Written Representation on DCO application for Springwell Solar Farm

1 I note that (from annex B of the Rule 6 letter) "the ExA will not spend time examining representations that challenge policy set out in NPSs, or the validity of NPSs themselves". This has legal implications, for both the Inspectorate and the Applicant, some of which I outline (briefly) in the first part of this representation. Please be aware that, should the matter come before them, **the courts can be expected to assume that both the Inspectorate and the Applicant will have read this representation, and can therefore be deemed to have had fair notice of the legal implications outlined**.

2 In the second part of this representation, I draw the ExA's attention to the possibility that the commercial viability of the development may collapse long before its anticipated payback time has elapsed, with the possibility of the Applicant (or its successor) becoming insolvent. Approval should therefore be conditional on sufficient funds being secured, in advance, to cover the cost of any necessary remedial work.

Part 1: Legal Implications

Background

3 In my initial comment[1], written as a jurist living near this proposed development, I drew attention to the fact that the constitutional legitimacy of the legislative and regulatory framework underlying this DCO process has been called into question and, as things stood, was likely to be challenged in the courts within the next eighteen months.

3.1 Shortly afterwards, the Constitution Committee of the House of Lords opened an inquiry into the rule of law. My written evidence to the inquiry[2] draws the Committee's attention to these constitutional questions. I now anticipate that, in the absence of effective counter-arguments, the necessary constitutional reforms will, in due course, be initiated by Parliament without the need for any legal challenge (which, however, remains an option).

4 At issue (as far as the current application is concerned) is the question of whether:

a. it is legitimate for central government to override local government in matters of this kind; and

b. whether, in the absence of expert consensus, it is legitimate, in administrative decision-making, for clearly identifiable harms to be set aside in favour of benefits that are essentially speculative.

1 Initial comment on this project: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010149/EN010149-000319-Springwell%20DCO%20submission%202.pdf

2 Written evidence to House of Lords Constitution Committee rule of law inquiry: https://committees.parliament.uk/writtenevidence/140697/pdf/

5 What follows is my understanding of what the legal position will be if the constitutional changes I am anticipating do indeed happen. Be aware that I am a jurist, not a lawyer, and my opinion is based on my understanding of legal principles rather than knowledge of established law (which, I suggest, will not be relevant in the event of the kind of constitutionally revolutionary reform I am expecting).

6 The implications for the Planning Inspectorate arise from the implications for DCO applicants, so I start with them.

Implications for DCO Applicants

7 It is a well-established principle that changes to the law do not apply retrospectively, i.e. if some action is lawful at the time that it takes place, it cannot be rendered unlawful by subsequent changes to the law.

8 As a general rule, this principle also covers the assignment of rights, including planning consent: if consent is granted in accordance with the laws pertaining at the time the grant is finalised, the courts can be expected to rule that the grantee should be compensated for any subsequent revocation of that consent.

9 This reflects the political reality that, currently, control of government policy is relatively frequently transferred from one side of the ideological spectrum to the other. If rights granted under one government could be freely set aside by the next, it would be impossible for anyone to make long-term investment decisions with any confidence.

10 The constitutional changes which I am anticipating fall outside this paradigm. Although they can be expected to come about through relatively normal processes – either through parliamentary legislation or a legal challenge which leads the courts to recognise the concept of an *ad hoc* Constitutional Parliament, superior to the existing Governing Parliament – they are changes which are essentially revolutionary, and it can reasonably be expected that nothing comparable will happen again for several centuries.

11 That being the case, there will be no reason for the courts to be concerned that revocation of consent without compensation (and possibly with remedial obligations), as a result of these changes, would set an undesirable precedent. Any judgment would therefore rest on other factors (which it would not be appropriate to go into in detail in this representation).

11.1 This also applies to repudiation of subsidy agreements (direct or indirect) if the courts find that the government has not exercised due diligence in entering into them (for example if the government has wilfully treated contentious scientific evidence or assumptions as undisputed fact).

12 In summary, I would expect the courts to find:

12.1 that under the existing settlement, central government has effectively usurped the authority of local government in a wide range of matters, and has routinely violated fundamental principles of governance (constituting misfeasance);

12.2 that usurpative or misfeasant decisions by central government can be set aside without any automatic right of compensation; and

12.3 that decisions on compensation should depend on specific circumstances, in particular whether a party was aware, or could reasonably be expected to have been aware, that an administrative decision it has relied upon might be usurpative or misfeasant.

13 As regards this specific application, I would expect the courts to assume that the Applicant has read both my initial comment and this written representation; and to find (in the absence of effective arguments to the contrary) that, if they decide to press ahead without waiting for the constitutional questions to be resolved, they do so entirely at their own risk (which may include liability for any necessary restoration work on the land).

Implications for the Planning Inspectorate

14 I said above that "Decisions on compensation would depend on specific circumstances, in particular whether a party was aware, or could reasonably be expected to have been aware, that the legitimacy of the existing legal framework is in question".

