



Department
of Energy &
Climate Change

Guidance on Disputes over Third Party Access to Carbon Dioxide Transport and Storage Infrastructure

The Storage of Carbon Dioxide
(Access to Infrastructure) Regulations 2011

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1. Introduction

- 1.1. This Guidance sets out the approach the Secretary of State would expect to follow if required to make a determination under the ‘*Storage of Carbon Dioxide (Access to Infrastructure) Regulations 2011*’¹ (“the Regulations”). It also covers the process that the Secretary of State would follow in considering whether or not to exercise the power to grant a consent subject to a variation condition (regulation 7) or a pipeline variation notice (regulation 8).
- 1.2. This guidance only applies where the Secretary of State is the “authority” as defined in regulation 4. For storage sites that are located in Scotland – including the Scottish territorial sea – and pipelines that begin and end in Scotland, the Scottish Ministers are responsible for the designated authority and may issue guidance as appropriate.
- 1.3. The Regulations are intended to enable third parties to obtain access to CO₂ transport networks and storage sites (CO₂ infrastructure) on transparent and non-discriminatory terms, where this is practical and where doing so would avoid the construction of new infrastructure or enable existing infrastructure to be used or developed more effectively. This is achieved by providing for the party seeking access or modification to appeal to the Secretary of State in circumstances where the parties are unable to reach agreement between themselves. The Regulations transposed into UK law requirements governing third party access to pipelines and storage sites and dispute settlement, in Articles 21 and 22 of the CCS Directive.²
- 1.4. “Relevant infrastructure” is defined as a relevant pipeline or a relevant storage site. A “relevant pipeline” means;
 - a controlled CO₂ pipeline; or
 - a CO₂ pipeline situated in, under or over Great Britain, including so much of the internal waters of the United Kingdom as are adjacent to Great Britain.
- 1.5. A “relevant storage” site means a storage site situated in Great Britain; or in, under or over Great Britain or
 - so much of the internal waters of the United Kingdom as are adjacent to Great Britain,
 - the territorial sea of the United Kingdom, or

¹ SI 2011/2305. <http://www.legislation.gov.uk/ukdsi/2011/9780111512777/contents>

² Directive on the Geological Storage of Carbon Dioxide (2009/31/EC)

- waters in a Gas Importation and Storage Zone.
- 1.6. A “relevant storage site” also includes any associated installations, apparatus and works that are required to store CO₂.
- 1.7. The Regulations apply to CO₂ pipelines and storage sites (collectively called infrastructure in this Guidance) including where:
- a party is seeking modification of CO₂ infrastructure prior to its construction (regulations 7 & 8);
 - a party is seeking access to that modified infrastructure once it is constructed (regulations 10(3) and 12);
 - a party is seeking access to existing CO₂ infrastructure, including in circumstances where a modification to that infrastructure is required (regulations 12 and 13).
- 1.8. The access application process in the Regulations and this Guidance are based on the principle that they are intended as a back-stop in the event that it is not possible for the parties to negotiate an agreement between themselves. The onus is therefore on the parties to reach agreement on a voluntary basis before an access application is made to the Secretary of State. These arrangements are not intended as a short-cut for those negotiations, or as a way of either of the parties seeking advantage over the other. The Secretary of State will not consider an access application unless he is satisfied that the applicant and the owners of the infrastructure have negotiated in good faith and have had a reasonable time in which to reach agreement.
- 1.9. This Guidance is intended to assist those involved in an access application under the Regulations and those investing in infrastructure, to understand the process and the factors the Secretary of State would be likely to take into account in considering a determination. However, each circumstance where the Secretary of State is asked to exercise these powers is likely to be unique and judged on its merits. This Guidance is therefore necessarily indicative and does not supercede in any way the Regulations. The intention is to review the Guidance, from time to time, as experience develops.
- 1.10. The Government is keen to ensure timely and efficient investment in, and integration and use of, CCS infrastructure. The Regulations and this Guidance are an important part of the framework for achieving this objective. Encouraging economically efficient investment in CCS infrastructure, whilst not discouraging early investors in CCS infrastructure or third parties to enter into early commercial agreements to access infrastructure, are therefore important general considerations in guiding the Secretary of State should he be asked to make a determination. Any determination will take into consideration any previous determination made by the Secretary of State.

2. How to Make An Access Application

2.1. The process provided for in regulation 12 is a means to determine access where no agreement can be reached between the parties despite genuine efforts to do so over a reasonable period of time.

2.2. The Secretary of State's approach is intended to ensure that:

- the procedure and outcome are fair;
- the procedure is transparent, subject to appropriate regard to commercial confidentiality; and
- applications are dealt with consistently, effectively and expeditiously, avoiding unnecessary expense.

2.3. CCS infrastructure that has not received consent or planning permission

2.4. Regulations 7 and 8 allow the Authority to issue a notice modifying CCS infrastructure for which relevant planning consents are being sought. This might be in response to submissions made by persons interested in gaining access to such infrastructure. Where such a notice is issued, the Authority has the power to require costs associated with changes required by the notice to be paid by third parties who have made representations to the Authority. Therefore, in order to reduce the costs that might be associated with such a change, where the pipeline will require development consent under the Planning Act 2008, the developer should consult those interested in the infrastructure about potential increases to the pipeline's capacity and associated access requirements during the pre-application stage; this will inform the developer's application. This will mean that third parties with an interest in the modification of a planned pipeline will need to make that interest known to those interested in the infrastructure during the Planning Act pre-application stage.

