

BY E-MAIL

Ms Frances Fernandes
Lead Member of the Panel of Examining
Inspectors - Wylfa Newydd Nuclear Power
Station
The Planning Inspectorate
Temple Quay House
2 The Square
Bristol
BS1 6PN

Your Ref EN010007
Our Ref 103130640.1\rg7\641594.07099

1 March 2019

Dear Madam

**REPRESENTATION ON BEHALF OF THE NUCLEAR DECOMMISSIONING AUTHORITY
FOR THE COMPULSORY ACQUISITION HEARING AND ISSUE SPECIFIC HEARING ON
THE DRAFT DEVELOPMENT CONSENT ORDER – 5 AND 6 MARCH 2019**

We act on behalf of the Nuclear Decommissioning Authority ("NDA"), an "affected person" under the Planning Act 2008 in respect of the application for a development consent order for the Wylfa Newydd Nuclear Power Station.

The NDA would like to thank the Examining Authority for its invitation to attend the Compulsory Acquisition Hearing on 5 March 2019 given the NDA's concerns over the extent of compulsory acquisition and the need for Protective Provisions to protect the NDA's statutory functions under the Energy Act 2004. The NDA is also concerned that the draft Development Consent Order ("dDCO") as currently drafted is inconsistent with the Nuclear Installations Act 1965. These concerns were set out in the NDA's Written Representation (REP2-251).

The NDA has been in discussions with the Applicant over the need for Protective Provisions and also various consequential amendments to the dDCO. Unfortunately, agreement has not yet been reached. This Representation is intended to assist the Examining Authority in understanding the NDA's position and to provide the Examining Authority with the Protective Provisions that the NDA requires to be included at Part 3 of Schedule 15 of the dDCO as well as other drafting amendments to the dDCO in order to make the dDCO acceptable to the NDA. Whilst the NDA will not be legally represented and will not be making oral representations at the Hearings on 5 and 6 March 2019, the NDA will be in attendance at the Hearings and will be able to take away any questions from the Examining Authority to discuss with its professional advisors and respond in writing.

We hope the Examining Authority understands that as a publicly funded body, the NDA has to be proportionate in seeking to inform a proper examination and ensure its duties and responsibilities are fully protected. The NDA's costs to take advice on the implications of the

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compulsory acquisition and accordingly make submissions that have resulted in a change to the powers sought (as made by the Applicant at Deadline 6) as well as progress the Protective Provisions have not been satisfactorily underwritten by the Applicant

This letter, therefore, forms the NDA's representations at both the Compulsory Acquisition Hearing on 5 March 2019 and the Issue Specific Hearing on the dDCO on 6 March 2019. We therefore hope that the Examining Authority will find this representation of full assistance in that regard.

1. COMPULSORY ACQUISITION HEARING – 5 MARCH 2019

1.1 Protective Provisions

- 1.1.1 We enclose with this letter the Protective Provisions required by the NDA in order to protect the NDA's statutory functions under the Energy Act 2004 and to ensure that the dDCO is consistent with the Nuclear Installations Act 1965.
- 1.1.2 The majority of the provisions are in agreed form, save for paragraph 3 and paragraph 9. Paragraph 3(a)(i) protects the NDA by preventing the Applicant from exercising compulsory acquisition powers before the NDA has been able to seek the modification or revocation of the Designating Directions over the land in question to its own satisfaction. The Applicant wants to be involved in this process, but that is not appropriate given the Designating Directions are made by the Secretary of State to the NDA.
- 1.1.3 Paragraph 9 covers the indemnity that the Applicant is to provide the NDA in the event of a claim or demand being made as a result of an act of the Applicant. The Applicant has requested that it take control of any settlement, but given the public body status and responsibilities of the NDA and the fact that any claim or demand must mean that the Applicant is somehow at fault, the NDA must have the ability to decide unilaterally whether or not to pass the conduct of the claim to the Applicant, whilst of course keeping them informed as we have drafted. The NDA's proposed drafting also means that the consent of the Applicant is required before the NDA can agree to any settlement, which the NDA considers is a more than reasonable position.

