MYNYDD Y GWYNT DCO

UPDATED LEGAL NOTE ON THE SCOPE OF THE DCO AND ITS REQUIREMENTS

INTRODUCTION

1. The matrix provided by NRW at the DCO ISH of 4th February 2015 summarises the oral case put at that hearing. The Legal Note prepared on behalf of Natural Resource Wales ("NRW") in respect of the scope of the DCO and its Requirements underpinned that matrix. This Note has been updated to respond to the matters raised by the Applicant and during discussions at the DCO ISH.

SUMMARY

2. The current draft DCO terms must be tightened up so as to ensure that they reflect what has been actually subject to environmental assessment. Further, objective and clear parameters must be imposed, together with draft plans, within which the ExA and Secretary of State can properly form a view about the likely decisions of future decision makers.

FACTS

Other DCOs

3. The Applicant's raised on 4th February 2015 DCO ISH the potential for other DCOs for wind farms to include provision for "up to" a number of wind turbines. In particular, Clocaenog Forest Wind Farm Order 2014. NRW considered this DCO and for completeness also the Brechfa Forest West Wind Farm Order 2013. NRW responds on the points raised and also the drafting points arising out of those two DCOs as follows.

4. On 12th March 2013, the Secretary of State made the Brechfa Forest West Wind Farm Order 2013, SI 2013/000). See attached at **Appendix 1**. His Reasons for Making the Order are at **Appendix 2**. The ExA's Recommendation is at **Appendix 3**. That Order concerned a proposed NSIP in SSA G of TAN 8 (see §3.8, ExA's Recommendation). The particular weighing of the relationship between need and impacts on landscape was not in issue.

5. The terms of the Brechfa Forest West Wind Farm Order 2013 authorised development are in Schedule 1, Part 1. Each Works Number is identified by number and Gird References, whether for a point such as a turbine, or a linear track, or by the location of a mast or area of enclosure or hardstanding. Part 1 includes no approximation or works not identified by exact reference to grid

co-ordinates. Part 2 provides for Ancillary Works, in that DCO, removal of hedgerows (also designed by exact length and Grid Reference).

6. Part 3, Requirements, §1(1) defines "wind turbines" by reference to Works No 1.

7. Requirement 2 provides:

> *2. Where under any Requirement details or a scheme or plan are to be submitted for the approval of the relevant planning authority then unless the Requirement provides otherwise—*
> *(a) those details or scheme or plan and that approval must be in writing;*
> *(b) the details, scheme or plan must be implemented as approved;*
> *(c) the approved details, scheme or plan shall be taken to include any amendments that may subsequently be approved in writing by the relevant planning authority, provided that no amendments may be approved by the relevant planning authority where such amendments may give rise to any materially different environmental effects to those assessed in the environmental statement.*

8. Requirement 3 provides:

> *3. The authorised development must be commenced within 5 years of the date of this Order.*

9. On 2nd October 2014, the Secretary of State made the Clocaenog Forest Wind Farm Order 2014, SI 2014/2441). See attached at **Appendix 4**. His Reasons for Making the Order are at **Appendix 5**. The ExA's Recommendation is at **Appendix 6**. That Order concerned a proposed NSIP in SSA A of TAN 8 (see §3.5, Reasons for Making the Order). The particular weighing of the relationship between need and impacts on landscape was not in issue.

10. The terms of the Clocaenog Forest Wind Farm Order 2014 authorised development are in Schedule 1, Part 1. Each Works Number is identified by number and Gird References, whether for a point such as a turbine, or a series of linear electrical cables with defined commencement and termination points by reference to the Grid references of Works Number 1 (the turbines); new and new tracks also defined by Grid Referenced commencement and termination points; other works also identified at certain Grid References and with a particularised plan area and depth (save where temporary). Works No. 5A comprises the onsite electricity substation:

> *Work No. 5A – An onsite electricity substation comprising an enclosed area of hardstanding of 4080 square metres located at Ordnance Survey National Grid Reference Point SJ0136958813 and including a control building to house switch gear and control equipment.*

11. Works No 5A is, therefore, a fenced off area inside of which is a control building.

12. Part 1 includes no approximation or works whose location is not identified by at least one exact reference to particular grid reference co-ordinates. Part 2 provides for Ancillary Works, in that DCO, removal of hedgerows (also designed by exact length and Grid Reference).

13. Part 3, Requirements §1(1) defines "wind turbines" by reference to Works No 1.

14. Requirement 2 provides as follows: [Emphasis added]

> *Where, under any Requirement, details or a scheme or plan are to be submitted for the approval of the relevant planning authority then unless the Requirement provides otherwise—*
> *(a) those details or scheme or plan and that approval must be in writing,*
> *(b) the details, scheme or plan must be implemented as approved, and*
> *(c) the approved details, scheme or plan are to be taken to include any amendments that may subsequently be approved in writing by the relevant planning authority, provided that no amendments may be approved by the relevant planning authority where such amendments may give rise to any materially different environmental effects to those assessed in the environment statement and that where under any Requirement there is an obligation to consult with a third party prior to the submission of any details, scheme or plan for approval to the relevant planning authority then there shall be an obligation to consult with the same third party prior to the submission of any amendments to the approved details, scheme or plan to the relevant planning authority.*

15. Requirement 3 provides:

> *3. The authorised development must be commenced within 5 years of the date of this Order.*

Mynydd y Gwynt Wind Farm

16. NRW raised at the DCO ISH the need for the candidate authorised development to match that which had been subject to environmental assessment. NRW orally noted EN-1, §§3.2.3 and 5.9.15, and provides clarification of the points raised, and also by way of amplification, as follows.

