IN THE HIGH COURT OF JUSTICE

PLANNING COURT

BETWEEN:

THE QUEEN (ON THE APPLICATION OF AQUIND LIMITED)

Claimant

-v-

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

STATEMENT OF FACTS AND GROUNDS

References in square brackets are to page numbers of (a) the exhibit [illegible] to the first witness statement of dated 2 March 2022 (in the form '[[illegible]-page number(s)]') or (b) the Core Bundle 'CB1' (in the form '[CB1-page number(s)]').

1. The Claimant, AQUIND Limited, applies for permission to seek judicial review of the decision of the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, dated 20 January 2022 to refuse development consent for UK and UK Marine elements of the AQUIND Interconnector in accordance with section 118(2) of the Planning Act 2008 (the "**Act**").

FACTS

The parties

2. The Claimant is a company registered in England and created in accordance with the laws of England and Wales, with company number 06681477 and whose registered office address is 5 Stratford Place, London, England, W1C 1AX and is the proposed undertaker for the purpose of the development consent order sought.

3. The Defendant is the Secretary of State who made the decision to refuse development consent.

The application and the examination

4. The project is a new 2,000MW subsea and underground High Voltage Direct Current ("**HVDC**") bi-directional electric power transmission link between the south coast of England and Normandy in France (the "**Project**"). The Project will have the capacity to transmit up to 16,000,000MWh of electricity per annum, which equates to approximately 5% and 3% of the total consumption of the UK and France respectively.

5. On 19 June 2018 the Applicant submitted a request to the Defendant for a direction pursuant to section 35 of the Act that the construction and use of the elements of the Project located in the UK and UK Marine Area (the "**Proposed Development**") are to be treated as development for which development consent is required. The Proposed Development includes:

    a. HVDC marine cables from the boundary of the UK exclusive economic zone to the UK at Eastney in Portsmouth;

    b. Jointing of the HVDC marine cables and HVDC onshore cables;

    c. HVDC onshore cables;

    d. A converter station and associated electrical and telecommunications infrastructure;

    e. High Voltage Alternating Current ("**HVAC**") onshore cables and associated infrastructure connecting the converter station to the Great Britain electrical transmission network, the National Grid, at Lovedean Substation ("**Lovedean**"); and

    f. Smaller diameter fibre optic cables ('**FOC**') to be installed together with the HVDC and HVAC cables and associated infrastructure.

6. The Defendant, being satisfied that the relevant legal requirements were met and of the view that the Proposed Development is by itself nationally significant, issued a direction on 30 July 2018 directing that the Proposed Development, together with any development associated with it, is to be treated as development for which development consent is required (the "**Section 35 Direction**") **[-16 to 18]**.

7. On 14 November 2019 the Claimant submitted an application for the AQUIND Interconnector Order (the "**Order**") pursuant to section 37 of the Act to the Defendant to authorise the Proposed Development (the "**Application**") **[I -140 to 160]**.

8. The Application was accepted by the Planning Inspectorate ("**PINS**") on 12 December 2019. A panel of three examining Inspectors was appointed as the Examining Authority ("**ExA**"). The examination of the Application commenced on 8 September 2020 and concluded on 8 March 2021. The ExA submitted a report and recommendation to the Defendant on 8 June 2021 ("**ExAR**") **[I -414 to 788]**.

The ExA's conclusions

9. The ExA recommended that the Defendant should make the Order. The ExA concluded that:

> *"overall, the need case for the Proposed Development strongly outweighs the identified disbenefits"* (ExAR 12.2.1) **[I -787 to 788]**

10. The ExA made the following findings on the need for the Proposed Development:

    a. In accordance with the Overarching National Policy Statement for Energy EN-1 ("**NPS EN-1**") the Application was required to be assessed on the basis that there is a demonstrated need for the Project (ExAR 5.2.3), that the need is an urgent one and that there is a presumption in favour of granting development consent unless more specific and relevant policies within the National Policy Statements indicate that consent should be refused (ExAR 5.2.5) **[I 1-19 to 139; 494 to 495]**.

    b. The Energy White Paper, *Powering our Net Zero Future* (December 2020) confirmed the Government's commitment to greater interconnection with the European energy market and to increase the supply of electricity via this method of transfer (ExAR 5.2.6) **[I -495]**.

    c. Substantial weight should be given to the contribution that projects such as the Proposed Development make towards meeting the need for all types of energy infrastructure (ExAR 5.2.28) **[I -499]**.

    d. The 2GW capacity of the Project would contribute towards the desired increase in interconnection capacity expressed by the Government in the Energy White Paper and by Ofgem (ExAR 5.2.29) **[I -499]**.

e. There is a compelling case for the need for the Proposed Development:

> *"The ExA is satisfied that the Applicant has set out a compelling case for the need for the Proposed Development. Given the level and urgency of the need for energy infrastructure, the ExA notes that consideration of applications for development consent should start with a presumption in favour of granting consent unless more specific and relevant policies in the related NPSs clearly indicate that consent should be refused. In light of NPS EN-1, the ExA considers that there is an urgent need for the Proposed Development, and that the need case has been clearly made."* (ExAR 5.3.54) **[-510]**

11. In terms of the impacts of the Proposed Development, the ExA concluded that:

a. Whilst there would be some temporary significant adverse effects on highways and traffic flows during construction, those temporary effects would be reduced to acceptable levels and there would be negligible operational impacts. These matters accord with NPS EN-1 and do not indicate against the Order being made (ExAR 9.2.17, 9.2.18 and 9.2.19) **[-684]**.

b. Matters of air quality (ExAR 9.2.24), operational noise (ExAR 9.2.26), effects on electromagnetic fields (ExAR 9.2.27), the marine environment (ExAR 9.2.33), shipping and navigation (ExAR 9.2.37), onshore biodiversity and nature conservation (ExAR 9.2.40), design (ExAR 9.2.42), trees (ExAR 9.2.57), onshore water environment including flood risk (ExAR 9.2.65), soils and land use (ExAR 9.2.69) and ground conditions and contamination ((ExAR 9.7.72) were all neutral matters in the planning balance **[-685 to 687; 689 to 691]**.

c. The only adverse effects of the Proposed Development beyond the acceptable temporary highways impacts, were:

i. Some minor and temporary noise and vibration effects during the construction phase, which remain following the application of mitigation to appropriately reduce those impacts (ExAR 9.2.25) **[-685]**;

ii. A minor negative socio-economic effect (ExA 9.2.31) **[-686]**;

iii. Despite careful design, and as with any nationally significant energy project of this scale, some inevitable adverse significant landscape and visual effects, assessed by the ExA as being a factor entitled to moderate

weight in the overall planning balance (ExA 9.2.51 and 9.2.54) **[-688 to 689]**; and

iv. Less than substantial harm to the setting and significance of two heritage assets (the listed cottage known as Scotland and the Fort Cumberland scheduled monument with its associated listed buildings), which harm would not alone justify refusal of the Application, but to which considerable weight needed to be accorded (ExAR 9.2.62) **[-690]**.

12. The ExA's conclusion on the planning balance was that, weighing the adverse effects against the urgent and compelling need case which it had accepted, the matters identified as disbenefits did not outweigh the significant benefits and the final balance indicated "*strongly*" in favour of granting development consent (ExAR 9.3.11 and 9.4.1) **[692 to 693]**.

The ExA's consideration of alternative connection points

13. The Proposed Development includes a connection to the electrical transmission network at Lovedean, near Waterlooville in Hampshire (see plans at ExAR pages 21 – 22) **[-442 to 443]**. Alternatives to this connection point were introduced as an examination issue and thoroughly examined in written questions, responses, representations, and during the hearings (ExAR 4.1.24, 4.1.25) **[-478]**.

14. The Applicant had engaged with National Grid Electricity Transmission ("**NGET**") to carry out feasibility studies to identify the available level of entry capacity to the Great Britain transmission network, required reinforcements to the network, and potential connection locations in the south of England within reasonable reach of the coast, with the technical criteria underpinning the feasibility studies set out in paragraph 2.4.2.2 of Chapter 2 of the Environmental Statement (ExAR 5.4.8) **[-511]**.

15. Ten substations on the 400kV transmission network were identified as potential connection points, with seven discounted because of the limited thermal capacity of substations, the technical capability to extend them to provide the required thermal capacity, or difficulties with onshore and offshore cable routeing (ExAR 5.4.9) **[-511]**. These seven included Mannington substation ("**Mannington**"), which is located in Dorset. Of the three remaining substations, Lovedean was the final choice for grid connection as it was the most efficient, coordinated and economical (ExAR 5.4.9) **[-511]**.

16. The National Grid Electricity System Operator ("**NG ESO**") confirmed the reasons behind discounting substations other than Lovedean (ExAR 5.4.24) **[[redacted]-514]**.

17. The Applicant's consideration of alternative connection points was set out in:

    a. The *Environmental Statement - Volume 1 – Chapter 2 Consideration of Alternatives* (14 November 2019) **[[redacted]-161 to 240]**, which explained:

"*Table 2.1. – Strategic Project Alternatives Considered*

Alternatives Considered	*Decision*	*Main considerations, including environmental effects*
…	…	…
General UK location for landfall and connection to GB electricity transmission network.	*South coast of the UK (refined to the South East of England)*	• *Reduced marine cable installation length from the South coast of England to France;* • *Avoidance of network congestion, associated risks with crossing and limited capacity to transmit electricity due to other interconnectors connected into, or planned to connect into the southern region and Europe (IFA2000, BritNed, ElecLink, NEMO))*

…

2.4.2.1. The Applicant requested National Grid Electricity Transmission ('NGET') to perform a feasibility study in December 2014, with the report completed in November 2015. The study sought to identify the available level of entry capacity to the GB transmission network, required reinforcements and potential connection locations in the South Coast of England, taking into account the information provided by the Applicant derived from the initial technical-economic study explained above.