1.2 Amendments to Article 29 (Private Rights) of the dDCO

- 1.2.1 The Book of Reference, Volume 1 (REP6-011) at page 5 states that the extinguishment or discharge of all private rights and restrictive covenants relating to the NDA does not apply to the NDA.
- 1.2.2 The NDA considers that this needs to be made explicit on the face of the Order, and therefore proposes that a new paragraph is added to Article 29 (private rights) that states:

"This article does not apply to any right, restriction or other interest of the NDA in plots [plots numbers subject to Class 4 to be inserted]."

- 1.2.3 Should the Applicant continue to resist this inclusion, despite it clearly matching the intention of the Applicant in the Book of Reference, we will provide the Examining Authority with the full article wording with the plots inserted, but we would hope to be able to avoid this additional unnecessary level of work being undertaken by the NDA which should be done by the Applicant.



2. ISSUE SPECIFIC HEARING ON THE DRAFT DEVELOPMENT CONSENT ORDER – 6 MARCH 2019

2.1 Amendments to Article 2 (Interpretation)

2.1.1 The following amendments should be inserted into Article 2 as they are used in the NDA's amendments to Article 9 (see below) and in Article 29 (see above).

"Existing Power Station" means the existing Magnox nuclear power station at Wylfa;

"Magnox" means Magnox Limited (Company No.02264251) and includes any successor body that holds the nuclear site licence for the Existing Power Station;

"NDA" means the Nuclear Decommissioning Authority, a non-departmental public body established by the Energy Act 2004 and any successor body with responsibility for carrying out the same or similar statutory functions;

"NDA Site" means the site over plots 16, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39, 40, 44, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 114, 118, 119, 122, 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 140, 141, 146, 147, 150, 153, 154, 159, 161, 176, 179, 181, 182, 183, 184 and 185 in the Book of Reference and shown on the Land Plans and in which NDA has an interest;

2.2 Amendments to Article 9 (Consent to transfer of benefit of Order)

2.2.1 The NDA and Magnox have a Co-operation Agreement with the Applicant which is mutually beneficial to all parties and which enables the continuing decommissioning of the Wylfa A site whilst the Applicant can construct and then operate its new power station. The Co-operation Agreement is an essential document to ensure the mutual co-existence of these works.

2.2.2 Whilst the long lease that the NDA has granted to the Applicant contains a restriction that prevents the Applicant from transferring all or any part of the leasehold land to a third party without that third party having entered into the Co-operation Agreement, the Order Land is wider than the leasehold land. The Order Land covers plots in which the NDA has an interest and which the NDA is using, and may use in the future, as part of its undertaking including, for example, monitoring and sampling purposes in respect of the NDA's/Magnox's responsibilities and duties at Wylfa.

2.2.3 For this reason, the NDA requires a restriction in Article 9 that prevents the transfer or grant of any part of the DCO that relates to or affects all or any part of the NDA Site and interests unless and until the transferee or lessee has first entered into a nuclear site licencees' co-operation agreement save where the NDA, Magnox and the undertaker agree otherwise (see amendments in red bold):

9.—(1) Subject to paragraph (2), ~~the undertaker may, with the consent of the Secretary of State—~~

~~(a) transfer to another person ("the transferee") any or all of the benefit of the provisions of this Order and such related statutory rights as may be agreed between the undertaker and the transferee; or~~



(b) grant to another person ("the lessee") for a period agreed between the undertaker and the lessee any or all of the benefit of the provisions of this Order and such related statutory rights as may be so agreed,

except where paragraph (45) applies in which case no consent is required from the Secretary of State **but subject always to paragraph (2)**.

(2) Prior to any transfer or grant made pursuant to the powers conferred by paragraph (1) which relates to or affects all or any part of the NDA Site, the transferee or lessee (as applicable) must first enter into a nuclear site licensees' co-operation agreement with NDA and Magnox, unless NDA, Magnox and the undertaker agree otherwise.

