involves permitted development is clearly beneficial in terms of timing, we consider it is equally, if not more, important that the approach decided upon by Capita is as risk (challenge) free as possible and robust as possible.
117. This points clearly towards a more straightforward application under the 1990 Act. This has the benefit not only of presenting a familiar legal landscape to the decision makers but is clearly ‘open handed’. The risk of challenging the process is

minimised. The only potential for delay would therefore lie in ‘pure’ planning impact from this type of facility.

118. We turn therefore to consider whether there are any evident planning and environmental issues raised by the ESF. In short, there appear to be few, especially given the careful analysis of the sites identified and assessed in site appraisal against relevant planning policies and considerations. We return below to the specific question raised about the Didcot site and the LDO.

119. Whilst there are few obvious likely detrimental impacts, taking account of the nature and location of the preferred sites, it is in our view better to approach any relevant planning authority with a proposal at an early stage that includes a request for a screening opinion. This is not a surfeit of caution although we have not been presented with information to indicate that there would likely significant issues arising from the ESF – it is once again to ensure as robust a consent as possible.

120. In this context we turn to the specific raised about possibly relying upon the LDO which covers the identified site at Didcot.

121. First we are instructed that the ESF is not going to generate much employment (if at all) secondly it is not really arguable that the processes involved in the receipt, storage and then intermittent supply of electricity can truly amount to an ‘industrial process’ as defined in order to conclude that the use fits within Class B1 or B2 of the UCO.

122. As such, given the way the LDO is drafted the ESF is not development in our view that would easily accord with the LDO’s provisions. On other hand there are many stated aspirations and objectives within the LDO, in particular those relating to scientific and environmentally forward looking proposals, which would provide a basis upon which to approach the local planning authority and perhaps seek an amendment to the LDO to allow for future ESF. It does need to be noted that the process for amendment as set out above within the LDO requires at least 12 months’ notice.

123. We turn next to the issue of whether the PA 2008 and the NSIP regime might be currently treated as the more relevant and appropriate legal provisions by which ESFs gain planning approval.
124. In short, there is nothing within the PA 2008 and in the policy statements in our view that should lead one to conclude that the regime currently applies to this form of energy facility. We are also not aware of any current Government announcement or policy statements that would suggest that a change to the statutory regime to make ESF NSIP is something that is being contemplated.
125. Those instructing us are (understandably) keen to avoid circumstances where the SofS decides that energy related development such as this ought to be subject to the DCO regime. If such a decision was made that would of itself require some delay although it would be highly recommended that the commencement of 1990 Act procedures including EIA screening and formal/informal public consultations take account of that possible risk and be conducted on as robust a basis taking account of the pre-application DCO advice. This would therefore avoid a waste of resources.
126. Lastly we turn to the question of whether or not an EA would be required. As advised in conference it is not obvious that the ESF as currently proposed would fall within Sch2 and indeed, given the nature of any likely impacts being less than significant, the need for EA appears low. However once again, in order to take as robust a legal position as possible and especially in order to take account of the real potential and recognised aim that the 49 MW facilities would most likely be expanded in the future, there would be again real benefit in applying for a screening opinion from the relevant planning authority.
127. We advise accordingly and trust that we have addressed the issues raised in instructions and reflected the advice given in consultation. If we can be of any further assistance, please do not hesitate to contact us through chambers.

25 JANUARY 2016

MARTIN KINGSTON QC
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