HORIZON NUCLEAR POWER

WYLFA NEWYDD

ENERGY WORKING FOR BRITAIN

Wylfa Newydd Project

Written opinion of Michael Humphries QC regarding the imposition of a Grampian condition

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HORIZON NUCLEAR POWER

WYLFA NEWYDD PROJECT

REPRESENTATIONS BY LAND AND LAKES LIMITED

ADVICE

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1. I am asked to advise Horizon Nuclear Power ('Horizon') about further representations by Land and Lakes Limited ('L&L') about the provision of temporary workers accommodation ('TWA') for the construction of the proposed Wylfa Newydd power station. The request for advice arises in the context of two events being;

   a. A written advice of Andrew Fraser-Urquhart QC dated 22 March 2019 ('the L&L Written Advice') submitted at examination Deadline 8 concerning the legality and acceptability in policy terms of a proposed Grampian-style requirement on the proposed Wylfa Newydd development consent order ('DCO'); and

   b. A request from the Examining authority ('ExA') to: *"Provide any comments in response to the Legal Opinion provided by Land & Lakes Limited [REP8-076], regarding the proposed use of a Grampian-style condition/requirement that would prevent development until a scheme had been submitted to IACC in relation to temporary worker accommodation. With particular reference as to whether the provision of the TWA off-site would threaten the viability of the scheme to such an extent that there would be no realistic prospect that the scheme could be implemented – please support with evidence."*

   This written advice will address the various issues raised in the L&L Written Advice as amplified by the ExA's request. It expands on some of the points already made by Horizon in previous submissions on this issue, including Horizon's Response to Land and Lakes' Deadline 4 Submission [REP4-036]. This written advice has not commented directly on the issue of financial viability, as that is a matter for Horizon, but it does comment generally on the effect of consenting uncertainty and delay in the context of the prospects of the project being implemented.

2. A number of issues arise, as follows;

   a. Is it lawful to modify a draft DCO;

b. Is it lawful to impose a Grampian-style requirement on a DCO;

c. What does L&L seek by its proposed Grampian-style requirement;

d. Is it lawful to 'change' the project that is the subject-matter of an application for a DCO and, if so, are there legal or policy limits to any such change;

e. Has there been adequate consultation on the Wylfa Newydd project as proposed to be changed by L&L;

f. Has the Wylfa Newydd project as proposed to be changed by L&L undergone adequate environmental impact assessment ('EIA');

g. Does the proposed change to the Wylfa Newydd project, as a consequence of the 'Grampian-style' requirement requested by L&L, alter the prospects of the project being implemented; and

h. In the circumstances, would the grant of development consent for the Wylfa Newydd project as proposed to be changed by L&L be susceptible to successful legal challenge.

3. Before turning to these issues I will just briefly state that Horizon does not accept the characterisation of the consultation and site selection process that it undertook when considering and rejecting the L&L proposals for workers accommodation at Cae Glas and Kingsland. Horizon's approach and justification in relation to the site selection process for TWA is set out in detail in the Site Selection Report Volume 4 - Temporary Workers' Accommodation [APP-439]. As detailed in the Consultation Report [APP-037], Horizon consulted on its preferred TWA scheme ('the Site Campus') at Pre-Application Consultation Stage 3. These documents demonstrate that the site selection and consultation processes undertaken by Horizon in respect of the Site Campus were valid and appropriate, and met relevant statutory requirements.

Is it lawful to modify a draft DCO?

4. Yes, it is clearly lawful to modify a draft DCO. Paragraph 1.5.2 of Horizon's D4 Response to L&L [REP5-048] made it clear that *"Horizon agrees that Section 114 enables the Secretary of State to modify a DCO post-application. However, such a modification is not unlimited, and is subject to legal challenge if improperly used."* It is the second sentence in the above quotation that it particularly pertinent in the context of L&L's proposed 'Grampian-style' requirement. That proposition is not contradicted or challenged in the L&L Written Advice and nor could it be.

Is it lawful to impose a Grampian-style requirement on a DCO?

5. It is perfectly lawful to impose a negatively worded requirement on a DCO; indeed, a large proportion of the requirements in any DCO are negatively worded. For example, requirement WN1(5) states that *"No part of the Power Station Works or Site Campus Works may commence until the schemes submitted under paragraph (2) have been approved by the discharging authority, in consultation with the relevant consultee identified for that scheme in Part 2 of Schedule 21"* (emphasis added).