(23) Where a transfer or grant been made in accordance with paragraphs (1) and (45) references in this Order to the undertaker, except in paragraph (34), include references to the transferee or the lessee.

(34) The exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) and (45) will be subject to the same restrictions, liabilities and obligations (including development consent obligations within the meaning of section 106 of the 1990 Act (planning obligations)) as would apply if those benefits or rights were exercised by the undertaker.

(45) The undertaker may make a transfer or grant under paragraph (1) without the consent of the Secretary of State where the transferee or lessee is the holder of a licence under section 3 of the Nuclear Installations Act 1965(a) (grant and variation of nuclear site licences).

(56) Where paragraph (45) applies the undertaker must notify the Secretary of State in writing before transferring or granting any benefit referred to in paragraph (1).

We trust that this letter is helpful to the Examining Authority both in providing proactive resolution of matters at issue and setting out why these are necessary. Whilst the NDA supports the principal of the Wylfa Newydd project and has been cooperative with the Applicant throughout and continues to be, the NDA cannot support the dDCO in its current form. However, with the Land Plan amendments and withdrawal and change of the compulsory acquisition powers sought (as confirmed by the Applicant's submissions at Deadline 6) and with the Protective Provisions enclosed with this letter and the amendments to Articles 2, 9 and 29 as set out above, the NDA will be able to support the making the of the Order.

In attendance at the Hearings as observers will be Michael Hughes and Tony Smithers both of the NDA.

Yours faithfully

PinSENT Masons LLP

Enclosure(s): Protective Provisions required by the NDA

PART 3

Protection for the Nuclear Decommissioning Authority

Application

1. The provisions of this Part have effect unless otherwise agreed in writing between the undertaker and NDA.

Interpretation

2. In this Part—

“access road” means the access and approach roads to the NDA Site from the A5025 as referenced by the brown line on the access road plan;

“access road plan” means the plan of that description referred to in Schedule 18 (certified documents) certified by the Secretary of State as the access road plan for the purposes of this Order;

“alternative installations” means appropriate alternative installations to the satisfaction of NDA to enable NDA and the relevant holder of the NSL for the NSL Site to fulfil its obligations under the Designating Directions and NSL in a manner not less efficient than previously;

“authorised development” has the same meaning as in article 2(1) (interpretation) of this Order;

“Book of Reference” has the same meaning as in article 2(1) (interpretation) of this Order;

“days” means any day other than a Saturday, a Sunday or a day on which commercial banks in London are required or authorised to be closed;

“include” or “includes” is to be interpreted in accordance with article 2(10) (interpretation) of this Order;

“installation(s)” means any buildings, structures, cooling water infrastructure, services and any other uses and apparatus belonging to or maintained by or used by NDA or Magnox and includes the southern contractors car park;

“in” in a context referring to apparatus in land includes a reference to apparatus across, under, over or upon land;

“Land Plans” has the same meaning as in article 2(1) (interpretation) of this Order;

“Magnox” means Magnox Limited (Company No.02264251);

“NDA” means the Nuclear Decommissioning Authority, a non-departmental public body established by the Energy Act 2004, and any successor body with responsibility for carrying out the same or similar statutory functions;

“NDA Site” means the site over plots 16, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39, 40, 44, 62, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 114, 118, 119, 122, 128, 129, 130, 131, 132, 133, 134, 135, 137, 138, 140, 141, 146, 147, 150, 153, 154, 159, 161, 176, 179, 181, 182, 183, 184 and 185 in the Book of Reference and shown on the Land Plans and in which NDA has an interest;

“Designating Directions” mean the nuclear site directions in force in respect of any part of the NDA Site and made by the Secretary of State in exercise of the powers contained in sections 3, 4 and 16 of the Energy Act 2004;

“NSL” means a nuclear site licence granted by the Office for Nuclear Regulation in exercise of powers contained in sections 1(1), 3 and 4 of the Nuclear Installations Act 1965;

