

1. INTRODUCTION

1.1 This is a written response by the Nuclear Decommissioning Authority ("NDA") to the Secretary of State for Business, Energy and Industrial Strategy's ("SoS") Request for Further Information, dated 23 October 2019 ("SoS Request").

1.2 To assist the SoS, the NDA refers to its Written Representation (REP2-351) submitted to the Examining Authority ("ExA") at Deadline 2 (4 December 2018) which sets out the relevant background information about the NDA, and in particular the nature of its legal relationship with Magnox Limited ("Magnox"). For the purposes of this response, however, and in case helpful to the SoS, 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, as well as 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 Power Station.

2. NDA RESPONSE

2.1 The NDA has set out at paragraph 3 below its response to each of the questions raised in the SoS Request and addressed specifically to the NDA.

2.2 In addition to this, and in order to assist the SoS, the NDA has set out at paragraph 4 below its overall position. It should be noted in this context that the NDA's current position remains substantively as set out in its Written Response to the ExA's Rule 17 Request for Further Information (REP9-040), submitted to the ExA at Deadline 9 (10 April 2019), the contents of which were supported and endorsed by both Magnox and the Office for Nuclear Regulation ("ONR"), the UK's independent nuclear regulator. The drafting recommendations made by the NDA in its Rule 17 Response (REP9-040) also remain the NDA's position. For ease, the NDA's recommended drafting is set out below at paragraph 4.3.2.

3. NDA RESPONSE TO SOS REQUEST FOR FURTHER INFORMATION

3.1 SoS Request, para 33 – Compulsory Acquisition, Protective Provisions

*"The Secretary of State notes that bespoke protective provisions in respect of the interests of Network Rail Infrastructure Limited ("Network Rail") and the interests of the Nuclear Decommissioning Authority were not agreed by the close of the examination. The Secretary of State requests the **Applicant**, **Network Rail** and the **Nuclear Decommissioning Authority** to confirm whether any agreement on bespoke protective provisions has been reached and, if so, to provide the agreed provisions to*

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

*the Secretary of State. If an agreement has not been reached, an indication of whether an agreement is possible and, if so, when it might be reached would be helpful. If an agreement has been reached, the Secretary of State requests **Network Rail** and the **Nuclear Decommissioning Authority** to state whether or not it will withdraw its representations (see section 127(1)(b) of the Planning Act 2008)"*

3.2 NDA Response

- 3.2.1 Since the close of Examination on 23 April 2019, the NDA and the Applicant have been in contact, as well as with Magnox, primarily through surveyors to discuss and progress various property transactions.
- 3.2.2 The NDA, Magnox and the Applicant have met formally on two separate occasions to discuss outstanding land matters, namely:
 - (a) **10 May 2019** – this meeting was focussed on completing the outstanding land transactions. The DCO was raised and discussed only during an update from the Applicant regarding progress and when a decision was expected; and
 - (b) **21 November 2019** – this meeting again focussed on completing outstanding land transactions, but the questions raised in the SoS Request were also discussed. It was considered at this stage that the outstanding points of disagreement on the Protective Provisions and draft Development Consent Order ("DCO") were legal in nature, and that a call between solicitors might be beneficial. However, the Applicant subsequently decided that, because the legal basis for the respective positions of the NDA and Applicant had not changed since the close of the Examination, the cost of the call was not justified in the circumstances.
- 3.2.3 As such, the NDA confirms that it has not been able to reach agreement with the Applicant on the bespoke protective provisions, and therefore is not in a position to withdraw its previous representations. The NDA requires its proposed amendments to the protective provisions for its benefit as set out in the NDA's Rule 17 Response (REP9-040) (Deadline 9) and repeated below at paragraph 4.3.

3.3 SoS Request, para 35 – Compulsory Acquisition Time Limit

*"The Secretary of State notes that Article 28 of the proposed development consent order was amended to allow the Applicant a period of 8 years, rather than the usual 5 years, to exercise its Compulsory Acquisition powers. The Secretary of State notes the information already provided by the Applicant during the examination to justify this. However, in order to consider this matter fully, the Secretary of State requests that the **Applicant** provide further detail as to why the 8 year period is necessary and proportionate in this case. The Secretary of State would also be interested in comments from **any landowners affected by compulsory acquisition** on this point"*

3.4 NDA Response

- 3.4.1 The NDA does not consider the proposed extension of the time limit in Article 28 to be reasonable or proportionate.
- 3.4.2 The NDA notes that the primary reason given by the Applicant during Examination for seeking an extension of the compulsory acquisition period is to avoid having to acquire all land immediately rather than at the appropriate time, and thereby to ensure that landowners continue to benefit from the

land for as long as possible. The NDA does not consider this to be a reasonable justification, and indeed notes in this context that the standard five year period for compulsory acquisition is designed specifically to strike a proportionate balance between providing landowners with sufficient certainty and at the same time accommodating an element of flexibility in project timetable. The period should only be extended where there are exceptional circumstances, and the NDA does not consider that such circumstances exist in this instance. The NDA also considers that consenting such an extended period in the circumstances claimed would risk setting a poor precedent.

