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To all interested parties

Your Ref:

Our Ref: EN010024

Date: 13 January 2015

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Dear Sir/Madam

**Planning Act 2008 (as amended) and The Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) - Procedural Decision, request for information and change of timetable – Rule 17 and Rule 8(3)**

**Application by Navitus Bay Development Limited for the Navitus Bay Wind Park**

**1. PROCEDURAL DECISION REGARDING SUBMISSION OF THE TURBINE AREA MITIGATION OPTION**

- 1.1. On the basis of the information provided by the applicant and other interested parties, in various submissions and particularly in response to the Examining Authority's Rule 17 request for information on 21 November 2014, the Examining Authority has decided that the Turbine Area Mitigation Option does amount to a material change but not to the point of constituting a new application. It can therefore be included in the examination as part of the application received by the Planning Inspectorate on behalf of the Secretary of State on 10 April 2014.
- 1.2. To enable affected and interested persons (IPs) to fully engage with the process, the timetable has been modified by extending the deadline by which they can respond to any issues concerning the Turbine Area Mitigation Option. The modified timetable is attached as Annex A.
- 1.3. While recognising that the Environmental Statement is based on the Realistic Worst Case Scenario (RWCS), and that the Turbine Area Mitigation Option falls within that scenario, the Examining Authority will need to examine whether the reduction in scale and therefore impacts are sufficient to conclude on its acceptability. To that end, information pertinent to the mitigation option for the purpose of consideration of its potential impacts is requested, as detailed in the second round of questions.
- 1.4. This procedural decision is made under s89(3) of the Planning Act 2008. The background, case for the applicant, summaries of submissions by IPs and the Examining Authority's reasoning for this decision are set out below.

## 2. BACKGROUND

- 2.1. In response to Deadline III date of 5 November 2104, the applicant submitted a turbine area mitigation option under Appendix 43 of its submissions.
- 2.2. The key characteristics of the mitigation option are:
  - A generating capacity of up to 630MW (the application has a capacity of up to 970MW).
  - A range of turbines between 76 x 8MW and 105 x 6MW (the RWCS for ES seascape/landscape/visual purposes assessed in the application is a range of turbines between 121 x 8MW and 194 x 5MW).
  - A reduced turbine area from 153km<sup>2</sup> to 79km<sup>2</sup>
  - Movement further south of the north west and north east boundaries of the turbine area.
  - The full onshore 40m working width would still be required along the trenched cable route but wherever possible would be reduced to 34m.
- 2.3. Appendix 43 states that; *"...in the event that the Secretary of State decides that the proposal does not strike the right balance between benefits and impacts, the applicant believes that it may assist the Secretary of State to at least have available the option to reduce the number of turbines, removing those closest to terrestrial viewpoints. Approval of a reduced number of turbines ....would involve striking a different balance, because the mitigation option would involve a reduction both in the total installed generating capacity and the environmental effects associated with the construction and operation of the turbines.....The mitigation option is primarily proposed to reduce the significant impacts on SLVIA but will benefit most of the other offshore EIA topics. "*
- 2.4. Subsequent to Appendix 43, the applicant submitted a written response to Deadline IV on 17 November 2014 (Part 1). Paragraph 5 of the summary to this document explains that; *"While the scheme as submitted remains the applicant's preferred proposal, and will continue to be promoted through the examination in the usual way, the provision of information relating to the Turbine Area Mitigation Option is intended to enable the Secretary of State to approve a reduced number of turbines should he consider that this is necessary as a matter of planning judgement."*
- 2.5. The applicant's Response to the Rule 17 request for further information was submitted on 11 December 2014 (Deadline IV). The covering letter makes clear that the Response to the Rule 17 request is intended to update and replace Appendix 43. The letter goes on to state; *"For the purposes of responding on the Mitigation Option documentation, Interested Parties are (therefore) directed to both the (enclosed) Response to the Rule 17 Request and the Response to Deadline IV (Part 1)."* That is the basis on which the Examining Authority has considered the materiality of the Turbine Area Mitigation Option and concluded on its status within the examination.

## 3. THE CASE FOR THE APPLICANT

- 3.1. The following paragraphs set out the applicant's case as described in their various submissions under Appendix 43, written responses to Deadlines IV/V and the Rule 17 letter.

