

NSIP Thresholds for Generating Stations

Introduction

1. We are instructed by Boom Developments Ltd (“the Developer”) in respect of the proposed development of a solar farm and associated infrastructure on land at New Hall Farm (“the Proposal”). The generating capacity of the Proposal is expected to be circa 22.4MW.
2. We understand that the City of Wakefield Metropolitan District Council (“the Council”) have asked the Developer for further information – as part of the Developer’s planning application for the Proposal – to demonstrate that the Proposal does not constitute an extension to the Low Farm solar farm (“Low Farm”) for the purposes of the Planning Act 2008. Low Farm is located on land to the West of the Proposal.
3. Planning permission for Low Farm was issued by Kirklees Council on 24 August 2022 under ref: 2021/62/93644/E. This permits the:

*ERECTION AND OPERATION OF GRID-CONNECTED SOLAR
PHOTOVOLTAIC FARM TO SUPPLY UP TO 49.9MW, WITH ANCILLARY
INFRASTRUCTURE AND LANDSCAPING AND BIODIVERSITY ENHANCEMENTS*

4. As such, the generating capacity of Low Farm is expected to be 49.9MW. It is worth noting that whilst a number of planning conditions for Low Farm are in the process of being discharged, to date the consent has not been implemented.
5. This note clarifies why – in a legal context – the Proposal is not an extension to Low Farm. In short, the Proposal is not an extension to Low Farm because it will be a functionally separate generating station.

Legal Position

6. Under the Planning Act 2008, s.15 provides that the construction or extension of a generating station qualifies as a Nationally Significant Infrastructure Project (NSIP) where the generating station’s capacity (once extended) is more than 50MW. NSIPs are consented by way of a development consent order; an application for which is made to the Secretary of State.
7. “Generating station” is defined by s.64(1) of the Electricity Act 1989. This 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.* As such, there is no explicit definition in statute detailing what constitutes a generating station (albeit case law has clarified its meaning - see below).
8. “Extension” in relation to a generating station has the meaning given by s.36(9) of the Electricity Act 1989. This provides that *“extension” in relation to a generating station includes the use by the person operating the station of any land or area of waters (wherever situated) for a purpose directly related to the generation of electricity by that station.*
9. The Council will no doubt be aware of the recent High Court case of *R (on the application of (1) Durham County Council; (2) Hartlepool Borough Council) v Secretary of State for Levelling Up, Housing and Communities (D); Lightsource SPV 206 Limited and Lightsource Development Services Limited (IPs) [2023] EWHC 1394 (“Lightsource”)*.

10. This case relates to two 49.9MW proposals situated approximately 1 mile apart. The first solar farm had already been consented and the second solar farm's planning applications were subject to a planning appeal. It is proposed that the projects each connect to a substation at the same location. This substation is to be adopted by the Distribution Network Operator ("DNO"). From this substation a 66kV cable will run to the grid infrastructure also operated by the DNO.
11. The claimant councils in the *Lightsource* case contended that the second 49.9MW solar farm was an extension of the already consented solar farm and therefore, together, they constituted a NSIP. This was in part because they were physically connected by infrastructure (namely the common substation and the 66kV cabling to the grid). The councils also argued that this physical connection was a functional link leading to an increased overall generating capacity and so qualified as an "extension" under the Planning Act 2008.
12. The developer in the case - and the Secretary of State - took the view that the projects were separate generating stations and not linked (para. 8(b) of the judgment). The developer argued that the projects were considered, developed and managed as different projects. The planning applications were submitted by different SPVs. The solar farms will be separately metered, with separate substations and switch-gear. It was expected that the DNO would adopt the electricity distribution infrastructure associated with the solar farms. There was a degree of commonality regarding the substation but this is a necessary piece of related infrastructure.
13. The Court considered (at para. 40) that there is nothing in the definition in s. 64(1) of the Electricity Act 1989 to suggest that the apparatus needed to transmit and distribute the electricity is itself part of the "generating station". This followed the reasoning in the case of *R (Redcar and Cleveland Borough Council) v Secretary of State for Business, Enterprise and Regulatory Reform* [2008] EWHC 184 ("*Redcar*").
14. *Redcar* notes that the statutory definition of generating station is not particularly helpful but provides that a 'generating station' simply means a building or structure where electricity is generated. The Court concluded that the 'generating station' is the place where the electricity is generated. Once it has been generated there, at a 'generating station', it is transmitted to the electricity network.
15. Having cited and reviewed these passages in *Redcar*, the Judge in *Lightsource* concludes (at para. 44) that:

These passages demonstrate that the cables and substation the subject of the present applications are not part of a "generating station". They are the means by which the electricity is transmitted and distributed, not generated. ... The Redcar case is therefore, on the face of it, fatal to the claimants' (the councils') argument that the cables and substation are part of the generating station.
16. Finally, at para. 47, the Court accepted that a non-contiguous site could fall within the definition of an "extension" and be regarded as part of one generating station. However, the Court pointed to a number of features which point strongly against that conclusion in the *Lightsource* case. This includes the projects being developed at different times; separate distribution and connection agreements; separately metered projects; the projects operating independently of each other in contractual terms and in terms of physical infrastructure; the substation is part of the transmission and distribution of electricity (not generation of electricity); and the cabling from substation to grid being for efficiency purposes only, and, in any event, not related to generation for the purposes of the Planning Act 2008.

New Hall Farm

17. Both Low Farm and the Proposal will be generating stations. There will be a degree of shared infrastructure between the projects as the Proposal will connect to the Low Farm substation (located in Kirklees Council's administrative area).

18. As part of Low Farm a substation, cable run between this substation and a point of connection into the grid (located on land at Lady Ing's Farm) will be developed. The point of connection will be at an existing pylon owned by the DNO. The Proposal will connect into the substation at Low Farm. The Low Farm substation and cabling will be adopted by an independent Distribution Network Operator (iDNO) and form part of its electricity infrastructure (N.B. iDNOs design, install, own and operate inset distribution networks located within the areas covered by the DNO).
19. Whilst there will be a degree of common infrastructure between Low Farm and the Proposal (in the form of the Proposal connecting into the Low Farm substation) this infrastructure is the means by which the electricity is transmitted and distributed, not generated (as per *Redcar* – see para. 15 above). As such this infrastructure does not form part of either 'generating station' for the purposes of the Planning Act 2008 and cannot be considered an 'extension'. In all other respects the Proposal and Low Farm will have no interconnection or interdependence and the schemes will be functionally separate.
20. To support this position:
- a. The Proposal and Low Farm are proposed by different applicants/developers; the Proposal is being promoted by Boom Developments Ltd and Low Farm was progressed by a separate company, Boom Power Limited.
 - b. The landowners for each site are different.
 - c. Each site will be separately metered to the local distribution network.
 - d. Each site has a separate grid offer from an iDNO.
 - e. The sites are physically separate and non-contiguous; they are also in separate local authority administrative areas and will be considered under different local plan policies; the Proposal will be considered on its own merits.
 - f. The impacts from each scheme will be different and will be mitigated differently. For example, the Proposal has been designed around the specific issues of the site including L&V impact, impacts on non-designated heritage assets, proximity to the nearby SAC etc. The scheme designs and panel configurations are different.
 - g. The sites are being developed at different times; indeed the two sites have been considered, developed and managed as separate projects. Low Farm is in the process of discharging planning conditions.
 - h. As the sites will be developed at different times they will be subject to different requirements and constraints (including mitigation and ongoing maintenance requirements).
 - i. Both the Proposal and Low Farm will start exporting electricity to the grid at different dates as Low Farm is more advanced than the Proposal.
 - j. The schemes will be subject to different commercial and contractual arrangements e.g. development contracts; and the sale or off-take of electricity through Power Purchase Agreements with different customers.
21. In summary, it is clear that the manner in which the Proposal is to come forward, in addition to its distinct lack of interdependence with Low Farm, demonstrates functional separation between the projects. This position is endorsed by the commentary in the *Lightsources* and *Redcar* cases highlighted above. On this basis we do not consider the Proposal to be an 'extension' to the generating station at Low Farm (under the terms of the Planning Act 2008).
22. We trust that this note assists the Council in concluding that the Proposal and Low Farm are separate projects. We can be contacted via the Developer if the Council has any further questions in respect of the points raised in this note.

Ashfords LLP
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