2.5. Where a notice is issued then an access application can be made by the party seeking the amendment in respect of that infrastructure, even though it has not yet been constructed (regulation 10(3)). In such circumstances the same process will be followed as would be followed if the infrastructure already existed and the guidance below remains applicable.

2.6. Making an access application to the Secretary of State

2.7. Before considering any approach to the Secretary of State the parties must enter negotiations and seek to reach an acceptable commercial arrangement between them.

This negotiation should be carried out in good faith and is a precondition to the Secretary of State commencing a determination.

- 2.8. The Secretary of State is not a party to this contract and will have no role in the enforcement of a determination. Once it has come into force, enforcement by the parties would be as if it were a contract between them (regulation 20).
- 2.9. If these negotiations have been given reasonable time to proceed, but it looks like they are unlikely to give rise to agreement, the parties (either individually or collectively) are encouraged to discuss informally the intention to seek a determination with each other and the assigned DECC lead official (a lead official will be assigned once either party has made contact with DECC; the DECC contact details can be found at **Annex A**) acting on behalf of the Secretary of State in the first instance. The Government will give all parties who wish to do so the opportunity to make representations to it, with a view to resolving the matter without recourse to the formal process.
- 2.10. If the party seeking access to the infrastructure (including where such access would require modification) decides to proceed to the formal process then in all cases a formal request for a determination under these arrangements should be made in writing to the lead official. There is no standard format or timescale for an application. **Annex B** provides an indication of the layout of the application and **Annex C** an indication of the scope of the information required; however this is not exhaustive. It should, however, normally take the form of a letter with supporting annexes with any relevant explanatory information to inform the determination. Further information will then be sought from all parties during the determination process. Should an applicant wish to withdraw their application at any time they should contact the designated lead official. The Secretary of State will ensure that the owner is aware that a third party has made an application by sending (by recorded delivery or by email) the owner, named in the application, a copy of the application; this will confirm the date the Department received the application (i.e. the date of the first milestone set out in **Annex D**).
- 2.11. There is no formal timescale for making an application, although an application for a variation condition under regulation 7 or a pipeline variation notice under regulation 8 (which allow for the variation of CCS infrastructure prior to the granting of “consent” or planning permission, as defined in regulation 3) must of necessity have been made before consent to or planning permission for the infrastructure has been granted.

2.12. Secretary of State consideration of an access application

- 2.13. **Annex D** sets out the expected milestones in the consideration of an application.
- 2.14. Once an access application is submitted the Secretary of State must first decide whether the applicant and the owner have had reasonable time to reach agreement. If not, then the application cannot be considered. If they had reasonable time, the Secretary of State will decide whether to consider the case further, reject it or adjourn it to allow time for further negotiations. In deciding which of these approaches to take the Secretary of State will have regard to:

- Whether an adequate amount of information (e.g. on required and available capacity, technical specifications etc.) had been provided by the parties and, if so, when it was provided;
- Whether the parties have negotiated in good faith - a lack of good faith might be evidenced by either the applicant or the owner drawing out negotiations with no real intention of bringing them to a conclusion;
- Whether an application should be rejected on the basis that it is misconceived, frivolous or vexatious.

2.15. In deciding what represents a reasonable timescale the Secretary of State will take account of the duration of the negotiations, the progress made and the intensity with which the parties have conducted those negotiations. Each case will depend on the circumstances, however as a rule of thumb it is unlikely that this would take less than six months of intense negotiations. The period will start from the point that the party seeking access or modification writes to the owner of the infrastructure (to ensure that the highest level of commitment to this process is present, the correspondence should take place at Board Director level for both the sender and receiver) setting out its interests.

2.16. While in general an application made after the parties have made every effort to negotiate an agreement will be considered for a determination, the Secretary of State may instead reject the case or adjourn its consideration to allow the parties to negotiate further.

2.17. Inviting the owner to provide information

2.18. If the Secretary of State decides to consider an application further he will invite the owner of the infrastructure to provide information which will assist him in considering the application. For example, the information should include details of all terms already offered by the owner to the applicant. He may also ask the applicant, any person with a right to have CO₂ conveyed by the pipeline or stored in the storage site, and any other persons he considers appropriate to provide relevant information (Regulation 15). While the Secretary of State will endeavour to identify all the additional information that may be required in order to bring the case to a conclusion, it is likely that supplementary information will be required from both parties as the case is being considered; this will be undertaken on a case by case basis.

2.19. Agreeing the facts

2.20. The parties are encouraged to agree the facts of the case. To maintain transparency and to provide an opportunity for both parties to agree as many of the facts as possible or, where appropriate, provide their own view of the facts, the Secretary of State expects each party to copy to the other party its submissions to the Secretary of State unless there is good reason not to do so. The Secretary of State will consider any fact that enables him to reach a determination of the issue(s).

2.21. Meetings with officials

2.22. As the determination process is likely to be complex, it is likely to be necessary to hold one or more meetings between the Secretary of State's officials, the parties and their representatives, and/or other government officials and interested parties to clarify and explore aspects of the information provided. The Secretary of State will encourage both parties to agree to the other being present at any such meetings; commercially sensitive material will not normally be required to be shared at these meetings.