## Whether the changes constitute a new application

- 3.2. The applicant's position is based on consideration of whether the Turbine Area Mitigation Option would amount to a change such that it effectively constitutes a new application. They claim that is the correct test rather than whether it amounts to a material change. The distinction is clarified in the Bob Neill letter<sup>1</sup>. They consider that to preclude consideration of the Turbine Area Mitigation Option simply because it represents a material change would be applying the wrong test.
- 3.3. The Turbine Area Mitigation Option involves reductions in the:
- turbine area;
  - maximum number of turbines;
  - maximum installed capacity;
  - number of offshore and onshore export cables, and
  - onshore cable corridor width.
- 3.4. Since the draft DCO option sets maximum limits on capacity, numbers of turbines and number and length of export cables, it would in theory be possible to develop the Turbine Area Mitigation Option by partially implementing the current application within the envelope already assessed. In other words, the Turbine Area Mitigation Option is already encapsulated within the parameters of the application.
- 3.5. The applicant further explains that the following factors demonstrate why the Turbine Area Mitigation Option can be considered under the existing application:
- The only material change to the DCO application would involve adoption of a turbine exclusion zone within the northern part of the turbine array area red line.
  - The red line boundary would remain unchanged and no additional development is intended within it.
  - There would be no increased environmental impacts. Scaling down of the application scenario that has already been assessed would offer reduced impacts.
  - No additional compulsory acquisition powers are being sought.
  - If the Turbine Area Mitigation Option were to be selected by the Secretary of State, minimal changes to the draft DCO would be required.
  - The Turbine Area Mitigation Option offers an alternative layout within the identified site, taking into account the constraints of economic viability and other constraints, along the lines recommended in NPS EN-3 (paragraph 2.6.208).
  - DCLG Guidance<sup>2</sup> on the pre-application process (paragraph 83) allows for more than one option in the draft Order and for the option to be explored as part of the examination with certain provisos.

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<sup>1</sup> [Letter to the IPC](#) from Bob Neill MP, dated 28 November 2011.

<sup>2</sup> [Planning Act 2008: guidance on the pre-application process](#)

- 3.6. Neither regulatory changes, nor technical developments nor the discovery of previously unknown factors necessarily provide the rationale for developing the Turbine Area Mitigation Option. However, these examples given in paragraph 105 of the DCLG Guidance for the examination of applications for development consent (April 2013) are just that – examples; and the list is not intended to be exhaustive.
- 3.7. The applicant remains of the view that the Application scenario strikes the right balance and is acceptable, but recognises that other parties take a different view and are seeking to persuade the Secretary of State accordingly. There is nothing unusual in identifying the scope for further mitigation, where it exists, should the decision maker consider it necessary in response to objections. It would assist the Secretary of State to have the option to reduce the number of turbines, if he considers that the Application scheme does not strike the right balance between benefit and impacts.

### **The applicant's response to addressing the *Wheatcroft*<sup>3</sup> principles**

- 3.8. The amendments to the timetable confirmed in the Rule 17 letter allowed for consultation to take place by seeking responses to the applicant's documents submitted at Deadline IV. A period of some four weeks was allowed for from the Deadline IV date. Responding to the Turbine Area Mitigation Option is largely a matter of identifying how far the impacts that have caused concern would be reduced, and commenting on how the planning balance should be struck in those circumstances.
- 3.9. The applicant believes that the likelihood of people not registered as IPs wishing to participate in the examination is remote, bearing in mind that no new development is involved and it is anticipated that the impacts would generally be reduced.

## **4. IPS' SUBMISSIONS IN RELATION TO THE STATUS OF THE TURBINE AREA MITIGATION OPTION**

- 4.1. A number of written opinions on the status of the Turbine Area Mitigation Option were submitted in advance of the issue specific hearing held on 18 November 2014. In addition to which, oral submissions were made at the hearing on behalf of the applicant and by a number of IPs. Having heard these submissions, and read the material presented, the Examining Authority announced that a Rule 17 letter was to be issued in due course outlining the process to be followed. The Rule 17 letter essentially allowed for IPs to respond to both the status and merits of the Turbine Area Mitigation Option by Deadline V (7 January 2015), based on the material submitted by the applicant by Deadline IV (11 December 2014).
- 4.2. The submissions arguing against examining the option can be summarised as follows:
- The Turbine Area Mitigation Option does not accord with relevant rules and guidance for the following reasons:
    - It runs counter to the established process for impact assessment and mitigation. If an applicant wishes options and alternatives to be considered, they should be included in the application following the pre-application and consultation process. Changes to an application

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<sup>3</sup> Bernard Wheatcroft Ltd v Secretary of State for the Environment (1982) 43 P & CR 200

should only be permitted under limited circumstances (NPS EN-1 and EN-3).

