RE: DRAFT ABERGELLI POWER

GAS FIRED GENERATING STATION ORDER

ADVICE

Introduction and summary of advice

1. We are asked to advise Mr Michael Edwards, Mr Wynne Watkins and Rediplay Ltd ("the Landowners") as to the validity of the Abergelli Power Gas Fired Generating Station Order 201 ("the Draft Order"), submitted by Abergelli Power Ltd ("APL") pursuant to the Planning Act 2008 ("the 2008 Act"), in respect of its application for a development consent order ("DCO") to construct, operate and maintain a gas fired power generation plant ("the Proposed Scheme").

2. The Proposed Scheme has a rated electrical output of up to 299 megawatts and would therefore be treated as a Nationally Significant Infrastructure Project ("NSIP") for the purposes of s15 of the 2008 Act.

3. The statement of reasons submitted with the DCO application confirms that the "Power Generation Plant" for which consent is sought will comprise the generating equipment, access road, temporary construction compound, ecological mitigation area, and parking and drainage areas (§2.5).

4. In order for the Power Generation Plant to function and to generate and transmit electricity to the grid, it will also be necessary to construct a gas pipeline (referred to as the Gas Connection ("GC")) to bring gas to the Generating Equipment from the National Gas Transmission System; and an Electrical Connection ("EC"), consisting of an underground cable to export power from the generating plant to the National Electricity Transmission System.

5. The Applicant considers that these elements of the project do not form part of the generating station itself but should instead be treated as associated development for which (in Wales) separate consent is required under the Town and Country Planning Act 1990 ("the 1990 Act"). The GC and the EC are not therefore included as part of the scheme for which development consent is sought. In reaching this conclusion, the Applicant relies upon the decision of the Secretary of State in relation to the Hirwaun Generating Station Order 2015, where she determined on similar facts that the GC and EC were not part of the generating station in that case and should not be included in the DCO.

6. Our advice is therefore sought as to:
    a. The validity of the application and draft order and, specifically, whether the Applicant is correct to treat the GC and the EC as falling outside the definition of a "generating station" for the purposes of s14, and thus as outside the NSIP regime;
    b. The Hirwaun decision and the reasons provided by the Secretary of State in that case;
    c. Whether the compulsory purchase powers in s122 of the 2008 Act extend to the land and rights required for the GC and the EC, in circumstances where these have been excluded from the draft Order.

7. For the reasons set out below, we advise as follows:
    a. The definition of a "generating station" is not confined to the turbine building or generating plant itself and may include such other ancillary facilities as should properly be treated as falling within the scope of the station or site. Whether ancillary infrastructure forms part of the "generating station" must be determined on a case by case basis having regard to factors such as geographical proximity and the integral nature of the infrastructure to the function of generating electricity.
    b. The decision of Sullivan J, as he then was, in *R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform v EDF Energy* [2008] EWHC 1847 (Admin) is clearly distinguishable, since in that case neither the cabling under the

sea nor the onshore substation could properly be said to form part of the offshore site at all.

c. Where, by contrast, the ancillary facilities are integral to the primary activity taking place at the station, i.e. the generation of electricity, and are located within a clearly defined site boundary, in our opinion they cannot properly be said to constitute separate (albeit related) projects or developments. Instead, they should be treated as forming an integral part of the project for the construction of a generating station.

d. The Secretary of State's decision in Hirwaun is not binding on a subsequent decision maker in a different case, and is of limited assistance in the absence of any clear explanation as to why she concluded that the GC and EC did not form part of the generating station, having regard to the factors identified above. We do not therefore consider that this decision justifies excluding the GC and the EC from the scope of the order in this case.

e. As the GC and EC are integral to and form part of the project for the construction of a generating station, they should have been included in the application for development consent. By analogy with *Redcar*, discussed below, it is clearly arguable that the grant of development consent for only part of the proposed generating station would be unlawful, and that the application is itself invalid.

f. A CPO may be made in respect of land which is not contained expressly in an order, if it is required to facilitate the construction of development to which the DCO relates. In principle, we therefore consider that land required for the construction of the EC is capable of falling within s122. However, the plots of land which the Applicant is seeking to purchase compulsorily appear to be required in relation to the construction of <u>both</u> the access road to the generating plant and the EC. This only serves to highlight the integral nature of the EC and the proximity between those elements of the scheme, which have been treated as part of the generating station, and those which have been excluded.