15 That raises the question of where responsibility lies for bringing this constitutional uncertainty to the attention of others who might be affected (which potentially includes everyone who is seeking, or has recently been granted, a DCO for any kind of 'Nationally Significant Infrastructure Project').

16 With my initial comment and this written representation, I have brought it to the attention of the Applicant and the Inspectorate (and I intend to submit similar representations, in due course, for any other DCO applications in my immediate area that come to my attention).

17 I would expect the courts to take the view that responsibility for bringing it to the attention of any other DCO applicant who might be affected now lies with the Inspectorate: the cost of doing so is negligible in comparison to the potential losses, and nobody else is so well placed to do it.

17.1 These questions on the legitimacy of the current constitutional settlement were brought to the Government's attention at the end of July last year, shortly after they came into office. I suggest that any projects given consent since the election last year should have been informed of this constitutional uncertainty and any which have not yet advanced significantly into the construction stage of the project should now be informed that, if they choose to do so without waiting for the uncertainty to be resolved, it will be at their own risk.

18 In view of the large costs which might be involved in restoring land which has been debilitated in consequence of usurpative or misfeasant decisions taken by central government – costs which would be pure waste, whether they fall ultimately on the developer or on the taxpayer – I think it likely that the courts would regard the Inspectorate as criminally negligent if it fails to bring this constitutional uncertainty to the attention of any DCO applicants who might be affected.

19 Implicit in this, is the possibility that the land might need to be restored long before the anticipated payback time of the project has been reached. I suggest that, with all DCOs, the Inspectorate therefore needs to ensure that funds to cover any necessary remedial work will

be available. As discussed below, it should not be assumed that the developer (or their successor) will still be solvent at that time.

Part 2: Funding Necessary Remedial Work

20 In addition to the possibility discussed above that exceptional constitutional changes might lead to consent being revoked and/or subsidy agreements being repudiated, I draw the ExA's attention to the possibility that the commercial viability of the development may collapse long before its anticipated payback time has elapsed, with the possibility of the Applicant (or its successor) becoming insolvent.

Future of Grid-based Electricity Supply

21 The commercial viability of developments of this kind rests on an assumption that electricity supply will continue, for many years, to be primarily grid-based and centrally-generated. I suggest that, for various reasons, this assumption needs to be regarded with considerable suspicion.

22 It is important to bear in mind that the technology and science on which the electricity industry has been built are not yet mature. In particular, there are significant gaps in physicists' understanding of the fundamental nature of energy and its relationship with matter, gaps which are often glossed over when students are learning the basics of the subject. The existence of these gaps means that it is possible for disruptor technology to emerge which would make generation close to the point of use much easier than it is at present. (I discuss this possibility in a little more detail in an appendix.)

23 New technology of that kind would allow people to be independent of the grid and is therefore likely to be embraced enthusiastically.

23.1 There are a number reasons why the public would prefer that electricity be produced as close as possible to the point of use, in particular growing awareness of the vulnerability of centralised energy supply, and possible health hazards associated with electricity transmission. (I discuss these points in more detail in an appendix.)

23.2 Migration away from the grid would very likely be a self-reinforcing process because the fixed costs of maintaining the network would need to be met by a diminishing number of customers, who would therefore be faced with rising prices — increasing the attractiveness of the new technology for consumers. Collapse of the market for centrally-generated electricity might therefore come very suddenly.

24 It is not in any way improper for policy makers to assume that no disruptor technology will emerge in the near future, and make plans accordingly. I suggest, however, that it would be negligent to make the opposite assumption, i.e. to assume that such technology <u>will not</u> emerge in the next thirty or forty years.

25 Public authorities therefore need to take account of the possibility that disruptor technology might indeed emerge, and allow for any foreseeable consequences.

25.1 I recognise that, once a solar farm has been developed its operational costs are relatively low and, even if it becomes clear that the development investment will never

be recovered, it may not become redundant as long as the grid itself continues to operate. That, however, cannot be taken for granted.

25.2 Established businesses rarely collapse gracefully when their markets evaporate. I suggest that public authorities need to recognise the possibility that the National Grid will become bankrupt within the next thirty or forty years and put as much thought into how the cost of dismantling the grid can be met as they do into facilitating speculative future demand. Obviously, this should include not only the networks of pylons and cables but also the generating stations which feed into it — including solar farms and wind farms.

Malcolm Ramsay

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Appendix

Possibility of technological breakthroughs

26 For most practical purposes, gaps in our understanding of the underlying physics are irrelevant. Most scientists therefore have no reason to consider them, often aren't even aware that they exist and, in some cases, actively deny their existence. As a result, the views of experts in a particular field or industry on how that field or industry will develop may be no more reliable than the views of educated outsiders.

26.1 Statements from government scientists are often reported as though they are authoritative but, from a scientific perspective, their opinions do not carry any special weight even in well-established areas of science.

27 Technological breakthroughs generally come about as a result of maverick thinkers exploring gaps in understanding. Breakthroughs may be rare but, when they do happen, new technologies can emerge very quickly and turn established industries upside down within the space of a decade or two.