2.23. Consulting with Regulatory Agencies

2.24. The Secretary of State will consult the Health and Safety Executive (HSE) or the Health and Safety Executive for Northern Ireland (HSE NI), as appropriate, about the safety aspects of applications. It will be for the owner to ensure that all safety requirements are met. The Secretary of State is also likely to consult with relevant agencies, for example the Infrastructure Planning Commission in relation to matters under the auspices of the Planning Act 2008, during the determination period.

2.25. Timetable

2.26. The timetable will be agreed with parties as soon as all the information has become available to the Secretary of State. Once the timetable is agreed the Secretary of State will do his best to adhere to this, and will expect the cooperation of all parties in order to enable this timetable to be met. The Secretary of State will usually aim to complete a determination in 10 weeks (once the Secretary of State is in receipt of all relevant information to allow the determination to be made; the lead official will confirm to the parties as soon as that information has been considered complete and therefore set the clock running), however it may well be necessary to extend this period, depending on the complexity of the case. Where an extension becomes necessary the Secretary of State will discuss and seek to agree an alternative timetable with the parties.

2.27. Form of a determination

2.28. In all cases a determination is expected to include a comprehensive and detailed set of terms and conditions specified by the Secretary of State in order to give effect to the determination. This will include financial terms (including liabilities and indemnities), but there are also likely to be other (non-financial) aspects which the Secretary of State will be required to settle. It is envisaged that the applicant and owner will be provided with an indication of the likely outcome of the determination, in the form of terms that the Secretary of State is minded to set and/or draft notice(s). This step will allow the parties to review the completeness of the proposed terms and to identify possible difficulties with their implementation, prior to finalising notices.

2.29. If a single determination is required, that will be made, however any application involving multiple determinations would be made at the same time by the Secretary of State; it would not be possible to make intermediate determinations during such complex cases.

2.30. Implementation of a determination

2.31. The Secretary of State will set out the determination in a notice (under regulation 12(8)) and would normally specify a short period (30 working days would be a minimum, though in complex cases this could be longer) for the applicant to confirm their agreement to the terms of the determination. If the applicant were to decline to accept the terms within this timeframe then the determination does not come into force. Once it has come into force it may be enforced by the parties as if it were a contract between them (regulation 20). The Secretary of State is not a party to this contract and will have no role in the enforcement of a determination. The determination would be based on CO2 volumes described in the application; the determination would take account of any situation that would mean that these volumes would not be realised.

2.32. Publication of outcomes of applications

2.33. As part of the process the parties will be asked for consent to enable the Secretary of State to make public the determination and the reasoning behind the decision. This is to ensure transparency and to reduce uncertainty for those that may wish to refer a case for determination in the future. In all cases, it is expected that the published decision will set out details of the dispute including the parties and infrastructure involved, the nature of the determination requested and the elements determined, e.g. tariff set, volumes, period of access etc. In order to improve upon the details of a determination, the Secretary of State may discuss a draft of it with the parties to which it is to apply or to seek comments on it from them.

2.34. The Secretary of State recognises that there may be legal and commercial constraints on his disclosure of information provided by companies. However, the parties should be aware that the Secretary of State has duties, under the Freedom of Information Act 2000 (FOIA) and Environmental Information Regulations 2004 to disclose information in certain circumstances.

2.35. The Secretary of State would want to avoid circumstances where the publication of information will make it less likely that the parties will provide information or not fully cooperating with the determination process. The Secretary of State will therefore endeavour only to publish as much of the reasoning that the parties consent to release sufficient to allow the decision and reasoning to be understood by others.

3. Factors to be Taken into Account in Reaching a Determination

3.1. This section describes the factors the Secretary of State would take into account in reaching a determination. It distinguishes between pipelines and storage sites where different considerations apply. In all cases, the Secretary of State is bound by a duty to act reasonably and, where possible, the Secretary of State will seek to reach a determination with the agreement of the parties. The Regulations set out the requirements for the Secretary of State to give the relevant parties the opportunity to be heard before he makes a decision (regulation 12(4) (b)) and the matters that must be taken into account (regulation 12(5)).

3.2. General Principles Guiding Determinations

3.3. The Government's main objective is to encourage investment in CCS infrastructure that will facilitate the safe and cost-efficient transport and storage of CO₂ produced in power generation and industry. The Secretary of State's determinations will be guided by the need to ensure that investment in CCS infrastructure is timely, efficient and also attractive to potential investors. In some cases there may be a balance to be struck in meeting these aims. The determination will be based on the facts presented, the principles of transparency and non-discrimination (as set out in the CCS Directive).

3.4. Efficiency

3.5. From an efficiency perspective, there is a need to ensure that investment in infrastructure for the transport and storage of CO₂ is carried out in the most cost-effective manner. Investment in CCS infrastructure networks will be characterised by significant costs and significant economies of scale. CCS infrastructure also has a long operating life and a number of commercial and technical risks will need to be taken into account by the Secretary of State in reaching a determination.

3.6. An important factor in reducing the costs of CCS will be the development of geographical 'clusters'³ in transport and storage that exploit these economies of scale. For example, it will make sense for similarly located CCS power plants and industrial emitters to make shared use of larger transport pipelines (as far as technically possible) rather than build multiple pipelines along similar routes. Lack of an effective regime to ensure third party

³ 'CCS Cost Reduction Task Force: final report' Published in May 2013

<https://www.gov.uk/government/publications/ccs-cost-reduction-task-force-final-report> DECC responded in October 2013 with the 'Government response to the CCS Cost Reduction Task Force'

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/251005/CCS_CRTF_Govt_Response_and_CCS_Update_15_Oct.pdf

access rights could therefore lead to wasteful duplication of resources and/or deter investment in CCS generation where economies of scale cannot be exploited.