6. The point about a 'Grampian-style' requirement, however, is that it is a negatively worded requirement that conditions the development upon something happening on land not under the applicant's control. Typically in Town and Country Planning Act 1990 cases this may involve off-site highways works being undertaken before the development being applied for may be commenced.

7. Policy indicates, however, that a Grampian-style condition – and this would appear to be true also for a DCO requirement – should not be imposed if there is no 'reasonable prospect' of the condition being complied with within the time limit imposed by the permission: see Welsh Government Circular 016/2014 at para 3.47.

8. In considering the lawfulness of L&L's proposed Grampian-style requirement, therefore, it will be necessary to examine both the nature of the Grampian-style requirement sought and the reasonable prospects of that requirement being satisfied.

What does L&L seek by its proposed Grampian-style requirement?

9. So what, exactly, is L&L is asking the Secretary of State to impose by way of Grampian-style requirement. There are two parts to L&L's proposal.

10. Paragraphs 4.5 and 4.14 of L&L's Deadline 4 submissions (REP4-036) state as follows:

"4.5 Accordingly, the ExA is invited to modify the dDCO to include an additional requirement that the Site Campus may not be occupied at any one time by in excess of 500 workers (which was the original proposal by HNP during PAC1 and PAC2).

4.14 The ExA are respectfully requested to provide for the balance of 3500 worker bed spaces by imposing a second additional requirement on the face of the dDCO which requires the developer to submit a scheme to the LPA demonstrating how it is proposed to accommodate 3500 workers. It is proposed that such a requirement ought to be a Grampian style requirement which requires the submission of the scheme prior to the commencement of the DCO development."

11. Thus the two parts to L&L's proposed requirements are (a) the removal of 3500 TWA units from the on-site campus TWA, and (b) a prohibition on Horizon undertaking the Wylfa Newydd development until it has secured replacement TWA for 3500 construction workers to the satisfaction of IACC as local planning authority.

12. It is clearly understood in this formula that the 'replacement' TWA provision is not predicated on the Cae Glas and Kingsland sites being selected for that purpose and this is clearly appropriate as Horizon has already made it clear, on a number of occasions, that that development is inadequate for its purposes and has been rejected.

13. It is clearly important to understand, therefore, that L&L seeks to 'change' the 'authorised development' the subject-matter of the application before the Examining Authority.

Is it lawful to 'change' the project that is the subject-matter of an application for a DCO and, if so, are there legal or policy limits to any such change?

14. Yes, it is lawful to 'change' a project the subject-matter of an application for a DCO and, indeed, Horizon has had a number of 'Requests for Non-Material Changes' ('RfNMC') to the Wylfa Newydd project accepted into the examination.

15. It is in this context that the letter from Bob Neill MP (the Parliamentary Under Secretary of State for DCLG) to Sir Mike Pitt (the Chair of the then Infrastructure Planning Commission('IPC')) dated 28 November 2011 is so illuminating:

"... I agree that where the Examining Authority determines the proposed changes to an application post submission are such that they effectively constitute a new application, they

should not be accepted. Any decision on materiality, including the point at which the materiality of proposed changes reaches this threshold, is for the Examining Authority to make ..."

16. In my opinion that view is correct, subject obviously to Wednesbury unreasonableness by an ExA exercising its judgement on 'materiality'. In the present case the ExA will clearly have to ask itself (a) whether the proposed 'change' to the project by L&L (i.e. the removal of 3500 beds of accommodation from the on-site campus TWA and its replacement by an equivalent amount of TWA at another unspecified location) is a 'material change' to the Wylfa Newydd project and, further, (b) whether it is a change that means that this is effectively a new application. If the ExA concludes the latter (i.e. that it is effectively a new application), then the change should not be allowed and that is the end of the matter. If the ExA concludes the former (i.e. that the change is material), then in considering whether to accept the change the ExA will have to have regard to both Government and PINS guidance on changes to DCO applications; as well as acting reasonably and in accordance with the principles of natural justice and the law generally on issues such as proper consultation and EIA. Thus the Minister continued:

"If the Examining Authority decides to consider material changes to an application as part of the examination, the Examining Authority will need to act reasonably, and in accordance with the principles of natural justice. In particular the principles arising from the Wheatcroft case must be fully addressed, which essentially require that anyone affected by amended proposals must have a fair opportunity to have their views heard and properly taken into account regarding them."

17. Again, this is clearly correct. In considering L&L's proposed 'change' to the project it is important to note that this is not merely a 'cutting down' of the application as it is a necessary consequence of the second part of the L&L proposal that some unspecified replacement TWA development – not the subject-matter of the DCO application – be brought forward instead of most of the on-site campus TWA.

