

Wylfa Newydd Project

Horizon's Response on The Proposed Security Articles 83 and 84

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1 Horizon's Response on the proposed security articles 83 and 84

1.1 Introduction

1.1.1 This is a post-hearing note which outlines Horizon's responses to the questions raised by the Panel in respect of the new articles 83 and 84 at the Issue Specific Hearing on the draft DCO held on 6 March 2019.

1.2 Article 83 – Guarantees in respect of payment of compensation

Purpose of Article 83

1.2.1 As set out in [REP6-020], Horizon has proposed a new article 83 that makes it clear that the undertaker cannot exercise any of the compulsory acquisition powers conferred under the DCO unless it has first put in place, to the satisfaction of the Secretary of State, a guarantee or alternative form of security. Similar articles have been included in other granted DCOs, including Swansea Bay, Wrexham, Hornsea and Eggborough.

1.2.2 The article incorporates the policy test in the Department of Communities and Local Government's ("DCLG") Guidance *Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land* ("DCLG Guidance"), which provides:

The applicant must have a clear idea of how they intend to use the land which it is proposed to acquire. They should also be able to demonstrate that there is a reasonable prospect of the requisite funds for acquisition becoming available. Otherwise, it will be difficult to show conclusively that the compulsory acquisition of land meets the two conditions in section 122 (see paragraphs 11-13 below).

[...] Applicants should be able to demonstrate that adequate funding is likely to be available to enable the compulsory acquisition within the statutory period following the order being made, and that the resource implications of a possible acquisition resulting from a blight notice have been taken account of. (our emphasis)

Need for third party assessment of compensation assessment

1.2.3 Article 83(2) provides that, to assist the Secretary of State in determining the adequacy of compensation for compulsory acquisition, the undertaker must provide information regarding: (a) the interests in the land affected; and (b) the undertaker's assessment of the proper level of compensation and justification.

1.2.4 During the DCO ISH, the Panel queried whether the assessment provided by the undertaker needed to be compared against an independent third party assessment. Horizon does not consider this is necessary as:

- Horizon will be instructing third party consultants to assess the value of the properties to be acquired and so this value would have already come from a third party assessment;
- this requirement has not been imposed on any other corresponding DCO article on compensation;
- the policy test under the DCLG Guidance provides that the applicant must demonstrate the adequacy of funding, and therefore the Secretary of State should be in a position to rely on the information provided to it by Horizon (just as it does in any other DCO application); and
- if the Secretary of State did not agree with Horizon's assessment, then he or she could seek their own advice or refuse to grant consent under article 83 (and therefore it is in Horizon's interest to ensure that the values given are accurate).

Security of guarantees in the event of transfer under article 9

1.2.5 Article 9 (Consent to transfer the benefit of the Order) provides that the undertaker may only transfer the benefit of the Order with the consent of the Secretary of State. Article 9(2) states that where a transfer has been approved by the Secretary of State all references in the Order to the undertaker will be deemed to be references to the new transferee.

1.2.6 This would mean that all obligations and liabilities under article 83 which apply to the undertaker would apply to the new transferee:

- If compulsory acquisition powers have not been exercised prior to transfer, article 83 would apply in full to the new transferee; or
- If compulsory acquisition powers had been exercised prior to transfer and security provided, then the obligations in paragraphs (4) and (5) would apply to the new transferee.

1.2.7 This is because the test in article 83 is not about the financial standing of the applicant itself, but whether the amount for compensation has been secured. Regardless, as the Secretary of State must consent to the transfer, it is unlikely that he or she would provide consent to an applicant which did not have the necessary financial standing.

1.2.8 In order to allay any concerns, Horizon would be happy to amend article 9 to make it clear that upon transfer that equivalent security under Article 83 must be provided by the transferee:

Consent to transfer the benefit of the Order

9. [...]

(4) Unless otherwise approved by the Secretary of State, the transferee approved under paragraph (1) is required to put in place at the time of the transfer an equivalent guarantee or alternative form of security to that in place at the time of the transfer under Article 83 of this Order.

