

1. INTRODUCTION

- 1.1 This is a written response by the Nuclear Decommissioning Authority ("NDA") to the Examining Authority's ("ExA") Rule 17 Request for Further Information, dated 3 April 2019. The NDA notes in this context that the ExA has requested further information from both the NDA and Magnox Limited ("Magnox").
- 1.2 To assist, the NDA refers the ExA to its Written Representation submitted to the Examination at Deadline 2 (4 December 2018) which sets out relevant background information about the NDA, and in particular the nature of its legal relationship with Magnox. For the purposes of this written response, however, and in case helpful to the ExA, the NDA wishes to emphasise the following key contextual points:
- 1.2.1 The NDA is a statutory corporation established by the Energy Act 2004. The NDA is responsible for ensuring that the UK's legacy nuclear sites are decommissioned and cleaned-up safely, securely, cost-effectively and in a manner that protects people and the environment. Pursuant to Directions made by the Secretary of State under the Energy Act 2004¹, the NDA has statutory responsibility for decommissioning and cleaning-up the Wylfa A Nuclear Site. The geographical extent of which is detailed in those Directions;
 - 1.2.2 Decommissioning activities at the Wylfa A Nuclear Site are carried out on behalf of the NDA by the site tenant, Magnox, in accordance with detailed lease and contractual arrangements with the NDA. Magnox is the holder of the nuclear site licence for the Wylfa A Nuclear Site, granted pursuant to the Nuclear Installations Act 1965, and a range of other operational regulatory consents, permits and licences; and
 - 1.2.3 The Wylfa A Nuclear Site is adjacent to the location of the proposed Wylfa Newydd Nuclear Generating Station.

2. NDA RESPONSE

- 2.1 Set out below is the NDA's response to each of the ExA's questions addressed to the NDA.
- 2.2 The NDA has discussed the contents of its response below with Magnox and the Office for Nuclear Regulation ("ONR"), the UK's independent nuclear regulator. Both Magnox and the ONR support and endorse the NDA's response and the proposals set out in it. The NDA understands that Magnox has responded directly to the ExA at Deadline 9 to confirm its support for the NDA's position, and the NDA has attached at **Appendix 1** email correspondence from the ONR which confirms its support.

ExA Question R17.2.9 Article 9 – Consent to transfer the benefit of the Order

(c) Does Magnox/NDA have any further comment on the Applicant's D8 response at para 1.2.24? [REP8-004 DCO Outstanding Issues Register]

(d) Would inclusion of the proposed amendment to Article 9 as proposed by Magnox/NDA be another consideration which could impinge upon the SoS's discretion to approve a transfer?

NDA Response

¹ Directions made by the Secretary of State for Trade and Industry, 3 December 2004 (coming into force 1 April 2005)