18. It seems to me that it is inconceivable that the ExA could properly conclude that such a change was non-material and, indeed, such a conclusion by the ExA would clearly be susceptible to challenge by third parties on the basis that it was *Wednesbury* unreasonable. Furthermore, the ExA has given no indication to the parties at the examination that it is considers L&L's request to be a 'non-material change' to Horizon's application for Wylfa Newydd. I will continue,

therefore, to analyse L&L's proposed requirements on the basis that they constitute a material change to Horizon's application.

19. The Minister goes on to give some guidance as to 'how' procedurally an ExA may wish to handle any material change to an application for development consent:

"Depending on the circumstance, in accordance with the principles of fairness and reasonableness, and specifically the principles set out in Wheatcroft, the Examining Authority may need to:

- *…*
- *take into account what publicity (if any) the promotor has carried out to ensure people who are not interested parties have an opportunity to make representations*
- *use the general power to control the examination of an application … to make changes to the timetable to allow for representations to be made regarding any such amendments*
- *exercise its discretion … to permit representations to be made by people who are not interested parties in cases where it is appropriate to do so."*

20. Whilst it must be accepted that the Bob Neill letter is correspondence between the Minister and the Chair of the (then) IPC, and not therefore a Court judgement, in my view it correctly sets out the relevant principles and, indeed, I note that it is relied on in the L&L Written Advice (para 7). Furthermore, these principles have been reflected subsequently in the DCLG Guidance for the Examination of Applications for Development Consent (March 2015) ('the DCLG Guidance'). Paragraphs 109-111 of the DCLG Guidance state that:

"… the Government recognises that there are occasions when applicants may need to make material changes to a proposal after an application has been accepted for examination. ...

However, if it is determined that a proposed change is of such a degree that it constitutes a materially different project then the applicant will need to determine how best to proceed. The applicant may decide to withdraw their existing application and restart the pre-application process or continue with their application in its original form or they may decide to submit an alternative proposal for change. It should be noted that the Examining Authority will not be able

to indicate what degree of change would be acceptable in advance of the applicant submitting a proposed change.

It is important for all parties to remember that it is for the applicant to decide whether or not to propose a change to a proposal during the examination. Other parties can highlight those areas where they think a proposal should be changed during their discussion with the applicant in the pre-application period and also in their written representations." (emphasis added)

21. Thus the Guidance clearly contemplates that an applicant will not be able to make a change to its application for a project *"of such a degree that it constitutes a materially different project"*, but will have to pursue some other course.

22. It also, helpfully makes clear that it is for the applicant to decide whether or not to propose a change to a proposal during examination, whilst recognising that others may highlight changes that they would like to see the applicant make. In the present case, L&L has sought to persuade the applicant to make a change to its project by removing most of the on-site campus TWA, but Horizon has declined to do so and has explained why. Thus, as a matter of fact, the ExA has no request for a material change before it to determine and has, furthermore, been granted no power to make a 'material change' to a DCO project of its own motion.

23. Thus the 'change' to the Wylfa Newydd project proposed by L&L in its suggested requirements has not gone through any of the procedural steps contemplated by PINS Advice Note 16: How to request a change that may be material (March 2018). So, for example, Figure 3 on page 5 of the Advice Note states *inter alia* that:

"If the proposed change results in any new or different likely significant environmental effects, provision of other environmental information and confirmation that:

i. the effects have been adequately assessed and that the environmental information has been subject to publicity. Whilst not statutorily required, the publicity should reflect the requirements of The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations) and applicants should also submit copies of any representations received in response to this publicity with the change request.

ii. any consultation bodies who might have an interest in the proposed changes have been consulted (reflecting the requirements of the EIA Regulations). It is recommended that

applicants submit copies of any responses received from consultation bodies with the change request. Applicants should identify those consultation bodies who were consulted on the proposed changes but NOT on the original application.

Where (proportionate) additional non-statutory consultation has been carried out (either voluntarily or at the direction of the ExA) a Consultation Statement confirming who has been consulted in relation to the proposed change should be submitted. Copies of any consultation responses received by an applicant should also be included with any request, as an annex."

24. Thus it can be seen from the above that where an applicant proposes a 'material change' to its proposed project, it will be necessary for the ExA to act reasonably and in accordance with the rules of natural justice and, furthermore, to observe other legal requirements such as the need for proper consultation and EIA. Indeed, PINS own Advice Note stresses the importance of this.