17. The Applicant accepts at §6.4.33, Scoping Opinion Statement, **Document MYG-AD-13** that:

> *The energy gain and landscape balance needs to be carefully considered.*

18. The proposal for the Mynydd y Gwynt Wind Farm was subject to scoping opinion statement, advertising, and to an environmental statement.

19. In each case, the development assessed was as follows:

a) The proposal was subject to a scoping opinion report dated 2005. See **Document MYG-AD-13**. This included:

> §3.3.1 *The development would consist of 27 wind turbines each rated at 3 megawatts. The layout of the turbines is shown on Plan 2.2…*
>
> §3.2.4 *included a table of 27 turbines defined by grid coordinate references and Tower Height of 65m.*

§3.2.5 *The turbines would be similar to Vestas V90 and would rotate at low speeds varying between 8.6 rpm and 18.4 rpm depending on wind speed. The rotor would consist of 3 blades, each approximately 45m long forming a swept diameter of 90m…*

§3.4.1 *The location of the substation is not known at present as the precise route of the grid connection has not been finalised.*

§6.7.2: *"…[I]t has been felt that for the purposes of these 110m high to tip wind turbines, in a middle-upland open and exposed landscape, a 25KM study area is appropriate*."

b) The MYG Scoping Opinion Statement, **Document MYG-AD-13**, explains at §6.4.34 that 30 turbines was reduced to 27 turbines (of specified hub and tip height as set out in §6.4.27, 65m towers and 90m swept blade resulting in an "overall height of 105m" (see §6.4.25) of each turbine) resulting in the identification of 18 viewpoints in §6.4.36, in part consequent from §6.4.28 identifying a maximum turbine height of no more than a third of the 330AoD. See also §§6.5.1-4;

c) The proposal was then *changed* by physically raising the turbine hub height (and so too overall height) from 65m to 80m and was then advertised in Summer 2013 pursuant to Section 48, Planning Act 2008. See **Document MYG-AD-12**. Each such public advertisement stated:

§3. *The proposed application … comprising the following development:*

- *The construction of 27 wind turbines up to 125m to tip;*
- *Electrical cables;*
- *Widening of existing tracks (7.73km);*
- *Construction of new tracks (8.33km);*
- *Replacement monitoring mast.*

These advertisements drew attention at §4 to the ES as available for consideration by third parties;

d) §2.4, Chapter 2, ES provides:

The proposed wind farm development ("the Wind Farm") will consist of the following:

- *27 turbines up to 125m to tip;*
- *Electrical cables;*
- *Substation, control building and satellite link;*
- *Widening of existing tracks (approximately 9.5km to be widened);*
- *Approximately 6.9km of new tracks; and*

- *Erection of meteorological mast.*

§2.5 *The development would consist of 27 turbines each with a generating capacity of 3-3.3MW. The installed capacity of the proposed development will therefore be 81-89.1MW…*

§2.7 *The turbines will be up to 80m to hub height and the blades will have a swept diameter of between 90m and 105m…*

e) Chapter 5, Site Design, §5.6 provides:

The final layout, which is assessed in this Environmental Statement (ES), consists of 27 turbines and is shown in Figure 2.1.

§5.11 …[The predicted energy yield for 27 turbines of hub height 80m and rotor diameter 90m is summarised in the Table 5.2 [at 37% net capacity factor]

f) §6.1, Chapter 6, ES provides:

The physical elements of the projects [sic] are made up as follows:

- *27 turbines (each turbine anticipated to be 80m high to the hub, and a maximum of 125m to the tip of the blade set);*

§6.3 provides for Turbine Physical Characteristics in Table 6.1 and show a "currently commercially available" 80m tower for a 3MW rated turbine;

g) §6.63, Chapter 6: Construction states that an: "indicative Construction Programme has been included as Figure 6.10. Figure 6.10 shows a draft Construction Programme of some 13 months;

[Note also ES Chapter 2, - the Proposed Development, §2.24: "Feasibility studies have been completed by SP [Manweb] and National Grid Electricity Transmission … to determine the route and locations of the major elements in the new network, which will be subject to a separate NSIP application. The anticipated completion date for the connection point is in 2019. See also the current Habitats Management Plan – 25th March to 30th June each year extends the period to about 16 months];

h) §8.2, Chapter 8 – Landscape states that the "assessment sets out the visual effect of the changes to the landscape through the development of the proposed Mynydd y Gwynt Wind Farm with 27 turbines."

§8.33-34 summarises the agreement in November 2011 of the scope of the LVIA; §8.49 that a "refined 20KM study area" was used; §8.52 states that "Photomontages and wireframes were created for the views experienced from each [of 26] viewpoint[s]";

[The Notes to:

1) for example, the ES Figures 8.1; 8.5 state that: "Vestas V90 Turbine is used for all turbines with a hub height of 80m and a rotor diameter of 90m, giving a total height to the tip of the rotor arc of 125m";

2) ES Figures 8.11 ai; aii; aiii; bi; ci; di; ei; eii; fi; fii; gi; gii; hi; jii; mi; mii; nii; o; qi; qii; ri; rii; riii; si; ti; tii; ui; uii; vi; vii; w; xi; xii; yi; zi; state that "The wireframe and photomontage were calculated using Vestas Turbine with a hub height of 80m and a rotor diameter of 90m.