Legal Framework

The requirement to obtain development consent

8. Section 14 of the 2008 Act provides, insofar as relevant:

> "(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…"

9. The words "consists of" require that the project must fall entirely within the relevant definition of an NSIP to fall within the scope of s.14: see *R. (on the application of Gate) v Secretary of State for Transport* [2013] EWHC 2937 (Admin); [2014] J.P.L. 383 (QBD (Admin)).

10. Section 31 provides that:

> "Consent under this Act ("development consent") is required for development to the extent that the development is or forms part of a nationally significant infrastructure project."

11. By virtue of s115, development consent may also be granted for "associated development". However, by virtue of s115(4) the types of associated development which can be consented in Wales are narrowly defined:

> **"115 Development for which development consent may be granted**
> (1) Development consent may be granted for development which is—
> (a) development for which development consent is required, or
> (b) associated development
> …
> (4) Development is within this subsection if—
> (a) it is to be carried out wholly in Wales,
> (b) it is the carrying out or construction of surface works, boreholes or pipes, and
> (c) the development within subsection (1)(a) with which it is associated is development within section 17(3).[1]"

12. The government has published guidance on associated development applications for major infrastructure projects under the Planning Act 2008. This guidance notes that it is of limited relevance in Wales, due to the narrow definition of associated development under s115(4).

[1] S17(3) relates to underground gas storage facilities

13. Paragraph 5 of the guidance confirms that it is for the Secretary of State to decide on a case-by-case basis whether or not development should be treated as associated development.

14. Annex A of the guidance contains general examples of associated development, including access arrangements such as the formation of new or improved vehicular or pedestrian access (to stations, work sites etc), and connections to national, regional or local electricity networks. Annex B identifies overground/ underground lines, substations and pipelines as possible forms of associated development, in the context of onshore generating systems.

15. However, paragraph 12 of the guidance emphasises that:

> 12. Annexes A and B provide examples of the type of development that may qualify as associated development. These annexes are illustrative only. In particular the following should be noted:
> • These annexes are not intended to be exhaustive. For example, technological progress may mean that some types of associated development could not have been foreseen when this guidance was written.
> • These annexes should not be read as a statement that the development listed in them should be treated as associated development as matter of course; these lists should be read together with the core principles.
> • <u>These annexes should not be treated as an indication that the development listed in them cannot in its own right constitute a project, or an integral part of a project, for which obtaining development consent is mandatory under the Planning Act</u>." [emphasis added]

16. It follows, logically, that development which constitutes an integral part of an NSIP cannot also be treated as associated development under s115 and must be the subject of an application for development consent.

17. Part of the purpose of the 2008 Act was to streamline the process of obtaining consent for national projects. By the operation of s.33 of the Act, where a proposed project falls within the parameters of "development consent" it is not necessary to obtain any of the other consents, permissions and authorisations, which would otherwise be required (including the grant of planning permission): see *Gate,* cited above, at §23.

Compulsory purchase powers

18. Section 122 provides that:

> "(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.
> (2) The condition is that the land—
> (a) is required for the development to which the development consent relates,
> (b) is required to facilitate or is incidental to that development, or
> (c) is replacement land which is to be given in exchange for the order land under section 131 or 132.
> (3) The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily."

Definition of "generating station"

19. Section 235 of the 2008 Act provides that *"generating station"* has the same meaning as in Part 1 of the Electricity Act 1989 (see section 64(1)). Section 64(1) provides that:

> *"generating station"*, 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."

20. In *Redcar,* it was argued that the cables connecting an offshore wind farm to the shore together with an onshore substation were all component parts of the "generating station", and that the grant of development consent for the offshore turbines alone was unlawful, since the defendant "had no power to grant development consent under s36 Electricity Act 1989 for part only of a generating system."

21. Sullivan J did not reject the argument that, under the equivalent regime under s36, a competent application for consent (and the consent itself) must be for the whole of the generating station. However, he held that the extent of the Secretary of State's jurisdiction to grant development consent under s36 fell to be determined not by considering which elements were required to convert the electricity generated "into a usable form" but rather by defining the place where it was to be generated.