2.4.2.2 Meetings were held between the Applicant and NGET to consider key issues and to determine the potential locations through an

efficient, coordinated and economical assessment of the options. The following criteria were identified:

- *HVDC technology is widely used to transmit large amounts of power (typically over 500MW) efficiently over long distances;*
- *For the power levels under consideration, the connection needs to be with the 400kV transmission network;*
- *An existing 400kV substation must have the thermal capability to handle the power exchange between the interconnector and the GB transmission network via two new electrical connections, one per circuit, or an extension to provide two new connections with sufficient thermal capacity is feasible;*
- *The import (or export) of power through the connection substation should minimise any adverse consequences on the GB transmission network; and*
- *The proximity of the substation options to the South Coast, so as to minimise onshore cable length and associated environmental disruption during installation.*

2.4.2.3. Taking into account the existing grid network congestion in the South East and South West of England, NGET refined the search area and identified ten substations (see Plate 2.2) on the 400kV transmission network for further studies.

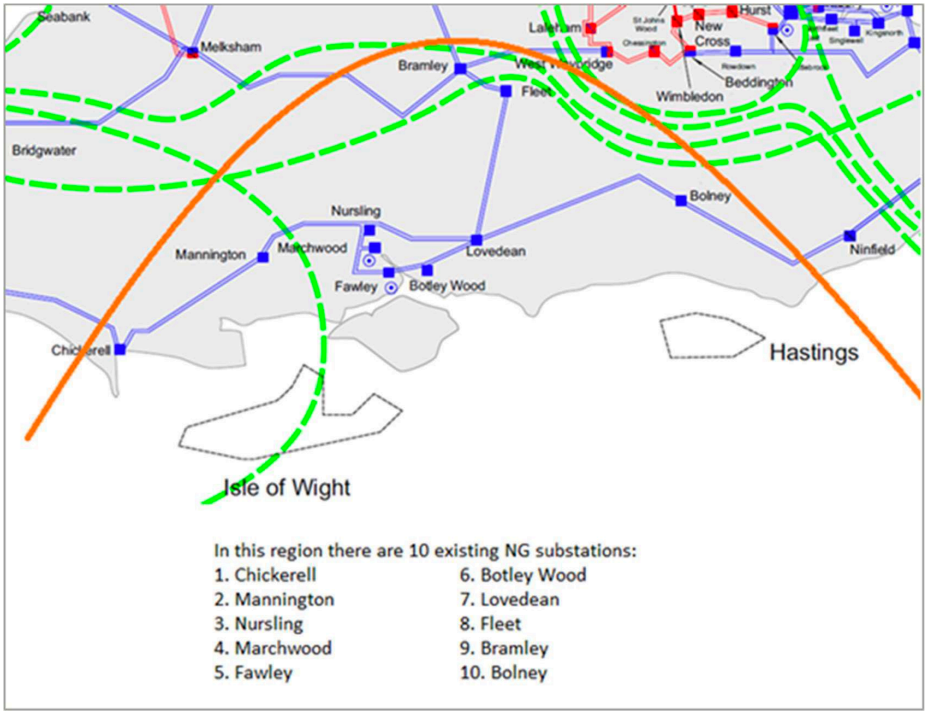

Plate 2.2 – England South Coast Map showing the region and ten connection sites identified

2.4.2.4. Utilising the above outlined criteria for the assessment and selection of the substation connection options, NGET discounted seven of the ten substations. This discounting was based on the limited thermal capacity of substations and/or feasibility to extend them to provide the

required thermal capacity, and difficulties with access for the marine cable onto the shore and/or potential onshore cable routes.

…

2.4.4.1 After completing a further assessment (Connection and Infrastructure Options Note) based on OFGEM's approved methodology (OFGEM, 2015) (National Grid ESO, 2018), which included the consideration of further technical and environmental constraints, NGET concluded that a single point of connection is preferred (two circuits connected to the same substation).

2.4.4.2 Subsequently, in October 2015, based on the results of NGET's feasibility study (see 2.4.2), the Applicant made a statutory application to NGET for a connection of 2,000 MW at Lovedean Substation.