NRW does not understand there to be any evidence of any Figures for wind turbines of rotor diameter of 105m i.e. approximately 17% larger than the 90m diameter];

§8.54 states:

"*It should be appreciated that due to the limitations of still photography, even accurate photomontages cannot fully represent the actual impact of a proposed development. However accurate, the photomontages are limited, and should not be relied upon solely to assess the magnitude of change, degree of impact and then the significance of effect*";

§8.55 states:

"*On the basis of the fieldwork observations and the analysis of these photomontages and wireframes, the magnitude of change in the view from each of the viewpoints has been assessed.*"

[There appears to be no evidence currently in the DCO examination of the proposed 27 turbines in motion. i.e. actually rotating, within an otherwise (all but) static landscape];

§8.92 states:

"*Accordingly, the main elements considered to have any potential significant effects on the landscape and visual amenity of the study area over the life of the development are the proposed 27 wind turbines and these are considered in more detail within this assessment*";

§8.93 summarises the refinement of the study area to 20km.

i) The Design and Access Statement, **Document MYG-AD-11**, dated July 2014, describes at §4:

The proposed wind farm development consists of the following:

- *27 turbines (each between 3 and 3.3MW generating capacity);*
- *Underground electrical and communication cables;*
- *Substation, control building and satellite link;*
- *Widening of 9.5km of existing tracks;*
- *Laying of 6.9km of new tracks; and*
- *Installation of a meteorological mast.*

§6 states:

"*With each turbine capable of generating 3-3.3MW per hour the Wind Farm would have an installed capacity of 81-89.1MW. The maximum height to blade tip would be 125m. Dependent on the actual turbine installed the hub height would be between 70-80m and the blades would have a swept diameter of between 90-105m.*"

§19 states:

"*The final layout consists of 27 turbines and is shown in Figure 2.1. The final design seeks to achieve the best possible compromise between the technical and environmental issues. A detailed description of the site design is contained in Chapter 5 of the ES*".

§30 states:

"*With an installed capacity of between 81-89.1 MW, and dependent on the choice of turbine, the wind farm has the potential to generate 237-324 GWH of energy from renewable sources per year, equivalent to the domestic needs of up to approximately 50,500-68,900 average UK households*".

j) The MYG HRA Screening Report, **Document MYG-AD-09**, dated July 2014, describes at §17:

The location of the site is shown on Figure 1.1 of the ES and the layout is shown on Figure 2.1 of the ES.

§21 states:

"*The development would consist of 27 turbines each with a generating capacity of 3-3.3MW. The installed capacity of the proposed development will therefore be 81-89.1MW*".

§22 explains that no specific make or model of turbine has been applied for but visualizations are based on the Vesta V90 3MW.

§23 explains that:

"*The turbines will be up to 80m hub height and the blades will have a swept diameter of between 90m and 105m (the longer length corresponding with a 3.3MW machine and being considered the worst case for collision risk) (ES Chapter 2, para 2.2). However, the maximum height to blade tip will be restricted to 125m, so if longer blades are used, the tower height will be reduced …*".

§26 provides that:

"*The total length of existing tracks to be used for the development is 9.5km …* "

k) The Planning Statement, **Document MYG-AD-11**, dated July 2014, describes at §13:

The Mynydd y Gwynt Wind Farm will consist of the following:

i. 27 wind turbines up to 125m to tip, each with a generating capacity of 3-3.3MW. The total installed capacity of the proposed development will therefore be 81-89.1MW. The turbines will be up to 80m to hub height and the blades will have a swept diameter of

between 90m and 105m. The maximum height will be restricted to 125m, so if longer blades are used the tower height will be reduced …

v. approximately 9.5km of existing tracks to be widened where required, and approximately 6.9km of new tracks to be constructed, together with crane hard standings at each turbine location…

20. It is apparent that the proposal subject to environmental assessment as 'worst case' was:

a) for a *certain* number - 27 - wind turbines comprising a hub of 80m and an overall blade diameter of 90m of "final" layout shown in Figure 2.1;

b) not for a dynamic number - "up to" - 27 wind turbines, nor actually of wind turbines of overall blade diameter of 105m (i.e. c.17% broader overall diameter – including width – than the 90m);

c) an "energy yield" premised on 90m rotors and with an estimated 37% net capacity;

d) of a predicted yield based on 27 wind turbines multiplied by (notional) 3MW equating to 81MW;

e) not an actual estimated energy yield premised on 105m diameter rotors;

f) for internal transformers and not for external transformers;

g) either the replacement of a monitoring mast or the erection of a meteorological mast.

21. Contrary to the Applicant's oral suggestion at the DCO ISH, the clear reason for NRW's landscape witness consideration of a certain number of 27 turbines, and reasonably so, is that 27 wind turbines is *the* certain development that was subject to environmental assessment and not another number. Further, so too was the 3MW notional output (based on a 90m diameter blade).

Guidance on Flexibility

22. NRW explained in its earlier iteration of this Legal Note the Guidance permits flexibility (if here sought) but through adherence to guidance. The Secretary of State's Planning Inspectorate's National Infrastructure Directive has produced guidance on the use of the Rochdale Envelope in applications for development consent orders. Advice Note 9 (April 2012), version 2, provides:

This advice note, which forms part of a suite of such advice provided by the Planning Inspectorate, addresses the use of the 'Rochdale Envelope' approach under the 2008 Act. A number of developers, particularly those for proposed offshore wind farms, have sought advice on the degree of flexibility that would be considered appropriate with regards to an application for development consent under the 2008 Act regime.
Developers have suggested that the approach known as the 'Rochdale Envelope' may be useful in considering applications for development consent under the 2008 Act, especially where there are good reasons why the details of the whole project are not available when the application is submitted. Such an approach has been used under other consenting regimes (the Town and

Country Planning Act 1990 and the Electricity Act 1989) where an application has been made at a time when the details of a project have not been resolved.
There are a number of key areas when preparing an application for development consent under the 2008 Act where the level of detail and amount of flexibility are particularly relevant. These are:
• in the description of the project within the application documents.