“NSL Site” means those parts of the NDA Site in respect of which an NSL is in force from time to time;

“Order Land” has the same meaning as in article 2(1) (interpretation) of this Order;

“plans” includes sections, designs, design data, software, drawings, specifications, descriptions (including descriptions of methods of construction), method statements, soil reports, programmes, staging proposals and other supporting information that are reasonably necessary to properly and sufficiently describe the works to be executed;

“specified works” means so much of any of the authorised development as is situated upon, across, under, or over the NDA Site or that are near to, or will or may in any way adversely affect the installations; and

“southern contractors car park” means the car park located at plot 69 in the Book of Reference and shown on the Land Plans.

Acquisition of Land and Installations

3.—(1) Despite any provision of this Order or anything shown on the Land Plans or contained in the Book of Reference, the undertaker must not—

- (a) exercise any power to acquire any of the NDA Site, or any right, interest, or installations in the NDA Site, or override any easement or other interest in the NDA Site or extinguish any right or suspend any right of NDA in the NDA Site or impose any restrictions in the NDA Site otherwise than by agreement with NDA, and:
 - (i) only once the Designating Directions in respect of the relevant part of the NDA Site have been modified or revoked to the satisfaction of NDA by the Secretary of State in accordance with section 5 of the Energy Act 2004; and
 - (ii) subject to paragraph 3(2), only once the NSL in respect of the relevant part of the NSL Site has been surrendered by the holder of the NSL or revoked by the Office for Nuclear Regulation;
- (b) exercise any power to temporarily use any Order Land located within the NDA Site otherwise than by agreement with NDA.

(2) Where the undertaker and NDA agree under this paragraph that any land interest in the NSL Site, or installations in the NSL Site, may be acquired by agreement at a time when the NSL remains in force, such acquisition may only take place after the consent of the Office for Nuclear Regulation has first been obtained by the holder of the relevant NSL in accordance with the NSL.

Right of access

4.—(1) The undertaker must not stop up in whole or in part the access road or extinguish in whole or in part any right of NDA along the access road unless and until all necessary replacement access have been agreed by the undertaker and NDA and put in place to the satisfaction of NDA and in accordance with all safety and emergency response requirements and all necessary rights have been granted to NDA.

(2) The undertaker must ensure that a full right of access for all emergency, operational and user purposes is maintained at all times by means of the access road or replacement access as set out in sub-paragraph (1).

Removal of Installations and Execution of Specified Works

5. If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in any land in which any installation is located or placed, that installation must not be removed under this Part or under any other statutory power, and any right of NDA to use, access, maintain, or renew installations on, in or over that land must not be extinguished until either alternative installations have been constructed and are in operation to the reasonable satisfaction of NDA or NDA provide their written consent to removal without alternative installations being required, constructed or in operation.

6.—(1) Not less than 56 days before the intended removal of installations and construction of alternative installations or execution of specified works, the undertaker must supply to NDA plans of the works to be executed for the reasonable approval of NDA and the removal of

installations, construction of alternative installations and/or the execution of specified works must not be commenced except in accordance with plans approved in writing by NDA or settled by arbitration under article [78] of this Order.

(2) The approval of NDA must not be unreasonably withheld and NDA must indicate its approval or disapproval of the plans submitted under sub-paragraph (1) within—

- (a) a period of 56 days beginning with the day immediately following that on which the plans are received by NDA;
- (b) a period of 56 days beginning with the day immediately following that on which the further information has been supplied in full by the undertaker following a request from NDA under paragraph 7; or
- (c) such longer period than 56 days in sub-paragraph (a) or (b) as may be agreed in writing by the undertaker and NDA before the end of such 56 day period.

(3) Any approval of NDA under this paragraph 5 may be provided subject to such requirements as NDA considers reasonable.