2.4.4.3 A Connection Offer was issued by NGET in February 2016 and subsequently signed by the Applicant in June 2016, confirming Lovedean Substation as the grid connection point for the Proposed Development." **[-170; 172 to 173; 179]**

b. The *Environmental Statement Addendum – Appendix 3 – Supplementary Alternatives Chapter* (6 October 2020) **[-243 to 400]**. This was provided in response to representations by Interested Parties in the examination and set out further explanation on alternatives and the options chosen supplemental to the *Environmental Statement - Volume 1 – Chapter 2 Consideration of Alternatives* (14 November 2019). The overall approach taken to considering alternatives was further explained at 3.1.1.1:

> "*The overall philosophy applied to the consideration of the reasonable alternatives, or the options, for the Proposed Development by the Applicant is explained at paragraph 2.3 of Chapter 2 of the ES. This explains that a process of staged filtering was applied, increasing knowledge of the individual options, so as to proportionately consider them from a technical, cost and environmental perspective. Key to this exercise was the identification of whether the potential options could proceed and also whether they had a realistic prospect of delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale.*" **[-254]**

The initial longlist of grid connection point alternatives is discussed at 4.1.3.1 – 4.1.3.6 and 5.1.1.1 – 5.1.1.8, stating:

> "*4.1.3.1 Initial discussions were also held with NGET regarding the 400kV transmission network in southern England and the availability of existing electricity sub-stations which could accommodate the import and export of 1800MW to 2000MW of power.*

…

4.1.3.5 To the west of but within this search region, the 970MW Navitus Bay wind farm, off the Isle of Wight, was due to connect into Mannington substation. Further west, the FABLink 1400MW interconnector was due to connect into Exeter substation. NGET informed that the connection of a new interconnector in this region would have the effect of overloading the transmission lines, due to the power flows travelling from the west to east i.e. heading towards the major load centre of London.

4.1.3.6 Taking into account those existing and future planned connections and the constraints of the network as a consequence, and in turn considering the opportunities provided by the network where those constraints were not apparent, the substations within the area identified by the red curve were taken forward for consideration. The consideration of those substations and the grid connection options is discussed below in section 5 to this supplementary chapter.

…

5.1.1.5 Whilst the position of NGET was that the other substations represented similar connection issues to the sites taken forward, save for Bolney which was excluded because that part of the NETS was already constrained due to existing and planned future connection, the Applicant's preliminary views at the time on the suitability of the remaining substations were as follows:

…

- ***Mannington** – the shared connection point with the 970MW Navitus Bay wind farm raised technical concerns;*

…

5.1.1.7 As mentioned above at paragraphs 4.1.3.5 and 5.1.1.5, a connection agreement for the 970MW Navitus Bay offshore wind farm was in place in relation to the Mannington substation when the feasibility study was carried out, and therefore it was not considered to be suitable for the proposed connection. Although that project was later abandoned, the connection agreement remained in place with the developers of Navitus Bay offshore wind farm for some time following the feasibility study, during which significant progress was made advancing the proposals for Proposed Development. As a result it was not reasonable for the Applicant to re-consider the potential for a connection at Mannington at that later stage, and this was not considered further." **[-260 to 264]**

c. The *Applicant's Post Hearing Notes – Appendix 6 – Technical Note – Consideration of Alternatives (Connections)* (1 March 2021) **[-408 to 413]**.

Further to the submissions of NG ESO dated 25 January 2021 set out at paragraph 19 below, this stated:

> *"**NATIONAL GRID ASSESSMENT***
>
> *In addition to Lovedean, Bramley and Chickerell, NG ESO had earlier identified Mannington, Marchwood, Nursling, Fawley, Botley Wood, Fleet and Bolney sub-stations as located within the study area boundary. ...*
>
> *The Applicant understands these were not taken forward for detailed assessment primarily on the basis that;*
>
> *(i) they were deemed by National Grid to be unfeasible; or*
>
> *(ii) they would require the same reinforcement works as determined for Lovedean, Bramley or Chickerell plus additional reinforcement works.*
>
> *The Applicant understands that all of the sub-stations considered would have required system reinforcement because of the significant flows of power generated or imported in the South-West and South-East of England to load centres north of the "SC1" planning boundary (i.e. London) in any case and there was no connection location that would not have been encumbered by requirements for such additional works. While such additional works to be carried out by National Grid, would have been similar in nature, all substations, which were not taken for further assessment, would have presented their specific challenges and additional costs.*
>
> …
>
> ***OTHER SUB-STATIONS***
>
> *Sub-stations at Mannington, Marchwood, Nursling, Fawley and Botley Wood had other challenges and restrictions:*
>
> *...*
>
> *iv. Mannington sub-station may not be suitable for extension at all due to the position of existing Static Var Compensation (SVC) within the substation and because there are residential properties in close proximity on three sides. It is also relevant that Navitus Bay offshore wind farm of nearly 1GW capacity was planned to connect there. In the Applicant's opinion, connecting to Mannington sub-station would have been deemed not feasible.*
>
> *...*
>
> ***CONCLUSION***
>
> *Among all the sub-substations along the south coast, Lovedean provides the most direct and least constrained route to evacuate power from AQUIND Interconnector towards consumption centres in the south as well as to the north, including London, as well as to supply AQUIND Interconnector with power since most generation is further north.*