23. Page 3 provides: [Emphasis added]

To understand the implications arising from the comprehensive consideration of the issues by the Judge in Milne (No. 2),it is helpful to note the key propositions. These are set out below:
• the outline application should acknowledge the need for details of a project to evolve over a number of years, within clearly defined parameters;
• the environmental assessment takes account of the need for such evolution, within those parameters, and reflects the likely significant effects of such a flexible project in the environmental statement;
• the permission (whether in the nature of the application or achieved through 'masterplan' conditions) must create 'clearly defined parameters' within which the framework of development must take place. It is for the local planning authority in granting outline planning permission to impose conditions to ensure that the process of evolution keeps within the parameters applied for and assessed;
• the more detailed the proposal, the easier it will be to ensure compliance with the Regulations;
• taken with those defined of the project, the level of detail of the proposals must be such as to enable a proper assessment of the likely environmental effects, and necessary mitigation - if necessary considering a range of possibilities:
The assessment may conclude that a particular effect may fall within a fairly wide range. In assessing the 'likely' effects, it is entirely consistent with the objectives of the Directive to adopt a cautious 'worst case' approach. Such an approach will then feed through into the mitigation measures envisaged…. It is important that these should be adequate to deal with the worst case, in order to optimise the effects of the development on the environment' (para.122 of the Judgment);
• the level of information required is: 'sufficient information to enable 'the main,' or the 'likely significant' effects on the environment to be assessed…., and the mitigation measures to be described….' (para.104 of the Judgment);
• the 'flexibility' referred to is not to be abused: 'This does not give developers an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has 'full knowledge' of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility, and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail, or refuse consent' (para.95 of the Judgment);
• it is for the planning authority to determine what degree of flexibility can be permitted in the particular case having regard to the specific facts of an application. It will clearly be prudent for developers and authorities to ensure they have assessed the range of possible effects implicit in the flexibility provided by the permission. In some cases, this may well prove difficult.

24. Page 5 provides:

A developer needs to be able to demonstrate, among other things, that the statutory consultation requirements under the Act (sections 42 and 47) have been complied with. It is possible to comply with less than full information on the application, but unless there is a clear iterative

consultation process followed and further documentation provided to consultees during the process, the developer could risk being unable to demonstrate that the proposals have been considered in the light of consultation responses received. Care will be needed by the developer to ensure that the project description is clear so that the developer can demonstrate that the statutory requirements regarding consultation have been met.

25. Pages 6-7 provide: [Emphasis added]

When considering a proposal the Planning Inspectorate must be satisfied that the likely significant effects, including any significant residual effects taking account of any proposed mitigation measures or any adverse effects of those measures, have been adequately assessed. … The Planning Inspectorate accepts that the details of a project may change as it progresses through the preapplication stages. For example, in relation to offshore wind farms detailed information on a project that may not be available at the time of making the request for a scoping opinion could include:

- *type and number of turbines;*
- *foundation type (this may depend upon the height and type of turbine and the seabed conditions);*
- *location of the export cable route (whether this is buried or on the seabed);*
- *location of the landfall point;*
- *the definitive location of any onshore substation;*
- *location of the grid connection point;*
- *construction methods and timing; and*
- *re-powering.*

In the course of preparing the ES, a developer should seek to identify those aspects that are likely to give rise to significant adverse impacts, such that the maximum potential adverse impacts of a project have been properly assessed and can be taken into account as part of the examination, and decision-making process. The Overarching NPS for Energy (EN-1) and the NPS for Renewable Energy Infrastructure (EN-3) both identify the need to address the maximum potential adverse impacts to ensure that the likely impacts of a project as it may be constructed have been properly assessed.

26. Page 9 provides for the Content of the Development Consent Order: [Emphasis added]

The purpose of the 2008 Act was to introduce a streamlined system that speeded up the consenting process for nationally significant infrastructure projects. As such, the consideration of an application is undertaken in a relatively short period but following substantial pre-application consultation. The Secretary of State cannot accept an application unless, among other things, the quality of the developer's statutory and public consultation has been adequate. NPS EN-3 states (paragraph 2.6.43) that the '….wind farm operators are unlikely to know precisely which turbines will be procured for the site until sometime after the consent has been granted'. This is not to say that the use of the 'Rochdale Envelope' should be used as an excuse not to provide *sufficient details. Developers should make every effort to finalise as much of the project as possible prior to submission of their application for development consent. Indeed, as explained earlier in this note, it will be in all parties' interests for the developer to provide as much information as possible … to enable development consent (if granted) to be for a distinct project.*

27. Page 10 provides: [Emphasis added]

One practical way forward would be for the draft Development Consent Order (DCO), submitted with an application for development consent, to set out specified maximum and minimum. For example, for offshore wind farms, these could be in terms of:

- *maximum number of turbines;*
- *minimum number of turbines;*
- *maximum nacelle (hub) height;*
- *minimum nacelle (hub) height;*
- *maximum blade tip height;*
- *minimum blade tip height;*
- *minimum clearance above mean sea level;*
- *minimum separation distances between turbines.*

Developers should be in a position to be able to identify the most likely variations of options and so provide a more focused description. However, any flexibility should not permit such a wide range of materially different options such that each option in itself might constitute a different project for which development consent should be sought and an ES provided, nor allow a scheme to be implemented which is materially different from that assessed in the EIA…
The Planning Inspectorate can confirm that developers may submit draft DCOs in advance of submitting an application, including properly drafted requirements, to the Planning Inspectorate and when so doing it may assist the discussion to provide legal submissions making reference to relevant case law to demonstrate that the draft provisions and requirements being proposed may be lawfully made and imposed. If approved, any flexibility of the project will also need to be reflected in appropriate DCO articles and requirements, …

28. Page 11 provides:

The approach set out in this advice note seeks to provide an acceptable solution, under the 2008 Act regime, to address areas of uncertainty as proposals progress towards making the application. The approach used needs to be clear and robust…
The challenge for the EIA will be to ensure that all the realistic and likely worst case variations of the project have been properly considered and clearly set out in the ES and as such that the likely significant impacts have been adequately assessed. It may be possible to draft a DCO in such a way as to allow some flexibility in the project. The project should be described in such a way that a robust EIA can be undertaken.