- 3.7. At the same time, the ability of third parties to access CCS infrastructure and associated services on transparent and non-discriminatory terms is key to ensuring the use of CCS in generation and industry is attractive. The need to avoid wasteful duplication in CCS infrastructure investment could potentially limit competition in transport and storage services. As such, a factor guiding the terms of determinations by the Secretary of State will be a desire to ensure fair access to CCS infrastructure that does not result in transport and storage costs that deter the use of CCS technology by third parties.⁴

3.8. Attractive to Investors

- 3.9. The Government recognises that potential infrastructure investors have a key role to play in ensuring the development of CCS usage and that too narrow a focus on setting terms may reduce the incentive for them to keep their existing infrastructure in operation and available and, invest in new infrastructure projects and innovations. It anticipates that the Secretary of State would consider these factors in making a determination. Any terms determined by the Secretary of State should reflect a fair payment to the owner for real costs and risks faced and for opportunities forgone. They should recognise that pipeline and storage capacity has a commercial value and that the owner, having borne the cost and risks of installing, operating and maintaining the pipeline system, should be entitled to derive a fair commercial consideration for that value. The terms may also recognise the costs and risks borne by other third parties that have entered into a commercial arrangement with the owner prior to the third party's application. This could also include third parties who have agreed to bear risks, without there being a direct contract.
- 3.10. As stated above, there is likely to be a balance to be struck in considering these factors and any attempt to be too prescriptive in setting out guidance on whether to grant a third party access to an owner's processing facilities or pipeline infrastructure and on what terms may either to overlook an important factor or to introduce a factor which, in some circumstances, might be entirely inappropriate. The relative weight to place on these factors will vary from case to case and the guidance that follows on specific scenarios is, of necessity, in general terms.

3.11. The applicant is seeking modification of infrastructure prior to consent/ planning permission, together with the access to that modified infrastructure once it is constructed

3.12. The relevant regulations and what they allow

- 3.13. Regulations 7 & 8 allow a third party to seek modification to infrastructure prior to the granting of the relevant consent or planning permission (as defined in regulation 3) and for the Secretary of State to consider the proposed modification. The authority may, when granting consent for relevant infrastructure, include conditions in that consent

⁴ More guidance on the context of Secretary of State decisions in relation to the general competition legislation enforcement regime is provided in **Annex E**.

requiring the infrastructure to be constructed to a capacity, design or (in the case of an offshore pipeline) route different to that proposed. Regulation 8 provides that, where a pipeline requires planning permission rather than a consent that is granted by the authority, the authority may (before planning permission has been granted) require the infrastructure to be constructed to a capacity, design or (in the case of an offshore pipeline) route different to that proposed. Regulation 9 gives power to the authority, where it has served a notice under regulation 7 or 8, to serve a notice allocating the additional costs of constructing the pipeline in conformity with the requirements as to capacity, design and route.

- 3.14. It is appreciated that engineering studies will be ongoing during the permitting/planning period and that this modification could add extra expense for the owner. There is provision for the Authority to require that such extra expense should be recoverable from the third party applicant, by the owner (regulation 9).
- 3.15. The Regulations provide for the Secretary of State, in some circumstances, to impose conditions on consents for new infrastructure, requiring it to be constructed to a greater capacity, with design modifications or on a different route.
- 3.16. The Secretary of State will be able to exercise these powers only if he is satisfied that there is sufficient evidence of demand (or likely demand) for further infrastructure and, in the case of a pipeline, that demand would be for a pipeline following a similar route for at least part of the length of the proposed pipeline. The Secretary of State will also have to be satisfied that the conditions he imposes will not compromise the safety and environmental integrity of the infrastructure or its efficient operation.
- 3.17. The Secretary of State will be able to exercise these powers on his own initiative although we expect that he will do so in response to representations made by third parties who want to use the infrastructure.
- 3.18. The power to impose conditions will be linked to existing consent regimes. The consents to which conditions may be attached include:
 - a works authorisation under s.14 of the Petroleum Act 1998 for an offshore pipeline;
 - a construction authorisation under s.1 of the Pipe-lines Act 1962 for cross-country pipelines;
 - a development consent under s.114 of the Planning Act 2008 for nationally significant infrastructure;
 - a storage permit for a storage site, under the Energy Act 2008 and associated Regulations;
 - a planning permission under Part 3 of the Town and Country Planning Act 1990 or Part 3 of the Town and Country Planning (Scotland) Act 1997.

3.19. Where the pipeline will require development consent under the Planning Act 2008, the owner is advised to consult those interested in the infrastructure about potential increases to the pipeline's capacity and associated access requirements during the pre-application stage. Third parties with an interest in the modification of a planned pipeline are advised to make that interest known to the developer during the Planning Act pre-application stage.

3.20. Regulation 10 permits any third party to make an access application to the (modified) infrastructure prior to a construction being complete. There is no requirement to make such an application, but where one is made the normal access application process will be followed, regardless of the fact that the infrastructure to which access is being sought does not exist at that point.