The selection of the other sub-stations would have resulted in the need for more extensive additional works which would increase the cost of such works to both National Grid and the project and the time that it would take for the interconnector to become operational." **[-410 to 412]**

18. Detailed information on alternatives was also provided to the examination by NG ESO. NG ESO is the system operator of the National Electricity Transmission System ("**NETS**"). NG ESO explained the following:

    a. Parties such as the Claimant who are considering connecting to the NETS may ask for a feasibility study prior to making their connection application. In respect of the Project, the Claimant commissioned a feasibility study which was undertaken and completed between December 2014 and November 2015, with the final version issued in January 2016. The feasibility study assessed the effect of the connection into the transmission system in the area being considered and the cost benefit analysis of various connection points.

    b. The output of the feasibility study was fed into the subsequent Connections and Infrastructure Options Note ("**CION**") process. The CION process is a collaborative process between relevant parties, including the owner and operator of the NETS and the developer (i.e. the Claimant). At the time of the CION process in the present case, the parties included NGET in its roles as both system operator and owner of the transmission system. The role of system operator was separated out from NGET in April 2019 to NG ESO. The CION process is designed to identify the most economic and efficient point for the connection between the transmission system and the developer's system, which includes consideration of environmental impacts, local disruption, and consenting. It is undertaken by NG ESO and NGET in accordance with their statutory licence obligation contained in section 9 of the Electricity Act 1989 (as amended by the Utilities Act 2000) to develop and maintain an efficient, co-ordinated and economical system of electricity transmission.

    c. The CION process identified the preferred option as being a connection to the Lovedean substation.

19. NG ESO's submissions to the examination included written comments in respect of alternative connection points on 30 November 2020, 25 January 2021, and 16 February

2021 **[-401 to 402; 403 to 405; 406 to 407]**. NG ESO explained in its 25 January 2021 submission why, inter alia, Mannington substation was not taken forward as a preferred option in the CION (page 2):

> "*In the case of AQUIND Interconnector, the CION did not progress with 7 existing substations. Bolney, Botley Wood, Fawley, Marchwood, Nursling, Mannington and Fleet these substations were not taken forward to the next stage of the CION due to the following reasons:*
>
> 1. *Options to the West of Lovedean required all or nearly all the same network reinforcements as a connection at Lovedean plus additional reinforcements to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety.*
>
> *...*
>
> *With the above considerations in mind these 7 substations were not taken forward for further assessment. This is because these sites would likely have resulted in more overall reinforcements, which would therefore lead to more environmental impact, and increased costs to the GB consumer. The extent of these additional works will vary from site to site but may involve new overhead lines or cables, additional operational equipment and multiple substation extensions in addition to the works identified for a connection at Lovedean."* **[-404]**

20. The ExA was content that informed and robust choices were made in the selection process leading to Lovedean being shortlisted as the most suitable grid connection point (ExAR 5.4.28) **[-515]**. No contrary evidence had been submitted to show that there was an alternative which would be technically feasible or would lead to lesser environmental effects compared to the Proposed Development (ExAR 5.4.31) **[-515]**. The assessment of alternatives was sound, with the ExA being content that the Claimant had provided adequate information to describe and explain its assessment of alternatives in relation to the social and environmental effects, technical feasibility and costs and that the requirements of NPS EN-1 and the EIA Regulations had been met (ExAR 5.3.33) **[-515 to 516]**. There was no policy or legal requirement to lead the ExA to recommend that consent be refused for the Proposed Development in favour of another alternative (ExAR 5.4.34) **[-516]**.

Defendant's requests for information after the close of the examination

21. On 13 July 2021 the Defendant issued a request for information and updates from the Claimant in respect of the Application. The Claimant responded on 23 July 2021.

22. On 2 September 2021 the Defendant issued a second request for information from the Claimant in respect of the Application. The Claimant responded on 16 September 2021.