22. On the facts of that case, the place where the electricity was generated was the wind farm offshore and the Secretary of State had not therefore erred by treating the offshore site as a generating station in its own right. However, Sullivan J also noted that whether or not ancillary facilities - such as a substation or cabling - should be included in any application for development consent would depend on the facts of the particular case:

> "18… In ordinary language a "station" is simply a place, building or structure where a particular activity occurs. Thus, we speak of police stations, polling stations, railway stations, et cetera. A non-technical description of a "generating station" would simply be a building or structure where electricity is generated. The nature of the building or structure will depend on the means of generation: wind, water, coal, nuclear power, et cetera. An application for consent under section 36 may include ancillary facilities, such as transformers, substations and associated cabling, and, for example, coal stockpiles and handling equipment if the generating station is coal-fired, et cetera. Whether or not such ancillary facilities are included in any section 36 application will depend upon the facts of the individual case, including, in particular, the physical proximity of the ancillary facilities to the turbines themselves. In the case of an oil or coal-fired generating station the turbines and some or all of the ancillary facilities may well be housed in one building or structure or complex of buildings or structures. In the case of an offshore wind farm the turbines may well be separated by many kilometres of territorial waters from the ancillary facilities onshore. In the former case it will be sensible to include all of the elements of the scheme, including any ancillary facilities, in one application under section 36. In the latter case it will not, not least since the environmental implications of the offshore turbines may well be entirely divorced from the environmental impact of the onshore facilities many kilometres distant."

Analysis

The validity of the application/ order

23. As noted above, in *Redcar* Sullivan J did not dispute the principle that a competent application (under s36 EA 1989[2]) must be for the whole of a generating station, and that the Secretary of State does not have power to grant development consent for the construction of only part of a generating station.

[2] "(1) Subject to subsections (1A) to (2) and (4) below, a generating station shall not be constructed at a relevant place (within the meaning of section 4), and a generating station at such a place shall not be extended or operated except in accordance with a consent granted by the appropriate authority."

The challenge failed on its facts, because the onshore elements did not form part of the offshore generating station, as properly defined.

24. Moreover, by virtue of s31 of the 2008 Act, development consent under the 2008 Act is required for any development which is, or forms part of, a nationally significant infrastructure project (in this case, the construction of a generating station).

25. Consequently, to the extent that the GC and EC are integral to and form part of the project for the construction of a generating station, they should have been included in the application for development consent.

The scope/ definition of the "generating station" at Abergelli

26. In light of *Redcar*, above, the question of what constitutes the "generating station" for the purposes of s14 of the 2008 Act cannot be determined solely by asking whether the electricity produced at the station will be usable. Instead, geographical considerations are critical to determining whether the EC and the GC are integral elements of the generating station, so that they should have been included in the application and draft Order.

27. The definition of a "generating station" is not necessarily confined to the turbine building or generating plant itself, but may include such other ancillary facilities as should properly be treated as falling within the scope of the station (or "compound" or "site", which seem to us to be interchangeable terms[3]). In this respect, the *Redcar* decision is clearly distinguishable, since in that case neither the cabling under the sea nor the onshore substation could properly be said to form part of the offshore site at all.

[3] We agree, in this respect, with the analysis set out in the application in respect of the Brechfa Forest West Wind Farm Order 2013 (as referred to at paras 67-70 of the Hirwaun Opinion) that infrastructure which is integral to the core function of the facility and which lies within a clearly defined site can (and indeed must) fall within the definition of a "generating station" for the purposes of s15.

28. Here, by contrast, the proposed EC and GC both fall within the parameters of the Order Land, despite being excluded from the application itself. This clearly points to the EC and the GC forming part of, and being integral to, the principal scheme for the construction of a gas station. Moreover, the EC is significantly shorter in length than, and contiguous with, the access road, which is included in the application for development consent.

29. Given that access arrangements are also identified as possible examples of associated development within Annex A of the 2013 guidance, it is wholly unclear why the access road is treated as part of the NSIP but the GC and EC have been excluded from the application. The land plans submitted with the application reveal that the main turbine generator building is broadly equidistant from the start of the new access road to the west and the AGI to the north; and that the electrical connection runs along the same route as the access road but stops short of it. If a consistent approach had been adopted in respect of the access road and the GC and EC, the latter should plainly have been treated as forming part of the generating station and thus of the NSIP.