25. Whilst I note that the DCLG Guidance and the PINS Advice Note are written in the context of an applicant seeking to make a request to make a 'material change' an application for development consent, this clearly reflects the advice (above) that *"it is for the applicant to decide whether or not to propose a change to a proposal during the examination"*. In my view, exactly the same legal and policy principles would apply in circumstances in which a third party sought to request a material change to a project.

26. Thus the first problem with the L&L proposed requirements is that they seek a material change to a project without going through the process identified by PINS own Advice Note and without, therefore, the procedural protections built-in to that process for both third parties and the environment.

Has there been adequate consultation on the Wylfa Newydd project as proposed to be changed by L&L?

27. At Pre-Application Consultation 2 ('PAC2') (Autumn 2016) Horizon undertook consultation on TWA development both on-site and also off-site at Cae Glas, Kingsland, Rhosgoch, Amlwch and Madyn Farm. Each site attracted both support and opposition. By PAC3 (summer 2017), however, Horizon had amended its proposals to exclude the PAC2 off-site TWA sites and proposed that all TWA be located on-site. The reasons for this change were explained in the

Stage Three Pre-Application Main Consultation Document are also set out in the Site Selection Report – Volume 4 – Temporary Workers' Accommodation [APP-439]. It is important to note, therefore, that Cae Glas and Kingsland were not identified as part of *"the proposed application"* for the purposes of the final (i.e. PAC3) section 42 / 47 consultation or as part of *"the proposed development"* for the purposes of section 48 publicity.

28. DCLG Guidance on pre-application consultation (March 2015) states at paragraphs 73 / 74 that

"Applicants are not expected to repeat consultation rounds set out in their Statement of Community Consultation unless the project proposals have changed very substantially. However, where proposals change to such a large degree that what is being taken forward is fundamentally different from what was consulted on, further consultation may well be needed.

...

Where a proposed application changes to such a large degree that the proposals could be considered a new application, the legitimacy of the consultation already carried out could be questioned. In such cases, applicants should undertake further re-consultation on the new proposals, and should supply consultees with sufficient information to enable them to understand the nature of the change and any likely significant impacts (but not necessarily the full suite of consultation documents), and allow at least 28 days for consultees to respond."

29. A change in the proposed development from one that had 4,000 on-site units of TWA to one with 500 units on-site and a further 3,500 off-site (whether at Cae Glas / Kingsland or elsewhere) would clearly have been a very substantial change to the project requiring re-consultation; indeed, that was one of the reasons for re-consultation between PAC2 and PAC3.

30. It is also important point to note that, as the project did not include TWA at Cae Glas and Kingsland at the time the application was made, the section 56 notice of acceptance of the application did not include notification of L&L's Cae Glas and Kingsland proposals. Thus objectors to the Cae Glas and Kingland proposals – and there had been 149 objections to those proposals at PAC1 – would not have known that they needed to register as 'Interested Parties' in the DCO examination into Wylfa Newydd. Similar issues arise if the excluded 3,500 TWA units are to be provided at a replacement TWA location other than Cae Glas and Kingsland. Residents or environmental groups near that site would also not have had an opportunity to participate in the examination and / or object to the project as a whole.

31. Furthermore, as L&L's proposed 'material change' to the application has not been through the usual material change request procedure – which includes appropriate consultation – again objectors to those sites would not know that they needed to take part in the examination. Thus there is a serious risk of a disenfranchised objector claiming procedural unfairness and / or a beach of natural justice.

Has the Wylfa Newydd project as proposed to be changed by L&L undergone adequate environmental impact assessment ('EIA')?

32. The Environmental Statement for the Horizon Wylfa Newydd project includes an assessment of the environmental effects of the project, including the effects of 4,000 construction workers being accommodated at the on-site campus TWA. It does not contain any EIA of a project with 3,500 units of TWA being located at Cae Glas, Kingsland and / or some other location on Anglesey.

33. This is important in the context of the legal duty under section 104(3) and 104(7) of the Planning Act 2008. Those sections provide that:

"The Secretary of State must decide the application in accordance with any relevant national policy statement, except to the extent that ....
... the adverse impact of the proposed development would outweigh its benefits." (emphasis added)

34. It is difficult to see how the Secretary of State could adequately discharge this duty when the 'adverse impacts' of the proposed development have not been assessed in the project Environmental Statement and so cannot be weighed against its 'benefits'.