LAW

29. By section 14(1)(a), Planning Act 2008:

(1) In this Act "nationally significant infrastructure project" *means a project which consists of any of the following—*
(a) the construction or extension of a generating station;

30. By section 15: [Emphasis added]

(1) The construction or extension of a generating station is within section 14(1)(a) only if the generating station is or (when constructed or extended) is expected to be within subsection (2) or (3).
(2) A generating station is within this subsection if—
(a) it is in England or Wales,
(b) it is not an offshore generating station, and
(c) its capacity is more than 50 megawatts.

31. By section 104(2) requires the Secretary of State to have regard to (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement").

32. Section 120(1) of the Planning Act 2008 entitles the Examining Authority to impose requirements in connection with the development for which consent is granted. By subsection (2), the scope of those requirements is inclusively defined to include: a) requirements that correspond to planning conditions; and also (b) "requirements to obtain the approval of the Secretary of State or any other person, so far as not within paragraph (a)".

33. The foregoing Advice Note guidance is set in the context of the Rochdale litigation in which Sullivan J. (as he then was) held in *R v Rochdale MBC, ex parte Tew* [2000] Env LR 1 ("Tew") at page 27 that the development description was required to address "main effects" within Schedule 3, paragraph 2. Whilst a "bare outline" application is permissible, such an application could not comply with paragraph 2. Rather, in *R v Rochdale MBC* [2001] Env LR 22 ("Milne"), Sullivan J. considered the same proposal as in *Tew* but which was then subject to further information resulting in it no longer being a bare outline application. Rather, its terms included the Application form which cross-referred to and incorporated certain documents including schedules of development frameworks. See attached at **Appendix 7 and 8**.

34. In *Smith v Secretary of State for the Environment, Transport and the Regions* [2003] Env LR 32, the Court of Appeal affirmed *Milne* and held at §33 that: [Emphasis added] See **Appendix 9**.

> *33 In my view it is a further important principle that when consideration is being given to the impact on the environment in the context of a planning decision, it is permissible for the decision maker to contemplate the likely decisions that others will take in relation to details where those others have the interests of the environment as one of their objectives. The decision maker is not however entitled to leave the assessment of likely impact to a future occasion simply because he contemplates that the future decision maker will act competently. Constraints must be placed on the planning permission within which future details can be worked out, and the decision maker must form a view about the likely details and their impact on the environment.*

35. The following cases concerning the Planning Act 1990 appear here relevant.

36. As a public document, a planning permission is required to be construed by a reasonable reader, having available to him only the planning permission that is valid on its face and excluding extraneous material (see *Carter Commercial Developments Limited (In Administration) v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1994, §§27-28,

affirming *R v Ashford Borough Council, ex parte Shepway District Council* [1999] PLCR 12 at 19, §§1-4 (a decision of Keene J. as he then was). *Ashford* p.19§3 held that use within the operative part of the permission of words like "in accordance with" incorporated by reference such further documents so that these became treated as part of the planning permission. See **Appendix 10-11**.

37. The following case illustrates what may happen of a consent (there in the form of a planning permission) contains omissions or matters not tied down expressly. In *Polhill Garden Centre Ltd v Secretary of State for the Environment, Transport and the Regions* [1998] JPL 1070, applied *Ashford* in ascertaining the scope of a permission to comprise 4 sheets of which 2 were a "site plan" (incorporated by a reference in condition 7). That plan showed a "store" building but there were no other plans of it, including none of its elevation. The main issue was whether there was an extant permission which turned on whether the size of a "store" was limited. "It [is] trite law that… if detailed drawings did not form part of the permission and the Planning Authority omitted to impose a reserved matters condition, the developer could construct the building in whatever dimensions and design he chose" (at 1075). (See also, *Slough Borough Council v. Secretary of State for the Environment* (1995) 70 P. & C.R. 56, an omission to limit the floor areas of new buildings). See **Appendix 12**.

38. NRW also made reference to 'tail pieces' and the wide discretion in the current draft Requirement 2. In *Mid-Counties* [2010] EWCA Civ 841, the Court considered a 'tailpiece' phrase in a condition attached to an outline grant of planning permission for a supermarket subject to a condition (6) which capped the floor space area but whose terms including "unless otherwise agreed within the Local Planning Authority" (and where there was also a section 106 planning obligation). In dismissing the appeal from Ouseley J., the Court of Appeal held at §27 that the permission "provides a sufficiently clear and certain form of control over the intended actual selling space" because (at §24) the attendant section 106 planning obligation itself operated to restrict more widely the floor space area. Thus, essentially, the exercise of discretion within condition 6 would be jurisdictionally contained by that planning obligation. The first instance decision in *Mid-Counties* [2009] EWHC 964 (Admin) was applied in *Warley* [2011] EWHC 2083 (Admin) and in *Halebank* [2012] EWHC 1889 (Admin). See **Appendices 13-15**.
39. In *Warley*, condition 2 required that lighting hours be controlled between certain hours except "with the prior consent in writing of the Local Planning Authority". Rabinder Singh QC held at §89 that such a tail piece offended the rule of law and excised it from the permission. But, in *Halebank* (Planning) Judge Gilbart QC disagreed (at §100) with Rabinder Singh QC in *Warley* holding that: "Nothing about the condition in that case altered the nature of the development applied for. The

condition set out the regime that was to apply, and permitted small scale relaxations to be made on an occasional basis".