23. On 4 November 2021 the Defendant issued a third request for information from the Claimant in respect of the Application, seeking information regarding (inter alia) consideration of alternatives and on how the construction programme for the Proposed Development will be managed to avoid causing delay to the North Portsea Island Coastal Defence Scheme (the "**Third Information Request**") **| -789 to 791]**. The request stated on this subject:

> *"**Consideration of Alternatives***
>
> *4. The Secretary of State notes that the document Environmental Statement Addendum – Appendix 3 – Supplementary Alternatives Chapter states that ten existing substations were evaluated as part of a feasibility study carried out by National Grid Electricity Transmission. One of the substations which was assessed in the feasibility study was the substation at Mannington. That substation was not considered to be suitable for the proposed connection because, at the time of the feasibility study, there was already a connection agreement in place for the proposed Navitus Bay offshore wind farm. The Addendum notes that the Navitus Bay project was subsequently abandoned but the connection agreement remained in place "for some time following the feasibility study" during which "significant progress" was made on the AQUIND interconnector proposal meaning that it was not reasonable for the Applicant to re-consider the potential for a connection at Mannington at that later stage.*
>
> *5. The Secretary of State is aware that the decision to refuse development consent for the Navitus Bay development was taken on 11 September 2015. He would be grateful for clarification from the Applicant in respect of how long the connection agreement for the Navitus Bay development remained in place following that refusal, what enquiries the Applicant made in respect of the potential use of the Mannington substation following the refusal of the Navitus Bay project and at what stage the development of the AQUIND interconnector project was when the connection agreement ended."* **[-790]**

24. On the subject of the North Portsea Island Coastal Defence Scheme, the Third Information Request stated:

> "***North Portsea Island Coastal Defence Scheme***
>
> *6. The Secretary of State notes the concerns raised by Portsmouth City Council regarding the potential impact of the proposed AQUIND Interconnector on the construction programme for the North Portsea Island Coastal Defence Scheme ("NPICDS"). The Secretary of State understands that the same six construction compound areas required for the NPICDS are also required for the proposed AQUIND Interconnector.*
>
> *7. The Secretary of State therefore requests that the Applicant provides further information detailing how the construction programme and use of the relevant construction compounds for the proposed AQUIND Interconnector will be managed to avoid causing delay to the NPICDS construction programme.*

8. The Secretary of State also requests an update from the Applicant on the proposed co-operation agreement between the Applicant and Portsmouth City Council." **[-790]**

25. The Claimant responded to the Third Information Request on 18 November 2021 **[-792 to 847]**. On the issue of how long the connection agreement for Navitus Bay was in place following the refusal of development consent for that project, what enquiries the Claimant made in respect of the potential use of the Mannington substation following that refusal and at what stage the development of the Proposed Development was when the connection agreement ended for Navitus Bay to Mannington was known to be cancelled the Claimant stated:

> *"2.14 Following the refusal of development consent for the Navitus Bay offshore wind farm, the Applicant made enquiries with NGET on 14th October 2015 regarding the impact of that refusal on the Feasibility Study which was being undertaken and known to be near completion. The Applicant has not been able to locate a response to this query, though it was understood by the Applicant that at this time that refusal would have been subject to the six week legal challenge period provided for by section 118 of the Act and as such the connection agreement for Navitus Bay would have remained in place.*
>
> *2.15 At a meeting with NGET in January 2016, following the issue of the final version of the Feasibility Study report and prior to the further CION processes which led to the issue of the CION in March 2016, it was noted that the Navitus Bay offshore wind farm had formally been removed from the list of future connections. It was therefore at this point in time that the Applicant was aware that the connection agreement for Navitus bay offshore wind farm to Mannington Substation was no longer in place.*
>
> *2.16 As is noted above, the Feasibility Study including the cost benefit analysis exercise was completed in November 2015, with the final version of the Feasibility Study report issued in January 2016. To include Mannington Substation in the shortlist of grid connection points for the Feasibility Study at this stage would have required the Feasibility Study process to restart, resulting in a further 10-12 months of work and the Applicant would not have been able to progress with its regulatory and other submissions until the further process was complete. This would also have meant that the place of the Proposed Development in the list of future connections would have been lost. In effect, the Proposed Development would have been significantly delayed and placed at a commercial disadvantage. It would also have resulted in the incurrence of significant cost in the form of NGET's fees and cost to the Applicant. The costs incurred to date for the Feasibility Study would also have become abortive.*
>
> *2.17 It was the view of the Applicant that for it to be reasonable to restart the Feasibility Study exercise to further consider the potential for a connection to Mannington Substation, noting the significant delay and cost this would have incurred, there would have needed to be a convincing justification for why Mannington Substation may have been preferable to Lovedean Substation.*

2.18 As is noted above, NGET had already identified that Mannington Substation was not preferable to Lovedean, on the basis that additional reinforcements would have been required to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety and that this would have led to more environmental impact, and increased costs to the GB consumer." **[-799 to 800]**

26. The Claimant also re-iterated the multiple reasons why Mannington substation was not taken forward in light of the misunderstanding expressed by the Defendant in paragraph 4 of the Third Information Request, including (but not limited to) the greater need for network reinforcements, and the resultant increased environmental impacts and costs, with a *supplementary* consideration on the part of the Claimant being the shared connection point with the Navitus Bay windfarm:

> *"2.6 With specific regard to why Mannington Substation was not taken forward for systems analysis following the initial evaluation, as is detailed in the letter submitted by NG ESO dated 25 January 2021 (REP7-109):*
>
> > *2.6.1 "Options to the West of Lovedean required all or nearly all the same network reinforcements as a connection at Lovedean plus additional reinforcements to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety";*
> >
> > *2.6.2 "these sites would likely have resulted in more overall reinforcements, which would therefore lead to more environmental impact, and increased costs to the GB consumer".*
>
> *2.7 In addition to NG ESOs reasons for why Mannington Substation was not taken forward for systems analysis, as is detailed at paragraph 5.1.1.5 of the Supplementary Alternatives Chapter the Applicant's preliminary view at the time on the suitability of Mannington Substation was that the shared connection point with the 970MW Navitus Bay offshore wind farm raised technical concerns.*
>
> *...*
>
> *2.19 The Applicant was also aware that the potential Jurassic Coast landfall locations to provide for a grid connection to Mannington Substation were not preferable to those for a grid connection to Lovedean Substation and, from its consideration of submarine cable approach to Chickerell Substation, that it would also have been necessary for the submarine cables to be longer than to a landfall location to Lovedean and to have crossed the major shipping lane in the English Channel for an increased duration, the IFA2 Interconnector and be subject to additional constraints resulting from difficult subsea conditions and increased environmental protections. This would have resulted in increased constraints and risk associated with both the construction and operation of the interconnector and was one of the reasons why Chickerell was not considered to be a suitable grid connection point for the proposed interconnector.*

2.20 Taking this into account, as the Applicant did, it was determined by the Applicant that it was not reasonable and/or necessary to further consider Mannington Substation as the grid connection point for the Proposed Development following the completion of the Feasibility Study and this was not considered further." **[-798; 800]**

27. On the issue of the North Portsea Island Coastal Defence Scheme, the Claimant explained the proposed arrangements for managing the relationship between the construction of the Proposed Development and the Coastal Defence Scheme and concluded:

> *"3.10 It is acknowledged by the Applicant that the need for the works to be undertaken in parallel in certain areas does give rise to the potential for delay, but through cooperation and co-ordination it is considered that such delay can be minimised and significant effects avoided and the Applicant is also willing to cover the costs of Portsmouth City Council and Coastal Partners as a consequence.*
>
> *...*
>
> *3.12 Subject to the provision of outstanding information by Portsmouth City Council and Coastal Partners, which was first requested in February 2021 and which is detailed in the draft appended at Appendix 3, the Applicant confirms the Co-Operation Agreement can be finalised and the Applicant remains committed to entering into this to address the concerns of Portsmouth City Council and Coastal Partners and ensure impacts on the NPICDS are minimised and that there are no significant or unacceptable effects."* **[- 803]**

28. The Claimant received no further request for information from the Defendant before issue of the decision on 20 January 2022. By letter dated 1 December 2021, the Defendant invited comments in response to the Claimant's submission of 18 November 2021 from specific parties (including NGET but not including NG ESO) on certain topics, but not Mannington substation **[-855 to 856]**. NGET responded to the Defendant on 13 December 2021, but only on the specific point requested (which concerned land rights).

The decision

29. The Defendant issued his decision on 20 January 2022 to refuse development consent pursuant to section 114(1)(b) of the Act **[CB1-71 to 89]**.

30. In his decision letter, the Defendant refers to the fact that the ExAR considers the planning balance "*at length*" (DL 3.5) **[CB1-75]**. The Defendant expresses agreement with the ExA's assessment of the adverse effects (DL 3.5 and 7.2) **[CB1-75; 85]**. No disagreement is expressed with any of the ExA's findings on those effects or the weight attributed by it to those adverse effects. It is therefore clear from the Defendant's decision letter that he agreed with the ExA's assessment and conclusions in relation to those matters. The only disagreement with the ExAR is with regard to alternatives (DL 4.1) **[CB1-76]**.

31. Notwithstanding the fact that the Proposed Development is of national significance and notwithstanding the content of NPS EN-1 which the Defendant had expressly directed should apply to the determination of the Application, nowhere in his decision does the Defendant engage with the ExA's assessment of the need for the development or the urgency of meeting that need as found by the ExA. In the absence of expressing any disagreement with its findings or any other contrary indications, it must be assumed that the Defendant accepted the ExA's conclusions both on need and the urgency of meeting that need in all material respects.