1. At the outset, the NDA refers the ExA to the key contextual points noted at paragraphs 1.2.1 to 1.2.3 above, and in particular to the nature of the NDA's and Magnox's respective interests and obligations at the Wylfa A Nuclear Site. The NDA is the entity with underlying statutory responsibility for decommissioning the Wylfa A Nuclear Site, whereas Magnox is the entity with day-to-day responsibility for carrying out decommissioning activities at the Wylfa A Nuclear Site in a manner which is compliant with the relevant regulatory regimes.
2. The NDA's overriding priority during this Examination, and indeed throughout all of its commercial discussions with the Applicant, has been to ensure that its ability to carry out its statutory functions and responsibilities in respect of the Wylfa A Nuclear Site are not adversely affected by the proposed construction and operation of the Wylfa Newydd Nuclear Generating Station, and indeed that the ability of Magnox to carry out decommissioning activities in a safe, secure and environmentally sound manner remains similarly unhindered. The existing Co-operation Agreement between the NDA, Magnox and the Applicant is designed to achieve this, but also to ensure that operations on the Wylfa A Nuclear Site do not adversely affect the ability of the Applicant to construct and operate the Wylfa Newydd Nuclear Generating Station in a regulatory-compliant manner.
3. The Applicant's assertion at paragraph 1.2.22 of REP8-004 that "*this matter relates to private land interests*" is a fundamental misconception and misunderstanding of the legal interests that the NDA is seeking to protect, and indeed of the nature of a Co-operation Agreement.
4. In the context of the NDA's proposed amendments to Article 9 of the draft DCO, the NDA's primary objective is to ensure that, should the Applicant seek to transfer the benefit of the DCO to a third party, the proposed transferee/lessee will work closely with both the NDA and Magnox to ensure that the proposed construction and operation of the Wylfa Newydd Nuclear Generating Station is carried out in a manner which does not prejudice or adversely affect the ability of the NDA or Magnox to satisfy their respective responsibilities and duties at the Wylfa A Nuclear Site.
5. The drafting solution proposed by the Applicant in paragraph 1.2.22 of REP8-044 (and which is in paragraph 29 of Part 3 of Schedule 15 of the draft DCO (REP8-029)) does not provide this required comfort or effect, for the following two principal reasons:
 - 5.1 firstly, given that there is already a Co-operation Agreement in place between the NDA, Magnox and the Applicant, the wording does not in fact create a substantive restriction on the Applicant's ability to transfer the benefit of the DCO to a third party. The Applicant's proposed drafting does not expressly require with sufficient clarity and certainty that the benefit of the DCO can only be transferred *after* a Co-operation Agreement (or terms of equivalent effect) has been concluded between the NDA, Magnox and the proposed transferee/lessee. As such, the proposed drafting fails to afford the necessary protections to the NDA or Magnox, or indeed to potential future owners/operators of the Wylfa Newydd Nuclear Generating Station; and
 - 5.2 secondly, the proposed drafting is much too closely conditional upon the undertaker exercising powers *on* the NDA's land, and as such does not address the plausible situation whereby powers are to be exercised on non-NDA land but in a manner which may nonetheless affect the NDA's land.
6. The NDA has expressed the above concerns to the Applicant on several occasions, maintaining its position set out in its letter dated 1 March 2019 (REP7-019). When the Applicant resisted on the basis that it did not wish to refer to the Co-operation Agreement in Article 9, the NDA suggested a compromise position in order to

proactively resolve the matter which moved the NDA's proposed wording in Article 9(2) (as set out in REP7-019) to the Protective Provisions, but on the basis that Article 9 was made subject to the NDA's Protective Provisions. The NDA did not receive a formal response from the Applicant to this compromise.

7. The NDA does not feel able to accept the drafting put forward by the Applicant at paragraph 29 of Part 3 of Schedule 15 of the draft DCO (REP8-029) for the reasons expressed above. However, in order to assist the ExA, and in continuing the proactive approach to resolution that the NDA has been seeking, the NDA would be prepared to accept the following approach:

- 7.1 Article 9(1) to be amended (in red) as follows:

*9.-(1) **Subject to paragraph 29 of Part 3 of Schedule 15, the undertaker may, with the consent of the Secretary of State-***

- 7.2 Paragraph 29 of Part 3 of Schedule 15 to be amended as follows:

Delete current paragraph and replace with:

29. The undertaker must not transfer or grant to another person any or all of the benefits of the provisions of this Order under Article 9 (Consent to transfer benefit of Order) which relates to or affects all or any part of the NDA Site without the consent of the NDA (such consent not to be unreasonably withheld or delayed).