SUBMISSIONS

40. NRW agrees that, for the purposes of the sections 14 and 15, Planning Act 2008, the proposed development qualifies within the terms of section 14(1)(a) and 15(1) and (2)(a) because its "expected" capacity is more than 50MW.
41. NRW submits that the correct approach to permitting flexibility in a DCO application such as is currently sought is to ensure that the actual terms (and so the scope) of the draft DCO terms for the proposed authorised development are such that the authorised development remains that the development that has been actually subject to environmental assessment and not some other.
42. In relation to the iteration of the Mynydd y Gwynt draft DCO as at 11th February 2015:
    a) The Applicant's apparent reliance on the DCO terms approved in 2013 and 2014 by the Secretary of State at Brechfa Forest West Wind Farm Order 2013 and Clocaenog Forest Wind Farm Order 2014 for its current use in Schedule 1, Part 1 of the phrase "up to", in seeking to define the scope of the "authorised development" in Article 3(1) and 2(1), and Schedule 1, Parts 1, but which has no *minimum* number of turbines, is currently misplaced and misconceived. This is because:
        i) the development in the Applicant's own assessments has proceeded from its advertised basis in 2013 and in its ES and other documents on the clear and unambiguous basis of a certain number of 27 wind turbines and not on a dynamic number of "up to" 27;
        ii) the potential for a reduction from 27 (but so as to remain within the scope of 81MW to 89.1MW) assumes an increase in the notional individual turbine capacity from 3MW to 3.3MW and a corresponding increase in actual blade length from 90m to 105m. e.g. 25 turbines multiplied by 3.3MW equals 82.5MW. Less than that number of turbines results in a generating station less than 81MW. However, the latter actually larger blade length has not been subject to any landscape impact assessment at all;
        iii) the Applicant is understood to already at the DCI ISH have orally stated that the number may be reduced to 26 turbines due to ground conditions. It is unclear how many further turbines may be removed in due course;
        iv) the dynamic number of turbines and the range of notional generating capacity results in difficulties in identifying the projects' actual contribution of the proposal pursuant to EN-1 §3.2.3 and, in turn, properly informing, and weighing, EN-1 §5.9.15 considerations identified by the Applicant at **Document MYG-AD-6** at §101 as important; and by him at

Document MYG-AD-13 at §6.4.34 as "The energy gain and landscape scale balance needs to be carefully considered"; and by NRW in, for example, its Written Representations, Simon White, December 2014, by further examples, §§4.3; 6.39; 6.40 *et seq*; 7.1; 8.1 *et seq*; 10.3; 10.13 and 10.15 (in addition to the "TAN 8 test").

b) The Applicant's draft DCO Schedule 1 includes in Part 1 some works numbers that are defined by grid reference co-ordinates and others that are not. NRW submits that the Applicant be consistent in its drafting approach;

c) The Applicant appears to need to choose:
   i) Maintain flexibility; or
   ii) Properly define the authorised development;

d) In the event that the Applicant chooses to maintain flexibility, NRW refers the ExA and Applicant to Advice Note 9, page 10, on how to improve and tighten up that which is being applied for currently. NRW notes that many of the Works have no grid reference. Assuming a changed turbine type, Works No. 1 has no upper height or width AoD grid reference or maximum tube diameter so as to establish even a notional *Rochdale* parameter box inside of which different types of turbine might be placed. Further, the phrase "all such Works to be located in the approximate positions shown on the works plan and within the order limits" is hopelessly wide and more so in the context of the very limited environmental assessment. The ExA should consider better defining discrete pockets of deviation limits around each Works No1 (and other works) grid references so as to ensure that that which may be authorised is that which has been subject to actual assessment;

e) Further, if some generating capacity flexibility of description is chosen by the Applicant, given that its environmental assessment assumed 27 turbines of 3MW type (90m blade diameter as assessed), but it has defined authorised development to be between 81MW and 89.1 MW, a lower parameter of 25 turbines would only maintain that generation capacity figure above 81MW assuming 3.3MW (105m blade diameter not assessed) - but such a wider blade has not actually been subject to environmental visualization assessment at this time;

f) If definition is chosen (to ensure a match between that assessed and that proposed to be authorised):
   i) whilst different NSIPs, both the Brechfa Forest West Wind Farm Order 2013 and the Clocaenog Forest Wind Farm Order 2014 included in Part 1 detailed and particularised grid-references for *all* works numbers. These Orders confined the scope of that permitted by not including (as the current draft DCO Schedule 1, Part 1 does) the phrase "all such