35. This issue is not resolved by pointing to the Environmental Statement that accompanied L&L's planning application for workers accommodation at Cae Glas and Kingsland – granted planning permission on 19 April 2016 – because:

a. Horizon has no commercial agreement to use that development;

b. there is thus no certainty that those sites would be the replacement TWA;

c. in any event, Horizon has pointed to why that the workers accommodation at Cae Glas and Kingsland is inadequate and inappropriate for Horizon's purposes and so would need amendment; and

d. the Environmental Statement for the Cae Glas and Kingsland development granted planning permission in April 2016 cannot adequately have taken into account the cumulative adverse impacts of that development and the Wylfa Newydd project as the Wylfa Newydd project has itself evolved since then; indeed, it changed at PAC3 (Summer 2017).

36. Furthermore, the current section 106 agreement negotiated with IACC is based on there being 4,000 construction workers accommodated in the on-site campus with the balance in the local community. Clearly, a change in the location of the main site for TWA could result in a different calculation for the leisure, housing, transport, health and wellbeing, and community funds in the section 106 agreement.

37. Thus at the time of making his decision on the Wylfa Newydd DCO, the Secretary of State would not know whether (and if so where) a replacement TWA could be provided and would not, therefore, know the adverse impacts of such replacement TWA and / or what changes it might require to the project section 106 agreement.

Does the proposed change to the Wylfa Newydd project, as a consequence of the 'Grampian-style' requirement requested by L&L, alter the prospects of the project being implemented?

38. This is principally a matter for Horizon to comment on, but there appear to be a number of reasons to expect that the imposition of L&L's proposed requirements would be likely to reduce the prospects of the Wylfa Newydd project being implemented. These are:

a. The imposition of the L&L requirements cause considerable commercial uncertainty for Horizon. The Grampian part of the requirements leaves the implementation of the project outside the control of the applicant. In terms of project funding and commercial risk this is deeply unattractive on a multi-billion pound project.

b. The imposition of the L&L requirements also creates consenting uncertainty. Horizon would be forced by the second part of the L&L requirements to secure planning permission and sufficient interest in the necessary land to bring forward a 3,500 unit

workers accommodation development in circumstances where it would not have compulsory acquisition powers as it would be outside the scope of the DCO.

c. Horizon would also be forced to recommence a site search for a form of development that would be likely to attract considerable objection; this would be likely to lead to further consenting risk. Indeed, a significant concern of consultees at PAC 2 had been the concept of locating a large purpose-built temporary construction worker campus in or adjacent to local communities.

d. The L&L requirements also give the potential for a ransom situation to arise on the acquisition of any land and rights necessary for a replacement TWA campus and / or in coming to other commercial terms with landowners.

e. Horizon has previously explained how there are worker welfare advantages in being able to accommodate construction workers close to site as, amongst other things, this reduces travel time. Whilst there will clearly be some workers who will want to travel from home or be based in existing communities, this will not suit all workers and the ability to accommodate some workers close to their place of work adds to the overall accommodation offering and thus aids the recruitment of high quality staff. Indeed, there are also worker welfare advantages on being able to concentrate worker health and amenity facilities close to the construction site so that they can benefit both on-site campus workers and other workers who will be working at the main construction site.

f. The L&L requirements also introduce the prospect of further delay. Clearly it would be extremely unlikely that the promoter would take a Final Investment Decision ('FID') until there was certainty that the project could proceed. Introducing a Grampian-style requirement for a major part of the development is a huge commercial risk and one that is likely to delay FID until after it had been resolved.

39. In a context where the project has already been suspended by Hitachi pending agreement with the UK Government over funding mechanisms, it is my view that the imposition of the L&L requirements represent a real risk to it coming forward at all. If that conclusion is correct, then in my view it would be difficult to conclude that there is a 'reasonable prospect' of L&L's Grampian-style requirement being discharged and it should not, therefore, be imposed as a matter of policy.

In the circumstances, would the grant of development consent for the Wylfa Newydd project as proposed to be changed by L&L be susceptible to successful legal challenge?

40. As should be clear from the above, I consider that the imposition of L&L's requirements introduces a very significant risk of successful legal challenge to the grant of development consent for the Wylfa Newydd project. The principal areas of concerns are:

a. that the requirements represents a 'material change' to the project without going through the proper procedures in the PINS Advice Note and in breach of the rules of natural justice;

b. that there was no proper consultation on this material change, such that potential objectors have not been given an adequate opportunity to make representations;

c. that there has been no proper environmental impact assessment of the proposed material change, such that the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 have not been complied with and, in any event, the Secretary of State cannot properly weigh the adverse impacts of the proposed development against its benefits.

41. In my view there is a high risk that in all the circumstances the imposition of L&L's proposed requirements would be held to be unlawful.

[redacted]

Michael Humphries QC

9 April 2019

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