- Introduction of new material at this late stage of the examination is contrary to the Planning Infrastructure principles of 'front loading' during the pre-examination process.
  - NPS expects mitigation by reductions in scale to be marginal (NPS EN-1 paragraph 5.9.21 and NPS EN-3 paragraph 2.6.210).
  - The Turbine Area Mitigation Option does not satisfy the conditions for including a number of options in an application (paragraph 83 of the DCLG Guidance on the pre-application process).
  - The option is not being advanced for the reasons of regulatory changes, technical development or discovery of previously unknown factors. There is no justification for it.
  - It is too late for the applicant to seek to amend the Application in a material respect, given the critical stage of examination into the Application.
- The option is put forward on the basis that reduction in impacts would be directly proportional to reduction in size. However, even a substantially smaller project may well result in similarly adverse impacts, due to the very sensitive and special nature of the location.
  - The option may go some way towards addressing objections, but may not necessarily have addressed the significant environmental impacts.
  - The case for the Turbine Area Mitigation Option undermines the viability case for the Application, which was considered by the developer to be constrained by the need to maintain economic viability.
  - The Turbine Area Mitigation Option is clearly a different project from the original Application.
  - Significant additional and substitute information is required in the ES to assess the scheme. For example, the socio-economic effects have been assessed only on the basis of a 970MW option.
  - The applicant has implicitly accepted that the submitted ES does not cover the Turbine Area Mitigation Option in the Response to the Rule 17 Request.
  - Local Authorities may also need to modify their Local Impact Reports.
  - This is a flawed attempt to widen the Application and runs against the Rochdale Envelope procedure.
  - NBDL has consistently refused to contemplate reductions in size of the project.
  - The submitted option must be scrutinised as a separate scheme under a new examination process.
  - There is insufficient time for a full consultation, or for IPs to make full assessments of the Turbine Area Mitigation Option through the process of site visits and preparation of new visual material.
  - This is too radical a proposal to amount to just a revision of the original.
  - It is an abuse of the process and the programme disadvantages IPs.
  - The option has not been subjected to a full EIA or public consultation.
  - Carrying forward both proposals through the examination would inevitably lead to extra complexity and uncertainty about which option is really being addressed.
  - The developer's ES, shadow HRA screening and the appropriate assessment documents are based on the Application and not the mitigation option. Neither regime permits or envisages the relevant

assessment as applying to multiple proposals simultaneously. A revised ES and shadow HRA is needed to inform the proposal.

- In the interest of procedural propriety the Examining Authority should:
  - extend the examination to enable interested parties to be consulted on the effects of the modified proposal;
  - take into account what publicity (if any) NBDL has carried out to ensure that people not registered as IPs have an opportunity to make representations;
  - pursuant to s87(1) of the 2008 Planning Act to make changes to the timetable; and
  - exercise its discretion under Rules 10(3) and 14(10) to permit representation from non-IPs.

4.3. A limited number of representations accept the validity of the Turbine Area Mitigation Option, as it does not amount to a material change and that it can be considered under the current Application.

## 5. THE EXAMINING AUTHORITY'S REASONING

5.1. In making this procedural decision, the Examining Authority has taken account of NPS EN-1 and EN-3, as well as the guidance in paragraphs 105 to 107 of the DCLG [Guidance for the examination of applications for development consent](#). The Examining Authority has also borne in mind the statement by Bob Neill MP in his letter to the IPC, dated 28 November 2011.

5.2. Paragraph 105 of the DCLG Guidance accepts that applicants may need to change a proposal after an application has been accepted for examination. The reasons for the change promoted by the applicant in this case do not fall within the categories cited in the guidance, but the list is neither exhaustive, nor intended to preclude other circumstances that might lead to changes.

5.3. Given the extent of reduction in the number of turbines, and in installed capacity, the Examining Authority accepts that the proposal for the Turbine Area Mitigation Option constitutes a material change. However, the Examining Authority does not consider that the materiality of the change applied for is of such a degree that it constitutes a new application. The main factors leading us to this conclusion are:

- The nature of the works proposed in the mitigation option is limited to reduction of the turbine area and, as a consequence, reductions in the maximum numbers of turbines and inter-array cabling to be accommodated within that area. No additional works are proposed.
- The application boundaries onshore and offshore are to remain unchanged in the mitigation option but with a structures exclusions zone to be included within that redline boundary to reflect the smaller turbine area.
- The mitigation option is a scaled down version of the application with the potential for reduced impacts on many of the environmental aspects of the ES topics.
- The mitigation scheme is implementable within the parameters of the Application scheme accepted for examination and within the environmental statement envelope assessed as part of that Application.
- The mitigation option is deliverable with relatively few alterations to the DCO under examination.
- As far as can be established from the material submitted to date, it appears

to the Examining Authority that there are no compulsory acquisition implications. The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 are not engaged by the proposed mitigation option.