3.21. The factors the Secretary of State would take into account in reaching a decision

3.22. In order to retain an incentive for investment in infrastructure, the Secretary of State would normally (as part of the determination of the terms upon which access would be granted to the infrastructure) set commercial terms which allowed for recovery of the owner's costs. This would include:

- the capital costs incurred as a result of the modification, including any ongoing costs;
- any incremental costs imposed on the owner as a result of providing access to the modified infrastructure;
- a reasonable return (premium) that reflects the risks and costs to the owner of establishing the original infrastructure and modification. The terms may also take into account the risks and costs that any other third parties have incurred by entering into a commercial agreement with the owner prior to the determination.

3.23. In the case of a storage site the same principles as above would apply, except that the applicant would be expected to enter an agreement with the operator to share the cost of liabilities and obligations that arise from the permitting of the operation of the site under the CCS Directive. The Secretary of State would expect to bind the applicant to meet these obligations in a way that met the requirements of the storage site licence and permit holder.

3.24. The applicant is seeking access to existing infrastructure

3.25. The relevant regulations and what they allow:

- Regulation 12 allows for the Secretary of State to determine whether a third party should be able to secure access to existing infrastructure and if so on what terms;
- Regulation 13 also allows for the Secretary of State to require modifications to existing infrastructure to increase its capacity or provide junctions for the connection of another pipeline and if so on what terms.

3.26. CO2 Pipelines

3.27. The factors the Secretary of State would take into account in reaching a decision

3.28. If the Secretary of State decides to consider further an application for access or modification to a CO2 pipeline and its associated infrastructure, he is statutorily required (so far as relevant) to consider the following factors:

- the capacity of the pipeline that can reasonably be made available; in reaching this assessment the Secretary of State is likely to give considerable weight to the information the owner is required to publish for available capacity under regulation 17 or otherwise, although he is likely to want to reassure himself that any assessment of their reasonably foreseeable needs (this also includes the owner and third parties with existing access rights) is likely to materialise during the operational lifetime of the asset;
- difficulties and incompatibilities in technical specification that cannot reasonably be overcome; in reaching this assessment the Secretary of State is likely to take account of any technical specifications published by the owner under regulation 17 or otherwise, although he is likely to want to reassure himself that these are reasonable and are not intended as a technical barrier to prevent third party access;
- any potential negative impact on the environmental security of the pipeline;
- any potential negative impacts on the health and safety elements of the pipeline operations and operators;
- the interests of all users and owners of the pipeline; and
- as detailed within the CCS Directive, the proportion of the UK's carbon reduction obligations under international agreements and EU legislation that will be met through capture, its transportation and geological storage of the CO2.

3.29. Where the Secretary of State is considering an application from a third party for access rights to the pipeline, the Secretary of State also has the power under regulation 13 to require modifications to the infrastructure in question, to increase its capacity or provide junctions for the connection of another pipeline.

3.30. If the Secretary of State grants access rights under the Regulations and he requires modifications to infrastructure then he will also have the power to determine the charges that can be made for access and ancillary rights and the costs of the modifications that should be borne by the third party.

3.31. How the Secretary of State would determine the financial arrangements

3.32. The terms set by the Secretary of State would normally provide for the recovery of capital costs incurred in the expectation of third party business, and be set at a level, taking account of the risks involved, to earn the owner a reasonable rate of return on the costs

incurred. Terms would also reflect the ongoing incremental costs and risks imposed on the owners from providing access to the third party. The Secretary of State, as with every determination, will base his decision on the facts and on all evidence provided by all parties involved. Any determination will be made on its merits but, for example, it would be expected that:

- **Where spare capacity becomes available in a pipeline**

If provision has already been made for recovery of the pipeline's capital costs and spare capacity can be made available to a third party⁵, then it is anticipated that the Secretary of State would normally set terms reflecting only the incremental costs and risks imposed on the infrastructure owners from providing access. The Secretary of State, as with every determination will base his decision on the facts and on all evidence provided by all parties involved.

- **Where the pipeline has been built oversized or maintained with a view to permitting third party access on commercial terms**

The terms set by the Secretary of State would normally provide for the recovery of the relevant proportion of the capital costs incurred in the expectation of third party business, and be set at a level, taking account of the risks involved, to earn the owner a reasonable rate of return on the costs incurred. As in the previous scenario, terms would also reflect the ongoing incremental costs and risks imposed on the infrastructure owners from providing access to the third party. The Secretary of State, as with every determination will base his decision on the facts and on all evidence provided by all parties involved.

- **Terms for infrastructure associated with an integrated plant at or near the end of its economic life**

In the case of infrastructure associated with an integrated CCS plant at or near the end of its economic life, the prospective tariff for third party access may need to be set above incremental costs to ensure that it is maintained and remains available for third party use. The terms set by the Secretary of State would need to provide for appropriate cost sharing or recovery arrangements in such circumstances including a mechanism for determining the date from when or circumstances in which they should operate. In other words, the incremental costs would include (a fair proportion of) costs incurred in extending the asset life. The Secretary of State, as with every determination will base his decision on the facts and on all evidence provided by all parties involved.

- **Where there is competition for limited pipeline capacity**

The Secretary of State is unlikely to require the owner to make the capacity available to a prospective user who values the capacity less than other prospective users. The Secretary of State, as with every determination will base his decision on the facts and on all evidence provided by all parties involved.