Works to be located in the approximate positions shown on the works plan and within the *order* limits". The other Orders included, in Part 2, specified ancillary works not included in the current draft DCO;

ii) 27 turbines (as assessed) multiplied by 3 MW (90m blades diameter as assessed) equates to 81MW. Consequently, Schedule 1, Part 1 should read "81MW" and the phrase "up to" should be deleted;

iii) The individual blade length should be defined at not more than 45m;

iv) The hub height should be defined as not less than 80m above AoD vertically below;

g) So far as relevant at this point of this Submission, draft Requirement 2 appears to currently seek to enable a later change from the development actually assessed in the environmental assessment (27 turbines of 3MW individual capacity) to a changed development (for example, of up to 27 turbines of 3.3MW individual capacity – not at this stage assessed visually) on the premise that the regulator alone may consider the environmental impact between 90m and 105m diameter blades not likely to raise significant environmental effects because of a then grant of a DCO. But, such an approach "offends the rule of law" and would be unlawful in seeking to avoid the far wider consultation process at this DCO hearing stage on the 105m blade scheme. See *Warley*;

h) Once the Applicant has defined the description of its authorised development to match that actually assessed (or has chosen to risk to leave it as it currently stands), NRW reserves the right to make further submissions on the project's actual contribution in due course;

i) The Article 11 proposal that the application site become "operational land", within the meaning of section 264(3)(a), Town and Country Planning Act 1990, treats the Applicant as a statutory undertaker under a number of statutory regimes. This engages section 263(1) "operational land", and also the scope of the permission granted under Article 3 of the Town and Country Planning (Permitted Development) Order 1995. That Order appears to permit construction of roads. Part 17, Schedule 1 also permits statutory undertakers to execute certain development. For example, Class G Electricity undertakers for generation, supply or transmission or supply of electricity. However, the likely engaged permitted development rights appear to have been subject to any environmental assessment at all at this stage of the DCO process as opposed to after the event.

43. In relation to further particular draft Articles:

a) Article 2(1): should include definitions of the (management) and other particular plans;

b) Article 3(1): should be drafted in simpler terms and not use the term "including" because that term admits of other (but to date, unassessed) bases for the consent (such as Requirement 2, for which see below). See the 3 examples of Article 3(1) drafting submitted by NRW;

c) Article 7(1): see NRW's submissions on Schedule 1, Part 1;

d) Whilst not raised at the DCO ISH, the following has become apparent. Article 12(1): the consent to fell or lop any tree in the Order land so as to prevent interference with "operation" of the authorised development has the potential to be used to remove *all* trees from that land as to improve the energy efficient of the generating station by *removal* of rough terrain reducing wind flow. This is likely to have landscape impacts and appears not have been subject to any environmental assessment. See for example, **Appendix 16** attached hereto, Energy Assessment of TAN 8, Wind Energy Strategic Search Areas, 14th April 2005, Garrad Hassan, Executive Summary, pages i-ii, and Conclusions on calculation of energy yields in respect of wooded areas. NRW submits that the term "operation" be removed from Article 12(1)(a);

44. In relation to the current draft requirements:

a) The correct approach in law to the use of Requirements obligates the ExA (and in due course, the Secretary of State) to:

i) be able, on the material before him today at this current DCO hearing stage, form an opinion of the likely future decisions of subsequent decision makers acting within those clear parameters (see *Smith*);

ii) impose objective and clear parameter terms upon the DCO "within which" (as in, *inside of which*) details can be subsequently decided upon (see *Tew* and *Milne*);

b) In this respect, the absence of draft plans being incorporated currently disentitles the ExA and Secretary of State from being able to form a view of the likely future decisions of decision makers (see *Smith*). NRW submits that this may be properly resolved (assuming agreement to their current content by the relevant decision maker) and consistent with the terms of Requirement 14(1) as follows:

i) Draft Requirement 8: Construction Traffic Management at (1) should include a reference to, and terms obliging adherence to, **Document MYG-TMP** Traffic Management Plan;

ii) Draft Requirement 9: Construction Management Plan at (1) should include a reference to, and terms obliging adherence to, **Document MYG-ES-APP6.1** Draft Construction Environmental Management Plan;

iii) Draft Requirement 12 or 13: Construction, at (1) should include a reference to, and terms obliging adherence to, **Document MYG-ES-FIG 6.10** Draft Construction Programme;

iv) Draft Requirement 15: European Protected Species at (1) should include a reference to, and terms obliging adherence to, **Document MYG-ES-APP11.20** Species Protection Plan;

v) Draft Requirement 27: Surface Water Drainage at (1) should include a reference to, and terms obliging adherence to, **Document MYG-ES-APP14.3** Surface Water Management Plan.

Any such Plans should be approved by NRW where within its functions.

The foregoing (management type) plans should also be defined in Article 2(1) of the draft DCO. See for example, any of the example DCOs provided to the ExA by NRW;

Further, a number of requirements provide for proposed future (management) plans whose content is not presently known and also use the term “including”. “Including” precludes, by such ordinary language the potential admitting of wider – but unassessed - matters, in such requirement clear and objective parameter *inside of which* future decision makers may properly operate;

c) The draft DCO appears ambivalent about the siting of certain development and, to provide a framework for decision makers, the draft DCO should in its certification provisions and Work Numbers expressly refer to the particular plans relied upon today and within the terms of which subsequent details can be concluded. For example, Figure 6.1, Indicative Site Access Layout; Figure 6.2. Typical Sections Through Access Tracks; Figure 6.3, Typical Cable Trench Detail and Typical Track Cross Section on Sloping Ground; Figure 6.6, Meteorological Mast Details; Figure 6.7, Cable Trench Arrangement; Figure 6.8, Outdoor Substation Layout; Figure 6.9 Outdoor Substation Elevations. These are important because the ground conditions include Peat and the Landscape impacts are a key issue in this particular DCO (where they were not in the 2013 and 2014 DCO examples because those other Orders concerned wind turbines *within* designated SSAs);

d) The provision today of such draft plans enables the current ExA and future Secretary of State decision maker to themselves consider *now* the likely future decisions of subsequent

decision makers within those clear parameters and those subsequent decision makers to remain within parameters which have been subject to consultation;