(4) The removal of installations, construction of alternative installations or the execution of specified works must be executed only in accordance with the plans submitted and approved by NDA under this paragraph 5 and in accordance with such reasonable requirements of NDA and NDA is entitled to watch and inspect the execution of those works, and the undertaker must supply NDA with any additional information concerning such works as NDA may reasonably require.

(5) Where NDA requires any protective works under sub-paragraph (3) to be carried out either by itself or by the undertaker (whether of a permanent or temporary nature), the protective works must be carried out to NDA's reasonable satisfaction prior to the carrying out of the specified works.

(6) Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of any works, new plans instead of the plans previously submitted, and having done so the provisions of this paragraph apply again in respect of the new plans.

7.—(1) Following receipt of plans under paragraph 6 of this Part, NDA may request such reasonable further information from the undertaker as is necessary to enable it to consider the plans.

(2) Any request under sub-paragraph (1) must be made within a period of 28 days beginning with the day immediately following that on which the plans are received by NDA.

Expenses

8. The undertaker must pay to NDA the proper and reasonable expenses reasonably incurred by NDA in, or in connection with, the inspection, alteration or protection of any installations and approvals.

Indemnity

9.—(1) Subject to sub-paragraph (3), if by reason, or in consequence, of the construction, use, existence, operation or failure of any specified works or in consequence of the construction, use, existence, operation, maintenance or failure of any of the authorised development by or on behalf of the undertaker or in any consequence of any act or default of the undertaker (or any person employed or authorised by the undertaker) in the course of carrying out such works, any damage is caused to any installations or property of NDA, or to operations, or there is any interruption in any service provided to NDA or by NDA, or in the supply of any goods to NDA or by NDA or NDA becomes liable to pay any amount to any third party, the undertaker must—

- (a) bear and pay on demand the proper and reasonable cost reasonably and properly incurred by NDA in making good such damage or restoring operations, services or supply; and
- (b) indemnify NDA for any other expenses, loss (whether direct or indirect and including losses of an economic nature), demands, proceedings, damages, claims penalty or costs

incurred by or recovered from NDA by reason or in consequence of any such damage or interruption or NDA becoming so liable to any third party.

(2) The fact that any act or thing may have been done by NDA on behalf of the undertaker or in accordance with a plan approved by NDA or in accordance with any requirement of NDA or its supervision does not (subject to sub-paragraph (3)) excuse the undertaker from liability under sub-paragraph (1).

(3) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any loss, damage, injury or interruption to the extent that it is attributable to the neglect or default of NDA, its officers, servants, contractors or agents.

(4) NDA must give the undertaker reasonable notice (being not less than 28 days) of any claim or demand and, subject to paragraph 5, NDA may decide whether or not to pass conduct of any proceedings necessary to rest the claim or demand to the undertaker.