⁵ Spare capacity in an integrated development could become available if, for example, the associated power plant's load factor declined as it aged and became relatively less effective

- **Terms set to cover costs of displacement of own use or reasonable forcible needs**
For infrastructure where the Secretary of State is satisfied that there is insufficient capacity (even after considering the modification power) to accommodate a third party's requirements, given the owner's rights and existing reasonable forcible needs, the Secretary of State will not require access to be provided. The Secretary of State, as with every determination will base his decision on the facts and on all evidence provided by all parties involved.

3.33. CO2 Storage Sites

3.34. The factors the Secretary of State would take into account in reaching a decision

3.35. In the case of storage sites the same principles as above would apply; though the determination will take into consideration the different risk profile, obligations and liabilities associated with CO₂ storage. Under regulation 13, however, the Secretary of State is prohibited from requiring a modification to a storage site where doing so would increase the capacity of the site beyond its authorised capacity. The Secretary of State may also consider other factors; e.g. 'injection capacity' of a store, as the maximum volume of CO₂ that can be injected into a formation over a unit of time is distinct from the authorised capacity. The Secretary of State may also consider whether a determination would impact the ability of the storage operator to cease acting as operator, within the conditions of the storage permit.

3.36. How the Secretary of State would determine the financial arrangements

3.37. In setting out the terms of access, the same principles as for pipelines (set out above) would apply. The Secretary of State will ensure that the terms reflect an appropriate payment for the costs and risks faced and/or forgone by the owner, including the impact on liabilities and contingent liabilities.

3.38. The balance of risk in such circumstances would have a significant impact on the commercial terms of storage. For example, one of the issues that will have a significant impact on the charge for storage is the extent to which the contingent liabilities are shared between the storage site owner and the producer of the CO₂ should there be a release from the storage site. In determining the financial arrangements, the Secretary of State would give consideration to whether contingent liabilities were shared between the parties or not. The Secretary of State would have to use his judgement in such circumstances having regard to the specific commercial, financial and technical circumstances of the projects that come forward for determination.

3.39. The applicant is seeking modification to existing infrastructure

3.40. The relevant regulations and what they allow

3.41. Regulation 13 provides for certain types of consent to the construction of a pipeline or a permit for the storage of CO₂ to be issued subject to conditions that may vary the capacity or design of the infrastructure or in the case of a pipeline its route.

3.42. The Regulations therefore address compulsory modifications to the infrastructure, where an application has been made to an owner and the Secretary of State is considering whether to give access under regulation 12(8). The Secretary of State is unable to serve a modification notice that requires authorised capacity of the storage site to be increased. Any compulsory modification will, as with all determinations, take consideration of the possible technical limitations to changing capacity. The determination also will take consideration of any issue where the third party was not able to meet pre-agreed technical specifications.

3.43. The factors the Secretary of State would take into account in reaching a decision

3.44. If the Secretary of State decides to consider an application for modification to CO2 infrastructure, he will consider the following points as per sections on access (Section 3.41).

3.45. How the Secretary of State would determine the financial arrangements

3.46. The guiding principles here would be similar to those where a modification to infrastructure was requested pre-consent. The Secretary of State would normally set terms that would provide for the owner to recover the costs incurred in making the modification and providing access to the applicant, as well as a reasonable return.

This would include:

- the capital costs incurred as a result of the modification, including ongoing costs;
- any incremental costs incurred on the owner as a result of providing access to the modified infrastructure;
- a reasonable return (premium) that reflects the risks and costs to the owner of establishing the original infrastructure and modification. The terms may also take into account the risks and costs that any other third parties have incurred by entering into a commercial agreement with the owner prior to the determination.

3.47. Compensation, Liabilities and Indemnities during the construction and tie-in phase (applies to all scenarios)

3.48. In the case of periods of planning application delay or shut-downs required for the sole purposes of the tie-in or modification, the applicant would be required to pay an appropriate level of compensation to the owner to cover losses arising from loss or deferral of economic activities associated with the infrastructure. Except in cases of wilful misconduct of the infrastructure owner, the Secretary of State would normally require applicants to indemnify owners against liabilities and losses arising out of tie-in or modification activity but with a cap on their maximum liability exposure. These caps would be reasonable and have regard to the realistic exposure of the infrastructure owners and the risk/reward balance of the overall determination. The Secretary of State would be as specific as possible as to the types and categories of loss recoverable under any indemnity with a view to avoiding subsequent disputes on the extent of recovery

under the indemnity and helping the placement of any insurance for the risk. In general, the Secretary of State would require that specific insurance arrangements or equivalent, acceptable to both parties, be put in place to cover tie-in or modification activity.

3.49. This would include (but not be limited to):

- a transport pipeline owner unable to meet contractual obligations to deliver CO₂ from power plant(s) to storage site(s) as a result of modifications to increase the capacity of the pipeline or to construct a junction with a third party's pipeline;
- a storage site owner unable to meet contractual obligations to take deliveries of CO₂ as a result of modifications to join an additional pipeline to the site and to infrastructure not included in the determination;
- a integrated CCS power plant owner losing or deferring generation revenue (including CfD payments, capacity market payments, financing costs etc.) or facing higher emissions abatement costs as a result of modifications to downstream CCS infrastructure (which they also own);

3.50. In deciding how much should be paid to the owner by the applicant for the purpose of defraying the cost of the modifications, the Secretary of State would thus make provision for the cost of interruption to the owner's economic activities while a pipeline and/or storage site is modified to enable use by that third party.