8. The suggested drafting above now contains a simple 'consent' mechanism, whereby the benefit of the DCO relating to or affecting NDA land must not be transferred to a third party without the prior consent of the NDA. This drafting has been crafted so that it is broadly aligned with similar DCO drafting whereby the consent of statutory undertakers (such as, for example, National Grid, Network Rail or the Environment Agency) is required before DCO powers are exercised in a manner which may affect their apparatus.
9. Given that the NDA is the entity with underlying statutory responsibility for decommissioning and cleaning-up the Wylfa A Nuclear Site, the NDA's suggestion is that only the consent of the NDA would be required in this context. As such, the drafting suggested at paragraph 7.2 above would be included only in the Protective Provisions in favour of the NDA, and need not also be included in the Protective Provisions in favour of Magnox. Magnox supports and endorses this proposed approach.
10. The suggested drafting above also no longer contains reference to the "site licensees' co-operation agreement" which, on reflection, does not need to be expressly noted in the DCO. As such, the question of whether the NDA requires a Co-operation Agreement to be put in place with the prospective transferee/lessee before issuing its consent will depend on the nature of the powers being transferred and which plots of land are affected, as well as the identity of the proposed transferee/lessee, which the NDA would examine at the relevant time.
11. It would then be for the Applicant to provide the Secretary of State with the necessary evidence of the NDA's consent when making its application under Article 9(1). The NDA's proposed drafting does not 'impinge' on the Secretary of State's discretion to approve a transfer under Article 9(1) - it simply requires the Applicant to provide evidence of the NDA's consent before the Secretary of State determines how to exercise his/her discretion under Article 9(1).

ExA Question R17.2.10 Article 9 – Consent to transfer the benefit of the Order

The Applicant proposes a bespoke clause in the protective provisions with NDA as follows:

29. The undertaker must not exercise any power under this Order on any part of the NDA Site, unless the undertaker has entered into a co-operation agreement with NDA and Magnox to facilitate the decommissioning and delicensing of the NSL Site and fulfilment of any statutory requirements. [REP8-004-DCO Outstanding Issues Register]

(a) What is meant by the term “cooperation agreement”; what would it ordinarily include and should the term be defined?

(b) Is the purpose of a cooperation agreement accurately represented by the wording “facilitate decommissioning and delicensing of the NSL Site”?

(c) Is it clear to all parties what a “cooperation agreement” is?

(d) Would arbitration come into effect if there was a stalemate over negotiations?

NDA Response

1. As noted above in respect of NDA's response to ExA Question R17.2.9, the NDA does not accept the Applicant's proposed wording for the reasons expressed above. The NDA has put forward a further compromise position which is based on a common approach to the prior consent of statutory undertakers in Protective Provisions, and which removes the need to refer expressly in the DCO to the "site licensees' co-operation agreement".
2. **In respect of the ExA's question R17.2.10(a) above**, the term "Co-operation Agreement" refers to a contractual arrangement that is entered into between adjacent nuclear sites, installations or facilities. In the context of NDA having statutory responsibility for the decommissioning and cleaning-up of one of the adjacent nuclear sites, installations or facilities, a Co-operation Agreement is ordinarily concluded by the NDA, and the holders of the nuclear site licences for each of the respective nuclear sites.
3. The overarching purpose of a Co-operation Agreement is to promote and encourage co-operation between two adjacent nuclear sites, installations or facilities, for the purposes of ensuring continued compliance by *both sites* with all relevant nuclear regulations and relevant environmental regulations, and to facilitate the smooth operation of activities (whether operational or decommissioning) on the respective nuclear sites. Where activities carried out have a bearing on the nuclear safety of the other site (such as, for example, operational safety, operating procedures, environmental monitoring, and emergency preparedness arrangements), the parties to a Co-operation Agreement ordinarily commit to co-operate with the adjacent site in order to ensure that safety is not risked or compromised on either site, and that no action is taken on either site which would, or would be likely to, cause a failure by the adjacent site to comply with its regulatory responsibilities and duties.
4. **In respect of the ExA's question R17.2.10(b) above**, the Applicant's assertion that the purpose of a Co-operation Agreement is to "facilitate decommissioning and delicensing [of the NSL Site]" is inaccurate and wholly misunderstands the purpose and objectives of a Co-operation Agreement.
5. As noted above, and indeed as the NDA has emphasised to the Applicant on several occasions, a Co-operation Agreement is designed fundamentally to be of mutual benefit to *both* adjacent nuclear sites and to ensure the safety of potentially interlinked site operations. As such, while it is necessarily the case that a Co-operation

Agreement has the effect of protecting and safeguarding the interests of the NDA and its ability to safely carry out its statutory functions and responsibilities, it is not the case that a Co-operation Agreement is an agreement which solely and unilaterally protects the interests of NDA – a Co-operation Agreement is of equal benefit to both the NDA (and Magnox) and the operator of the Wylfa Newydd Nuclear Generating Station.