3.4.3 While the NDA acknowledges that the compulsory acquisition period has been extended beyond the usual five years in other DCOs, this has been due to exceptional circumstances which do not exist in this instance in the context of the Wylfa Newydd Nuclear Power Station. The NDA notes the following in particular:

- (a) **The National Grid (Hinkley Point C Connection Project) Order, 2016/49:** The compulsory acquisition period was extended to eight years specifically for the purposes of accommodating uncertainties surrounding the commencement of construction works for the main Hinkley Point C nuclear power station, in part because of the Seabank 3 Power Station DCO which had not been submitted when the Hinkley Point C Connection DCO was determined. The Applicant does not face the same uncertainties in the current circumstances, and in any event the NDA notes that the compulsory acquisition period in the main Hinkley Point C Nuclear Generating Station DCO itself remained at the usual five years;
- (b) **The Thames Water Utilities Limited (Thames Tideway Tunnel) Order, 2014/2384:** The compulsory acquisition period was extended to ten years as temporary powers were proposed to be used before acquiring land and/or rights on a permanent basis once the construction of the relevant works were completed in order to minimise compulsory acquisition of land. The overall shaft and tunnel construction programme was based on a period of six years and only once the deep tunnels have been constructed would Thames Water know the full extent of land required and therefore exercise its powers of compulsory acquisition on the land actually used for the permanent works. The Applicant does not have a similar or comparable approach to land acquisition in the current circumstances;
- (c) **Hornsea Three Offshore Wind Farm DCO [draft]:** It is currently proposed that the compulsory acquisition period be extended to seven years in order to maximise the chances of cost advantages being offered to the energy consumer, such as the development of increased clean energy generation cost efficiencies and progressing further towards subsidy-free generation. The consent time limit for the application was linked with the UK Government's policy objectives to support the development of a domestic offshore wind industry which delivers renewable energy at reduced costs through competitive market mechanisms. The Applicant does not require additional time to offer such benefits to consumers in the current circumstances.

3.4.4 The NDA is of the view that the Applicant has failed to establish exceptional circumstances which exist to justify the proposed extension of the usual five

year period, and to evidence and demonstrate that such an extension is necessary or proportionate.

4. NDA OVERALL POSITION

4.1 As noted at paragraph 2.2 above, the NDA confirms that its overall position remains substantively as set out in its Written Response to the ExA's Rule 17 Request for Further Information (REP9-040), submitted to the ExA at Deadline 9 (10 April 2019), and that both Magnox and the ONR support and endorse this position.

4.2 NDA has summarised its overall position below.

4.3 NDA Position: Transferring the Benefit of the Order

4.3.1 The NDA's overriding priority during 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 compromised or adversely affected by the proposed construction and operation of the Wylfa Newydd Nuclear Power Station, and indeed that the ability of Magnox to continue to carry out decommissioning activities in a safe, secure and environmentally sound manner remains similarly unhindered and does not substantially increase risk profile.

4.3.2 For this reason, the NDA has proposed, and continues to propose, as essential, amendments to Article 9, and Part 3 of Schedule 15, to the draft Development Consent Order (REP10-006) ("DCO"), further details of which are again set out in the NDA's Rule 17 Response (REP9-040) (Deadline 9), namely:

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-*

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).*

4.3.3 The above amendments contain 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 precedent 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. It would be for the Applicant to provide the SoS with the necessary evidence of the NDA's consent when making its application under Article 9(1).

4.3.4 The drafting proposed by the Applicant in paragraph 29 of Part 3 of Schedule 15 to the DCO (REP10-006) does not provide the NDA with this

required comfort, safeguard, or effect, for the reasons set out in the NDA's Rule 17 Response (REP9-040) (Deadline 9).

4.4 NDA Position: Article 29

- 4.4.1 In respect of Article 29 of the DCO, the NDA reiterates the position set out in its Rule 17 Response (REP9-040) (Deadline 9).
- 4.4.2 The NDA remains firmly of the view that the DCO should make expressly clear the position that is set out in the Book of Reference (REP8-039) that the Applicant does not intend to affect any of the NDA's rights and restrictions where it seeks to acquire land from a third party. The NDA's recommended drafting remains 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.

**Written Response of the NDA to the SoS Request for Further Information
Submitted to the SoS on 20 December 2019**