- 5.4. In effect, the materiality of the change does not reach the threshold of constituting a new application. The Examining Authority therefore concludes that the Turbine Area Mitigation Option can be considered within the existing Application, provided that the information submitted is complete for the purpose of the examination and issues of fairness can be satisfactorily addressed.
- 5.5. The Examining Authority recognises that by including the Turbine Area Mitigation Option it needs to act reasonably, in accordance with the principles of natural justice and the principles arising from the *Wheatcroft* case. In other words, anyone affected by the amended proposal should have a fair opportunity to have their views known and properly taken into account.
- 5.6. To that end, all affected and interested parties were notified by way of the Rule 17 letter. The change to the timetable gave IPs the opportunity to respond to the material submitted by the applicant in terms of the merits of the Turbine Area Mitigation Option as well as its status. Details of the option were available initially when Appendix 43 was submitted at Deadline III. Since then, further material was published on 17 November 2014 and by the Deadline IV date of 11 December 2014. The Rule 17 letter invited written responses to the applicant's additional material by 7 January 2015. There is also an opportunity for invited IPs to make oral representations at an issue specific hearing on the subject to be held on 22 January.
- 5.7. Notwithstanding the opportunities provided to date for IPs to make their views known, the sensitivity of the project and changes in impacts render it difficult for them to respond fully and assess the implications of the reduced option within the constraints of the timescale imposed by the Rule 17 letter. For that reason, the examination timetable is to be modified along the lines indicated in Annex A to this letter to allow IPs additional time to prepare and submit representations on the merits of the Turbine Area Mitigation Option.
- 5.8. As the Turbine Area Mitigation Option does not amount to a new application, and is included as part of the Application currently under examination, we do not consider it necessary to extend consultation beyond affected and interested parties. For the same reason, there is no need to extend the examination as requested by IPs.
- 5.9. On the other hand, it is open to the Examining Authority to accept written representations from non-registered IPs, provided they relate only to the Turbine Area Mitigation Option. In this way, the Secretary of State can be assured that no one is prejudiced by including the Turbine Area Mitigation Option in the examination.
- 5.10. As for the level of information provided by the applicant, in our second round of questions we have identified such matters that we believe are necessary to assess the impacts of the Turbine Area Mitigation Option, other than just as a comparison exercise with the Application project. The applicant has provided a shadow HRA screening and appropriate assessment matrices for the Turbine Area Mitigation Option. A revised ES is not deemed necessary, as the original assessment represents the RWCS.
- 5.11. With arrangements in place for those with an interest in the project to make

their views known and heard, the *Wheatcroft* tests would be met. Additional information on the Turbine Area Mitigation Option requested by the Examining Authority would allow its implications to be assessed and the Secretary of State to make a decision on its acceptability on the balance of the evidence provided.

Yours faithfully

*Ava Wood*

**Ava Wood, Lead Member of the Panel of Examining Inspectors**

Advice may be given about applying for an order granting development consent or making representations about an application (or a proposed application). This communication does not however constitute legal advice upon which you can rely and you should obtain your own legal advice and professional advice as required.

A record of the advice which is provided will be recorded on the Planning Inspectorate website together with the name of the person or organisation who asked for the advice. The privacy of any other personal information will be protected in accordance with our Information Charter which you should view before sending information to the Planning Inspectorate.

## Timetable Variation

The Examining Authority is under a duty to complete the examination of the application by the end of 6 months beginning with the day after the preliminary date.

Add item 20a

Item	Matters	Due Dates
20a	<p><b>Deadline VI a</b> Deadline for receipt by the Examining Authority of:</p> <ul style="list-style-type: none"> <li>• Additional representations on the merits of the Turbine Area Mitigation Option</li> </ul>	<p><b>Thursday 5 February 2015</b></p>
22	<p><b>DEADLINE VII</b> Deadline for receipt by the Examining Authority of:</p> <ul style="list-style-type: none"> <li>• Comments on ExA's revised draft DCO</li> <li>• Comments on responses to ExA's second written questions</li> <li>• Comments on ExA's RIES</li> <li>• Receipt of any further information as requested at item 21 (if required)</li> <li>• <b>Comments on additional representations on the merits of the Turbine Area Mitigation Option</b></li> </ul>	<p><b>Thursday 5 March 2015</b></p>