30. Moreover, as Sullivan J observed in *Redcar*, where ancillary facilities such as electrical connections or substations fall well outside the boundary of the main station site, they may give rise to completely different environmental impacts, so that it would not be appropriate for them to be treated as a single project. By contrast, in this case it is clearly appropriate – and necessary - for the environmental impacts of the different elements of the scheme to be considered together given their geographical proximity.

31. In our opinion, the approach adopted by the Applicant is also inconsistent with one of the main purposes of the 2008 Act, which is to streamline applications for projects of national significance. It is clearly desirable, and consistent with this overarching objective, for all integral elements of a proposed scheme which fall within a clearly definable and localised site area to be considered at the same time and by the same decision-maker. Different considerations would, of course, apply in cases where the associated infrastructure (e.g.

pylons or substations) is in reality a separate project, with separate environmental and other impacts.

The Secretary of State's decision in Hirwaun

32. The Secretary of State's reasons for excluding the electrical and gas connections at Hirwaun from the Order, contrary to the conclusions of the Examining Authority, are contained in §3.18-23 of the decision letter. However, they do not contain any proper explanation as to why she concluded that the GC and EC did not form part of the generating station, having regard to the factors identified above (i.e. geographical proximity and the integral nature of the infrastructure to the purpose of the station).

33. We note, however, the evidence/ case law, which the Secretary of State apparently took into account in reaching her conclusion, as set out at §3.20. As to these:
    a. Insofar as relevant, the definition of "generating system" in s235 as including (in relation to a station driven by water) "all structures and works for holding or channelling water for a purpose directly related to the generation of electricity", in fact supports the argument that the GC and EC should be treated as forming part of the Generating Station and thus as part of the NSIP for the purposes of s14.
    b. The applicant's response to the consultation letter, including the (detailed) Hirwaun Opinion, also clearly supports this interpretation.
    c. As explained above, the facts in *Redcar* are clearly distinguishable from Hirwaun or the present case. The offshore location of the wind turbines in that case meant that there was no question of the cabling or the onshore substation forming part of the same facility or site. Moreover, Sullivan J expressly noted that the nature and scope of the building or structure constituting the "generating station" will depend on the means of electricity generation.
    d. The previous decisions referred to by the Secretary of State were considered in some detail in the Hirwaun Opinion and are also clearly distinguishable on the facts, given that they involved electrical connections covering substantial distances (see, in particular, Swansea

Bay Tidal Lagoon and South Hook), giving rise to their own environmental impacts: see, similarly, *Redcar* at §18, where Sullivan J noted that the environmental impact of the onshore facilities would be entirely divorced from the impacts of the offshore facility). Given the distance covered by these connections, it is not difficult to see why they were treated as freestanding, albeit 'associated', projects for which separate consent was required.

34. For these reasons, and those set out in the Hirwaun Opinion, we do not consider that the Secretary of State's reasons justify the applicant's decision to exclude the GC and the EC from the definition of "generating station" here. On the contrary, we consider that all the evidence supports the interpretation that the GC and the EC are integral parts of the scheme for the construction of a generating station, as properly defined, and should have been included as part of the application and the draft order.

The exercise of compulsory purchase powers

35. Under s122, the acquisition of land under compulsory purchase powers may be authorised by a DCO, where the Secretary of State is satisfied that the land is required to facilitate or is incidental to the development to which the development consent relates.

36. A CPO may therefore be made in respect of land which is not contained expressly in an order, if it is required to facilitate the construction of development to which the DCO relates. In principle, we therefore consider that land required to construct the EC is capable of falling within s122. Indeed, this land is clearly essential to enable the generating station to operate.

37. We note, however, that the same plots of land have apparently been identified for compulsory acquisition to facilitate the construction of the access road and the EC. This merely serves to illustrate the geographical proximity between those elements of the scheme, which have been treated as part of the generating station and those which have been excluded.

Conclusion

38. Our conclusions are summarised at §7 above. Please do not hesitate to contact us if we can be of further assistance.

PETER VILLAGE QC

PHILIPPA JACKSON

7 November 2018