Implications of revised timeframes for exercise of CPO powers

- 1.2.9 Article 28 of the Order currently provides that Horizon has 5 years to serve all notices of treat or declarations to compulsorily acquire all land necessary for the authorised development.
- 1.2.10 Given the suspension of the Project, Horizon is now seeking to extend the timeframes for exercising its compulsory acquisition powers to 8 years following grant of the DCO. This is to prevent the situation where Horizon implements the DCO (say at the end of year 4) and is forced to acquire all of the land and interests immediately, rather than when it is actually required for construction. This would lead to a significant cost, particularly where the DCO is implemented towards the end of the implementation period in Requirement PW1. This extension would also mean that landowners have the benefit of their land for as long as possible.
- 1.2.11 This change would affect Articles 28, 31 and 33 of the Order.

Treatment of blight

- 1.2.12 Blight applies upon application for a DCO or grant of a DCO with compulsory acquisition powers.
- 1.2.13 In Horizon's view, blight is not an issue for the following reasons:
 - The designation of the Wylfa site for new nuclear pursuant to NPS EN-6 means much of the Wylfa Newydd Development Area has in effect fallen within schedule 13, Town and Country Planning Act 1990 for a number of years and so far as Horizon is aware, no blight claims have been made in respect of it. In addition no blight claim has been made in respect of the land the subject of related to the Wylfa Newydd DCO application.
 - Further it is difficult to see how a blight claim could arise. Horizon owns a large portion of the Order Land or has options over it. As the landowners have contracted to sell their interests blight cannot arise.
 - The main area of the Order land which Horizon does not fully own or have options over is the land required for the A5025 Off-Line Highway Improvements. This land is for the most part agricultural land. Although blight does apply to agricultural holdings, blight claims most commonly arise in relation to residential properties. Horizon is not seeking to acquire any such properties and is offering to purchase any land subject to the A5025 Off-Line Highway Improvements. In these circumstances it is difficult to see how there could be blighted land.
 - Once the DCO is granted, land is blighted where compulsory acquisition of the land is authorised by the DCO or the land falls within the limits of deviation within which powers of compulsory acquisition conferred by a DCO are exercisable (s175 Planning Act 2008). The fact that the undertaker cannot exercise any powers of compulsory acquisition until it has satisfied the provisions of article 83 (i.e. provision of the necessary security is in place) means that in effect no blight

would be created. As a result of Article 83 any DCO would only authorise compulsory acquisition once the necessary security is in place and once this security is in place it would therefore cover any blight claims arising.

1.3 Article 84

Purpose of Article 84

1.3.1 As noted at the DCO ISH held on 6 March 2019, Horizon has proposed a new article 84(1) that provides that the undertaker cannot implement the DCO unless the Secretary of State is satisfied that the Project is likely to be undertaken and there are no obstacles or barriers to having the necessary funding. Article 84(2) also provides that Work No.12 cannot commence unless the undertaker has provided a guarantee for that work that is approved by the Secretary of State, or the Secretary of State has provided its approval under paragraph (2).

1.3.2 Article 84 incorporates the test in the DCLG Planning Act 2008: Application Form Guidance (paragraph 26):

[...] A funding statement must contain sufficient information to enable the Secretary of State to be satisfied that, if it were to grant the compulsory acquisition request, the proposed development is likely to be undertaken and not be prevented due to difficulties in sourcing and securing the necessary funding. (our emphasis)

Secretary of State consideration

1.3.3 The Panel asked the parties to consider whether the criteria in 84(1) should be tightened. Other parties, such as the North Wales Police, have sought for clearer criteria to be included on what considerations the Secretary of State can take into account when determining whether or not to grant approval under this article.

1.3.4 Horizon considers this is not appropriate for the following reasons:

- The proposed article is clear that it is for the Secretary of State to determine whether there is "written information" to enable him or her to make the decision and for the Secretary of State to be "satisfied" that the Project is likely to go ahead and not be prevented by sourcing and securing funding. This reflects the policy test under the DCLG Guidance and is the same test applied to all DCO applications. To try and impose criteria or to define the Secretary of State's decision making any further, beyond what all applicants of a DCO must satisfy, is inappropriate, discriminatory against Horizon and/or nuclear NSIPs and would fetter the Secretary of State's decision making.
- The policy test under the DCLG Guidance does not require an applicant to demonstrate it has all the funds available upon implementation – it only requires the applicant to demonstrate that there are no difficulties in obtaining the necessary funding. It would not make commercial sense for all the funding to be available on implementation and most, if not all NSIPs would fail to meet such a requirement.
- In Swansea Bay, both the ExA and the Secretary of State concluded that to make an applicant prove the existence of all necessary funds for

the project before any work may commence would be an "*unusual and unreasonable hurdle*".