3.51. Liabilities and Indemnities during transportation and storage

3.52. The liability and indemnity (L&I) regime forms an important part of the overall risk/reward balance with consequent impact on reward levels. If the Secretary of State is asked to make a determination it is likely that the applicant and the owner would each bear appropriate risks having regard to the respective rewards which each is expected to enjoy. A fundamental presumption is that the applicant and owner will both mitigate their losses when seeking recovery from each other. The L&I terms that would be determined by the Secretary of State would have regard to the terms prevailing with existing users of a system and to the specific circumstances of each case: every deal is different, as is the overall risk/reward balance and thus the final liability and indemnity regime.

4. Publication of Spare Capacity

- 4.1. Regulation 17 requires publication of available capacity in CCS infrastructure. Infrastructure owners have a year to publish capacity information following the granting of the original storage permit or the initial construction authorisation being granted and after that whenever the capacity information changes. For a pipeline that is not initially constructed as a CO₂ pipeline, the information must be published within one year of the pipeline starting to be used to convey CO₂ and thereafter when the information changes. Regulation 17(2) sets out when the start date of the year begins.
- 4.2. In circumstances where the Secretary of State is being asked to determine access to existing infrastructure he will base his assessment of whether capacity is available on the published spare capacity, although he is likely to reassure himself that the reasonably foreseeable needs identified by the owner are realistic.
- 4.3. Any capacity estimate produced by the owner will be able to take account of their reasonably foreseeable needs (and those of their associates and other parties with rights to use the pipeline or storage site in question). The Secretary of State recognises that the available capacity would normally be zero except where, for instance:
 - there has been speculative investment in additional capacity;
 - an existing pipeline (constructed for non CO₂ use) has been re-used for CO₂ transport; or
 - where the original emitter's planned requirements have reduced for some reason.
- 4.4. For the purposes of the regulation, publication of details will be deemed to be met when these details have published electronically.
- 4.5. Where there is available capacity then owners are also required to publish information about the technical specification (such as dryness and impurities) of the CO₂ stream that must be met in order to secure access to the relevant infrastructure. That specification should be in sufficient detail to enable a prospective user of the infrastructure to make an assessment of the technical compatibility of their CO₂ stream with the available infrastructure. If asked to reach a determination the Secretary of State will take account of this published specification, in any dispute over technical compatibility although he is likely to want to reassure himself on its reasonableness.

5. Guidance Annexes

Annex A Secretary of State Lead Official Contact Details

Contact Address

Office of Carbon Capture & Storage
Department of Energy & Climate Change
3 Whitehall Place
London
SW1A 2AW

Email: occs@decc.gsi.gov.uk

Contact this e-mail address and the lead official will be assigned

To ensure efficient management of the application and to facilitate communication between the parties and the Secretary of State, the lead DECC official will be assigned as soon as one of the parties has made contact with DECC to discuss both an informal and formal application (an application under the regulations). The identity of this single point of contact will be advised at this time.

Annex B Submitting an Application to the Secretary of State

1. There is no standard format for an application. It should, however, normally take the form of a letter with supporting annexes. Applicants should send an electronic submission (preferably using Word, PowerPoint, Excel or PDF) to: see **Annex A** for DECC contact details
2. Applications must be signed and dated by the applicant or their legal representative. Where the application is made on behalf of a group of companies, acting under a joint venture agreement, the application should be submitted by all companies involved within that joint venture.
3. Applicants should include the following information in their request:
 - the regulation(s) under which the application is made;
 - the applicant's name and address and, if different, an address for contact in the UK;
 - details (name, location) of the infrastructure which is the subject of the dispute;
 - the name and address of the owner of the infrastructure the subject of the dispute;
 - details of the negotiation to date including:
 - i) the request to the owner of the infrastructure;
 - ii) A description of the (including dates) progress of the negotiations to date including any indicative information provided by the owner;
 - iii) an explanation of the reason for referring the matter to the Secretary of State for a determination.
4. It is expected that this information will enable the Secretary of State to decide whether to consider an application further. The Secretary of State will base his decision solely on information provided as part of this process. It may also be necessary to seek supplementary information from the applicant during consideration of the case, both when considering whether or not to proceed with a determination and when considering the determination itself. The owner will be informed of the application and then may be given the opportunity to make a representation at this stage.

Annex C Scope of Information Required from Owners

1. Where the Secretary of State decides to consider an application further, the Secretary of State will invite the owner of the infrastructure in question to provide information to assist him in considering the case.
2. Owners will be asked to confirm their ownership or joint ownership of the infrastructure in question and where applicable the details of other joint owners. In the case of jointly owned infrastructure the representative responding to the Secretary of State's request should confirm that he has the agreement of all owners to act on their behalf.
3. Owners should expect to provide, as appropriate, a demonstration of the technical issues that lead the owner to calculate the charges and arrive at the terms that have been offered, or the reasons for refusing to provide a service. These may include but are not limited to:
 - a) the capacity which is or can reasonably be made available. Where the calculation of that capacity includes an estimate of reasonably foreseeable future needs the basis on which that estimate is made. The requirement for any increased capacity; whether additional infrastructure (e.g. another injection point) is required to allow for the increased capacity;
 - b) any incompatibilities of technical specification which cannot reasonably be overcome, the justification for that technical specification and the feasibility of modifying the infrastructure to address the constraint;
 - c) difficulties which cannot reasonably be overcome and which could prejudice the efficient current and planned future use of the infrastructure including contractual constraints and the justification for these;
 - d) the need to maintain security and regularity of transportation and storage of CO₂ for other users impacted by an application to the Secretary of State for a determination;
 - e) if there is capacity available to meet the user's requirements, the incremental costs on an annual basis of accommodating their throughput, including separately and one-off costs;
 - f) if the infrastructure was built or oversized to take third party throughput, an indication of the incremental capital costs and of the owner's expectations of such throughput at the time of the decision to invest, giving an indication of the risks then associated with different projections of throughput;
 - g) details of all existing commercial terms.