(5) Where NDA decides—

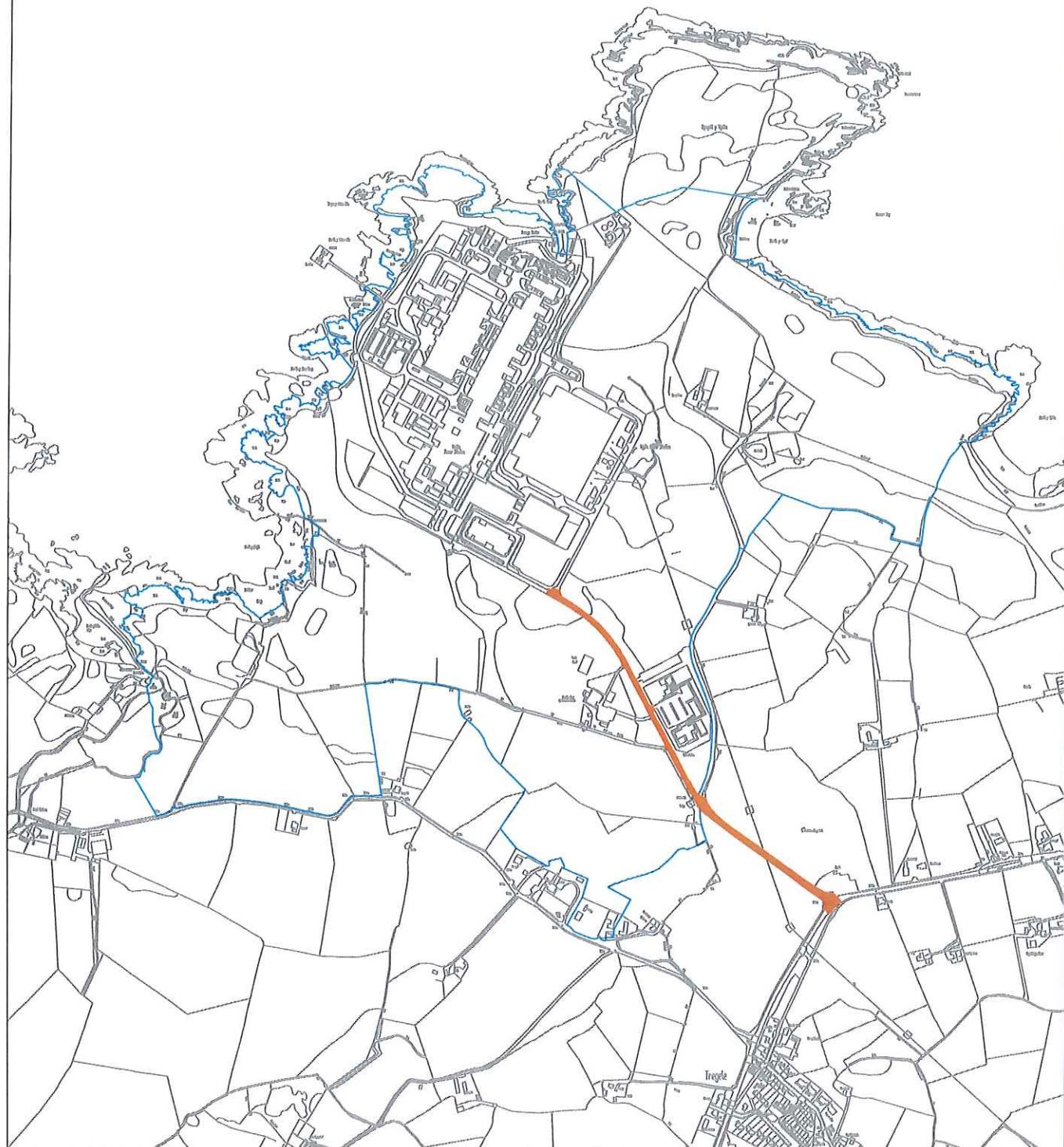
- (a) to retain conduct of any proceedings necessary to rest the claim or demand, NDA must consult with the undertaker and have due regard to the undertaker's representations as to how the proceedings are to be conducted and no settlement or compromise may be made without the consent of the undertaker (not to be unreasonably withheld or delayed);
- (b) to pass conduct of any proceedings necessary to rest the claim or demand to the undertaker, the undertaker must consult with NDA and have due regard to NDA's representations as to how the proceedings are to be conducted and no settlement or compromise may be made without the consent of NDA (not to be unreasonably withheld or delayed).

(6) Neither NDA nor the undertaker must make any public statement relating to any claim or demand or any settlement or compromise that may be made in respect of any claim or demand without the consent of NDA or the undertaker (as applicable).

10. Nothing in this Part affects the provisions of any enactment or agreement regulating the relations between the undertaker and NDA in respect of any installations located at or providing access into the NDA Site on the date on which this Order is made.



WYLFA



(A) Land within the combined freehold ownership of the NDA and NDA Properties Ltd. (115.63ha)
(B) Access Road

File No:
Client: Nuclear Decommissioning Authority
Site Name: Wylfa
Project:
Title: Access Road Plan

Scale: 1:7500 @ A3 Date: 25 February 2019
Drawn by: JN Dwg No: ACCESS PLAN