28 Within the mainstream, research on fusion technology offers significant potential for widespread generation near the point of use. On the fringes, there are a number of people actively researching areas where there are divergent theories (for example aether or zero-point energy theories). Even further from the mainstream are people exploring the implications of quantised (as opposed to infinitely-divisible) space-time, which can offer a radically different perspective on energy.

29 The important point here is that there is no way at all of knowing what technologies might become available in the near future. Centralised electricity systems might be with us for a very long time but it is equally possible that they will become redundant within the next thirty or forty years. Public authorities need to take account of both possibilities.

Vulnerability of centralised energy supply

30 The recent country-wide blackout in Spain and Portugal highlights the vulnerability of centralised energy supply. The electricity industry and its supporters in government might confidently predict that the problems that caused those networks to fail will be solved, but it's likely that any solutions will require new levels of complexity and therefore introduce new areas of potential failure.

31 Public awareness of the possibility of such failures can be expected to encourage more and more people to seek independence from the grid. Even if it were technically possible to eliminate the danger of cascading technological failures causing widespread outages, it's likely that a large proportion of the public will distrust any assurances given.

32 Alongside the possibility of technological failures, centralised electricity systems put large numbers of people at the mercy of 'bad actors'. The last few years have led to increasing distrust of government and large corporations and, as things stand, that trend seems unlikely

to reverse. That too will encourage people to seek independence from centrally-controlled energy systems.

Possible health hazards

33 I anticipate that growing public awareness of possible health hazards associated with electricity transmission will also encourage people to minimise their dependence on remotely generated electricity.

34 Many people are already aware of risks associated with living in close proximity to transmission lines, despite the efforts of the industry and official bodies (such as the UKHSA) to play them down.

35 The risks that the public are already aware of are the ones that show up in marginal rates of disease (i.e. local rates of disease that are noticeably higher than baseline rates). What is not currently widely known is that historical evidence (as set out in Arthur Firstenberg's book, *The Invisible Rainbow*[3]) suggests that randomly-fluctuating electro-magnetic fields may be an underlying cause of baseline rates of a number of the most serious modern diseases, e.g. cancer, heart disease and diabetes.

35.1 For practical purposes, historical evidence is the only way such an effect can be identified because, in modern societies, there is no way to have a control group that has not been exposed. (Firstenberg doesn't only present historical evidence: there are also many references to a wide variety of modern research which supports his arguments.)

35.2 I suspect that some of the conclusions Firstenberg comes to in his book will not stand up to close scrutiny but, to my mind, he has made a strong *prima facie* case that randomly-fluctuating electro-magnetic fields destabilise biological activity at a fundamental level, making living organisms vulnerable to a wide range of other factors which they would otherwise be able to adjust to relatively easily.

36 As far as I can tell, the electricity industry, and other industries whose activities directly affect the ambient electro-magnetic field have, so far, made no serious attempt to rebut this historical research. Instead, they have relied on *ad hominem* and/or 'appeal to authority' dismissals of the people publicising them, characterising them as fringe scientists whose opinions are too far outside the mainstream to be taken seriously.

36.1 Health officials and government scientists seem to have accepted industry's perspective on these risks and either ignore them or actively downplay them.

37 To date, as I understand it, the only legal challenges that have been made have been attempts to stop specific projects. These have failed because the complainants have effectively been asking the courts to determine scientific truth which, quite properly, they are not prepared to do.

38 I anticipate that, in future, challenges will be brought against health officials (such as UKHSA) on the basis that they have been negligent in one of two ways:

3 https://chelseagreen.co.uk/book/the-invisible-rainbow/

38.1 if effective counter-arguments exist, then they have been negligent in failing to bring those counter-arguments to public attention and have thereby allowed unwarranted fears to flourish (albeit in a minority of the public who are aware of and actively concerned about the possible dangers); or

38.2 if effective counter-arguments do not exist, then they have been negligent in failing to bring the existence of these concerns to the attention of the general public, and in failing to require the industry to actively assist in making the public aware of them (for example, by including health warnings, similar to the warnings on cigarette packets, in all their communications with their customers).

38.3 I suspect that, if effective counter-arguments did exist, the industry would certainly have deployed them. I therefore assume that they do not exist.

39 Obviously, modern society is so dependent on electricity that there is no prospect of most people giving up using it just because they become aware that it might be an underlying cause of much serious illness. However, the principle of informed consent requires that the public should be made aware of any possible dangers so that they can make their own choice in the matter and take what steps they can to mitigate it. Minimising transmission distances is one obvious form of mitigation.

39.1 Electricity transmission is a less significant source of random EM fluctuations than radio and mobile phone signals. Nonetheless, it is a contributor and if those fluctuations are indeed an underlying cause of serious illness, the public should be made aware of that fact.

40 In summary, I anticipate that

40.1 in the absence of a voluntary change of policy in regulatory and advisory bodies such as UKHSA, legal challenges will be brought to require them to keep the public properly informed about possible health risks associated with the use of electricity; and

40.2 greater public awareness of possible dangers is likely to encourage people to shift away from grid-based electricity.