- Policy 4.1.9 of NPS EN-1 provides that provided the Secretary of State is satisfied that the "*financial viability and technical feasibility of the proposal has been properly assessed by the applicant it is unlikely to be of relevance in IPC decision making*".
- The criteria that has been included within 84(1) therefore directly applies this policy test (set out above at 1.3.3). To try and define the Secretary of State's decision making any further, beyond what all applicants of a DCO must satisfy, is inappropriate and would fetter the Secretary of State's decision making.

1.3.5 Horizon does not consider it necessary that the applicant should be able to demonstrate to the Secretary of State that the project will be implemented within a certain timeframe, as the DCO already sets out the period by which the Project must be implemented (see Requirement PW1). To require an applicant to demonstrate that it will be implemented within, say, 12 months is arbitrary and would place a greater onus on the undertaker than any other DCO is subject to.

Implications of revised timeframes for implementation of the DCO

1.3.6 Requirement PW1 of the Order currently provides that Horizon has 5 years to implement the authorised development. Horizon has sought a one-year extension to this timeframe to reflect the fact that the undertaker will have to go through an additional process under article 84 before it can implement the Project. Other granted DCOs, such as York Potash Harbour Facilities Order 2016/772 (7 years), National Grid (Hinkley Point C Connection Project) Order 2016/49 (8 years), and Dogger Bank Teesside A and B Offshore Wind Farm Order 2015/1592 (7 years), have been granted for longer than 5 years.

Response to Welsh Government proposed amendments

1.3.7 The Welsh Government has stated it has no objection to the extension to the timeframes for implementation of the Project or CPO notices.

Date of determination

1.3.8 The Welsh Government has requested that article 84 is made clear: namely that the Secretary of State must be satisfied that the undertaker has the funding in place at the time that article 84 consent is sought, rather than at some future point. As noted above at paragraph 1.3.4 to 1.3.6, article 84 follows the policy test that the Secretary of State must consider at the time of granting a DCO for any NSIP. All article 84 does is to enable the test of funding to be deferred to a later date post-grant of the DCO. For this reason, it would be prejudicial to require Horizon to be subject to a more stringent test than any other DCO applicant who has had a DCO granted without the necessary funding in place at the time of grant. Numerous DCOs have been granted without the funding arrangements in place – this is not unusual. The policy

test is whether the applicant has demonstrated there is a reasonable prospect of the funding being available.

Restoration for works up to FNC

- 1.3.9 The Welsh Government has sought for the restoration provisions in Article 84(2) that apply to Work No.12 to extend to include any excavation works prior to the first nuclear construction. They have referenced the restoration mechanisms in permissions for mineral extraction.
- 1.3.10 There is no justification or precedent for the imposition of a restoration obligation for NSIPs (or other major developments under the town & country planning system. The imposition would severely prejudice Horizon and its ability to both secure funding, and implement the Project or transfer the Order to another undertaker. It would effectively end the Project. Any undertaker that is ready to implement a NSIP will have reached a final investment decision or its equivalent, and undergone rigorous due diligence by government regulators to ensure it is capable of delivering the project.
- 1.3.11 Restoration obligations in the event of abandonment have been rejected in other DCOs, such as the Hinkley Point C DCO where the Examining Authority stated "*that national policy does not require that infrastructure projects must insure themselves against the possibility of incomplete development. The draft DCO contains no requirement for such insurance, and would set no precedent for such a requirement to be imposed in future.*" For this reason, the ExA refused to impose such an obligation.
- 1.3.12 In any event, we would expect that the Secretary of State would not provide consent to an undertaker under Article 84 if it did not consider that it had the funding necessary to implement and complete the Project.
- 1.3.13 For these reasons, Horizon is strongly opposed to a restoration obligation being imposed upon it.

Financial standing of any transferee

- 1.3.14 The Welsh Government has requested that article 9 of the Order is clarified to make it clear that in determining whether or not to grant the transfer of the Order to a third party, the Secretary of State will consider whether that transferee has sufficient standing under article 84.
- 1.3.15 While Horizon does not oppose this clarification in principle, it is wary that this may be seen to elevate this consideration above others that the Secretary of State may take into account and may be viewed as seeking to control the decision making function of the Secretary of State which would be inappropriate. Horizon considers that financial standing would be a matter that would be considered by the Secretary of State in any event. For these reasons we do not believe that the proposed amendment is justified or appropriate.

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