Secretary of State may decide not to base his decision solely on information provided as part

of this process and may wish to seek supplementary information as the case is considered. This will inevitably involve sharing information with third parties and sharing information provided by third parties with the parties to the dispute. Please note implications of Section 2.34 where disclosure under the Freedom of Information Act or Environmental Information Regulations are discussed.

Annex D Minimum Timetable for Secretary of State Determination

Milestones	The Department will endeavour to ...	Applicant and owner
Receipt of an application	Assign and notify to the parties contact details of an official who will be responsible for managing consideration of the application	Applicant provides The information set out in Annex B & C (or anything else that is deemed appropriate/material) to enable the Secretary of State to establish if there is a case to consider. This information will also inform consideration of the case
Establishing there is a case to consider	Advise the parties of receipt of the application and of whether the case will be considered.	
Submitting information to inform consideration of the case	Ideally 5 working days after receipt of the application where the case will be considered, allow at least 15 working days for full submissions to be made	Owner should submit information to the Secretary of State within the deadline requested which will be at least 15 working days but unlikely to be more than 20 working days . Applicant may be asked to supplement their initial submission to assist the Secretary of State's consideration
During consideration of the Case	Allow at least 5 working days for companies to respond to requests for further information	Owner and applicant should submit supplementary information to the Secretary of State within the deadline requested which will be at least 5 working days but not likely to be more than 10 working days

Milestones	The Department will endeavour to ...	Applicant and owner
Meetings with officials during consideration of the case	give at least 5 working days' notice of any meeting with officials to explore the information provided and at the same time notify companies of the issues for discussion	
Advising the parties of the determination	advise both parties of the determination ideally within 10 weeks of receipt of the application	
Applicant to make decision		Within the time period specified by the Secretary of State, the applicant will decide whether or not to proceed to obtain access under the determined terms

Note that this is a minimum timetable, however depending on the complexity and requirement for more information to be made available a decision could take longer.

Annex E Competition Legislation

General competition law applies to activities on the UK Continental Shelf. European Community competition rules apply to activities which may have an appreciable effect on trade between Member States of the European Union. Article 81 of the Treaty establishing the European Community prohibits anti-competitive agreements, decisions and concerted practices. Article 82 prohibits abuse of a dominant position.

The Competition Act 1998 has now introduced into UK law similar prohibitions modelled on those in Articles 81 and 82 (the "Chapter I" and "Chapter II" prohibitions). These concern similar agreements etc. and conduct that may affect trade within the UK (subject in certain cases to transitional arrangements). In applying those provisions of the Competition Act 1998, both the courts and the Competition and Markets Authority (CMA) are required to follow the relevant jurisprudence of the European Court of Justice and to have regard to decisions of the European Commission.

Both EU and UK competition law prohibit abuse of a dominant position. Broad categories of business behaviour within which abusive conduct is most likely to be found include:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

In determining whether or not a business is in a dominant position, the CMA will look first at its market share. Generally, a business is unlikely to be considered dominant if it has a market share of less than 40 per cent. But this does not exclude the possibility that an undertaking with a lower market share may be considered dominant if, for example, the structure of the market enables it to act independently of its competitors. In looking at market structure the CMA will consider the number and size of existing competitors as well as the potential for new competitors to enter the market. **A dominant position essentially means that the business is able to behave independently of competitive pressures, such as other competitors, on that market.** Market power exists where a business can consistently charge higher prices, or supply a service of a lower quality, than they would if they faced effective competition.

Before the Office of Fair Trading (OFT) and the Competition Commission were replaced in 2013 by the CMA, the OFT published, in a series of guidelines

[\[http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act/\]](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.offt.gov.uk/OFTwork/publications/publication-categories/guidance/competition-act/), guides as to how they and the

sector regulators intended to enforce the Competition Act 1998 and to deal with particular matters. Although the OFT did not issued specific guidance on the application of the Act to CCS infrastructure (including on the definition of the relevant market), it would have considered that **infrastructure owners are unlikely to have breached the Chapter II prohibition on abuse of a dominant position where they have had due regard to the Secretary of State's principles for setting terms in arriving at the terms that they offer to, and agree with, third parties.**

If a third party applicant for a right to use a third party's infrastructure covered by the relevant legislation is dissatisfied with the outcome and/or progress of a negotiation with the owner, he may as described here apply to the Secretary of State to require access and to set appropriate terms. If the applicant considers that there may have been abuse of a dominant position, he may make a complaint to the CMA. However, the CMA may conduct a formal investigation only if it has reasonable grounds to suspect an infringement; simply receiving a complaint does not automatically trigger an investigation. Even then, investigation is at the CMA's discretion and would be subject to resource constraints and priorities. Recourse to the sector specific legislation therefore provides a more certain process and is likely to give a speedier outcome.

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