6. **In respect of the ExA's question R17.2.10(c) above**, it should be noted that while there is no formal legislative requirement for adjacent nuclear sites, installations or facilities to enter into a contractual equivalent of a Co-operation Agreement, the practice of doing so is very much considered 'industry standard'. In addition, the principle of co-operation between adjacent nuclear licensed sites is endorsed in regulatory guidance of the ONR. The ONR's *Safety Assessment Principles for Nuclear Facilities*², for example, provides as follows:
 - 6.1 *"In some locations there are multiple sites, governed by different licensees, i.e. there are neighbouring sites. In this circumstance, ONR expects licensees and others in control of major nuclear hazards to co-operate with one another so that the overall risks in the location, taking into account all neighbouring sites, are kept as low as reasonably practicable"*³; and
 - 6.2 *"Where neighbouring sites, which may be under the control of different dutyholders, share common systems or have the potential for interactions, there should be co-operation between them in developing safety cases and emergency arrangements. Formal mechanisms should be established and demonstrated to be working effectively"*⁴.
7. **In respect of the ExA's question R17.2.10(d) above**, the NDA confirms its understanding that Article 78 (Arbitration) of the DCO would apply to Part 3 of Schedule 15 of the draft DCO (REP8-029).

ExA Question R17.2.27 Schedule 15 – Protective Provisions

- (c) *Confirm which matters remain unresolved with regard to the protective provisions that should be included within Schedule 15.*
- (d) *Provide your final position in relation to those matters or, confirm in which Examination document your final position in relation to those matters can be found.*

NDA Response

1. In respect of the Protective Provisions contained in the Applicant's draft DCO submitted at Deadline 8, the NDA confirms as follows:
 - 1.1 the Protective Provisions contained in Part 3 of Schedule 15 of the draft DCO are agreed, save for paragraph 29 (Co-operation);
 - 1.2 Paragraph 29 of the Protective Provisions contained in Part 3 of Schedule 15 of the draft DCO is not agreed for the reasons set out in the NDA's response to the ExA's question R17.2.10 above.
2. In respect of Paragraph 29, the NDA makes the following suggestion as its final position:

² Office for Nuclear Regulation, *Safety Assessment Principles for Nuclear Facilities*, 2014 Edition, Revision 0

³ Paragraph 42

⁴ Paragraph 139

2.1 Article 9(1) of the draft DCO to be amended as follows:

9.-(1) *Subject to paragraph 29 of Part 3 of Schedule 15, the undertaker may, with the consent of the Secretary of State-*

2.2 Paragraph 29 of Part 3 of Schedule 15 to be amended as follows:

Delete current paragraph and replace with:

29. *The undertaker must not transfer or grant to another person any or all of the benefits of the provisions of this Order under Article 9 (Consent to transfer benefit of Order) which relates to or affects all or any part of the NDA Site without the consent of the NDA (such consent not to be unreasonably withheld or delayed).*

Additional NDA Response – Article 29 (Private rights)

1. Whilst the ExA has not specifically asked the NDA or Magnox for comments on Article 29 (Private rights) of the draft DCO, the NDA notes that the Applicant has not made the NDA's required amendment to Article 29.
2. The Applicant states at paragraph 1.2.30 in REP8-004 that "*While NDA is correct that this reflects what is in the Book of Reference and that Horizon does not intend to affect any of NDA's rights and restrictions where it seeks to acquire land from a third party...*", it does not intend to make the NDA's required amendment on the basis of the Protective Provisions.
3. However, given this is what the Book of Reference says, the NDA is of the firm view that this position should be expressly clear on the face of the DCO, and as such Article 29 should contain this restriction. Accordingly, Article 29 should be amended as follows:

Insert new Article 29(10):

29(10)-*This article does not apply to any right, restriction or other interest of the NDA as set out in the Book of Reference.*