e) Whilst different NSIPs, both the Brechfa Forest West Wind Farm Order 2013 and the Clocaenog Forest Wind Farm Order 2014 included numerous and detailed plans. These included land plans, access plans and works plans. Whilst it is accepted that the latter Order also certified the ES, the Secretary of State in *Kent* No 1. consented to judgment (i.e. the case was not heard by the Court) in a claim that the incorporation of the ES into a planning permission was *Wednesbury* unreasonable because the sheer volume of additional words in the whole ES rendered interpretation of the terms of the planning permission (into which document they were all incorporated) unreasonable. By contrast, NRW accepts that a DCO may properly expressly refer to particular paragraphs or Figures in an ES without resulting in the DCO terms being rendered nonsensical;

f) Requirement 3, Time Limits, is and remains currently unjustified, in particular, and more widely:

   i) The Applicant's proposal relies in its environmental assessment on a construction programme of 13 months (taken with the draft Habitat Management Plan prohibition on certain Summer months, may be extended to approximately 16 months). The Applicant also notes in its ES that the Grid Connection is due in 2019. A five year life time in which to enable *implementation* of the authorised development is more than adequate as at Spring 2015;

   ii) More widely, both the Brechfa Forest West Wind Farm Order 2013 and the Clocaenog Forest Wind Farm Order 2014 are subject to 5 year limits;

   NRW reserves the right to make further submissions in the event that the Applicant declines to curtail the draft DCO period for implementation to 5 years (from the current 8 years);

g) Requirement 4, Expiry, should include under (2) provision for "written" confirmation of the first export. There also appears to be no provision to exclude repowering the generation station. It cannot be assumed that the order will not simply be renewed in due course;

h) The draft DCO definition in Part 2, Requirements, 1, of "wind turbines" is, as currently drafted, broader than Works No 1 because the further definition for the purposes of the Requirements seeks to define each *individual* turbine as a discrete *generator* notwithstanding that Schedule 1, Part 1 seeks to at the same time aggregate all 27 turbines

into a “an onshore wind turbine generating station” (singular). NRW submits that there is no justification for expanding the definition beyond the scope of the examples of the same phrase as defined in Schedule 1, Part 3 to each of the Brechfa Forest West Wind Farm Order 2013 and the Clocaenog Forest Wind Farm Order 2014. That is, to tie “wind turbines” back to Works No 1 (and in turn properly back to the definition of authorised development, being for a “generating station” (singular and not many *generators*).

45. In relation to draft Requirement 2:

a) NRW notes that whilst both the Brechfa Forest West Wind Farm Order 2013 and the Clocaenog Forest Wind Farm Order 2014 post date the emerging ‘tail piece’ case law, the latter *appears* to have taken this case law into account under its Requirement 2 whereas the former has not. The current draft DCO appears to also not have taken account of the tailpiece case law because it obligates the relevant planning authority to consult with third parties (which may include all those consulted on the DCO itself);

b) In simple terms, the current drafting of Requirement 2 provides a discretion to a subsequent decision maker on its face entitling it to change the content of the “authorised development” (as defined) and thereby the very DCO itself. The sole condition is that the environmental effects of the change are not “materially” different. NRW has serious concerns about draft Requirement 2. This is because it enables potentially unassessed changes to the authorised development which will not have been subject to the DCO consultation process. If the current DCO were granted, the principle of the development will have been established and, to all intents and purposes, the current draft DCO operates as an outline planning permission for up to 27 turbines in relation to which a subsequent decision maker would appear hard pressed to show a “material” difference in environmental terms;

c) NRW submits that:

i) Draft DCO requirement 2 be brought into line with the terms of Clocaenog Forest Wind Farm Order 2014 requirement 2; but also, to ensure adherence to the rule of law;

ii) Assuming a requirement repeating the terms of Clocaenog Forest Wind Farm Order 2014 requirement 2, that draft DCO requirement 2 include after “effects” the phrase “(in the opinion of the relevant planning authority)” - who must also consult, and so would enable NRW to express a view. Such an approach would also avoid the question of effects descending into arbitration;

iii) NRW reserves its right to make further submissions when appropriate wording has been submitted by the Applicant. In the event that the Applicant declines to make any amendments, NRW reserves the right to make further submissions.

TAN 8 and Actual Contribution

46. In relation to the ExA's proposal for a TAN 8 ISH and in light of the NRW submissions as to the actual contribution of the proposal to need, NRW submits at this time the following documents:

a) **Appendix 17**: Arups Research Report to Welsh Assembly, July 2010;

b) **Appendix 18**: National Grid, Project Need Case, Issue 2, July 2012, including §2.17 and Figure 2.2, and §3.3, Table 3.1, and §3.5;

c) **Appendix 19**: National Grid, Update of Strategic Options Report, July 2012, including Section 3, Summary of Need, and §3.10. See also Section 6;

d) **Appendix 20**: SP Manweb, Mid Wales Connections, Third Strategic Optioneering Report, September 2013, including Table 1: Mid Wales Wind Farms- status and capacities at 1st April 2013;

e) **Appendix 21**: SP Manweb SP Mid Wales Connections, Scoping Report, June 2014, including Table 1.1 Contracted Connection, §5.8 Summary of Contracted Wind Farms;

f) **Appendix 22**: National Grid, 2.2 Preliminary Environmental Information Report, Autumn/Winter 2014-15, including Part 1, Introduction and Table 2.1,

Baseline

47. NRW submitted at §A1.7-8 of its Written Representations that it has concerns about the baseline description. It cannot be assumed that the use asserted by the Applicant of the land for rallying is other than seasonal or permitted development, or that it is not precluded from being lawful due failure to comply with Habitats Regulations requirements.

CONCLUSIONS

48. The current draft DCO terms must be tightened up so as to ensure that that which has been actually subject to environmental assessment is within that which is proposed to be authorised.

CHRISTIAAN ZWART

11th February 2015