32. To the extent that the Defendant actually engaged with any kind of balance in his decision making, the basis of his decision is that given the number of residual adverse effects of the Proposed Development (claimed to be a significant number, but in fact limited to those identified above at paragraphs 11(a) and (c)) he could not be satisfied that the need for the Proposed Development outweighed the harm, because of the claimed failure by the Claimant to adequately re-consider whether Mannington could provide a feasible option for a connection point and the *"possibility"* that a connection at Mannington might have resulted in less adverse impact. This, he states, was a material consideration and one which *"weighs significantly against the proposed Development"* (DL 4.15 – 4.21, 7.3 – 7.4) **[CB1-80 to 82; 85]**. That was the sole express reason given by the Defendant for disagreeing with the ExA's recommendation.

Law

33. The Act is the principal legislation governing the examination of an application for development consent and the decision on whether to grant development consent.

34. Section 104(1) provides that section 104 applies to an application for an order granting development consent if a national policy statement has effect in relation to development of the description to which the application relates **[CB1-128]**.

35. The Section 35 Direction directed that the Overarching National Policy Statement for Energy EN-1 has effect in relation to the application for the Proposed Development. Accordingly, section 104 is engaged in the present case.

36. Section 104(2) prescribes the matters to which the Defendant must have regard when deciding the Application, being **[CB1-128]**:

    a. any relevant national policy statement;

    b. the appropriate marine policy documents;

    c. any local impact report;

    d. any matters prescribed in relation to development of the description to which the application relates; and

    e. any other matters which the Defendant thinks are both important and relevant to the Defendant's decision.

37. Section 104(3) provides that the Defendant must decide the application in accordance with any relevant national policy statement, except to the extent that one or more of subsections (4) to (8) applies **[CB1-128]**. Subsections (4) to (8) apply where **[CB1-128 to 129]**:

    a. the Defendant is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the United Kingdom being in breach of any of its international obligations;

    b. the Defendant is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Defendant being in breach of any duty imposed on the Defendant by or under any enactment;

    c. the Defendant is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment;

    d. the Defendant is satisfied that the adverse impact of the proposed development would outweigh its benefits; or

e. the Defendant is satisfied that any condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

38. Regulation 3(1) of the Infrastructure Planning (Decisions) Regulations 2010 provides that when deciding an application which affects a listed building or its setting, the Defendant must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest it possesses **[CB1-135]**.

39. Section 116 of the Act imposes a duty on the Defendant to give reasons for a decision to grant or refuse development consent **[CB1-131]**.

40. Section 118(2)(a) provides that a court may entertain proceedings for questioning a refusal to grant development consent only if the proceedings are brought by way of a claim for judicial review. Normal judicial review principles apply **[CB1-132]**.

41. The judicial principles in respect of whether alternative sites or options may permissibly be taken into account or where they are an "obviously material consideration" which must be taken into account, which include guiding principles as to how such matters should be taken into account, are summarised in the judgment of Holgate J in *R (on the application of Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) at paragraphs [269] – [274]:

> *"269. The analysis by Simon Brown J (as he then was) in Trusthouse Forte v Secretary of State for the Environment (1987) 53 P & CR 293 at 299-300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider whether there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse effects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it". Examples of this second situation may include infrastructure projects of national importance. The judge added that even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.*
>
> *270. The Court of Appeal approved a similar set of principles in R (Mount Cook Land Limited) v Westminster City Council [2017] PTSR 116 at [30]. Thus, in the absence of conflict with planning policy and/or other planning harm, the*

relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant, or where relevant, should be given little or no weight.

271. Essentially the same approach was set out by the Court of Appeal in R (Jones) v North Warwickshire Borough Council [2001] PLCR 31 at [22] to [30]. At [30] Laws LJ stated:-

"... it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking - and I lay down no fixed rule, any more than did Oliver L.J. or Simon Brown J.- such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse effects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."

272. In Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2010] 1 P&CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred by failing to take them into account ([17] and [35]). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account ([16] to [28]).

273. In R (Langley Park School for Girls Governing Body) v Bromley London Borough Council [2009] EWCA Civ 734 the Court of Appeal was concerned with alternative options within the same area of land as the application site, rather than alternative sites for the same development. In that case it was necessary for the decision-maker to consider whether the openness and visual amenity of Metropolitan Open Land ("MOL") would be harmed by a proposal to erect new school buildings. MOL policy is very similar to that applied within a Green Belt. The local planning authority did not take into account the claimant's contention that the proposed buildings could be located in a less open part of the application site resulting in less harm to the MOL. Sullivan LJ referred to the second principle in Trusthouse Forte and said that it must apply with equal, if not greater, force where the alternative suggested relates to different siting within the same application site rather than a different site altogether ([45 to 46]). He added that no "exceptional circumstances" had to be shown in such a case ([40]).

274. At [52-53] Sullivan LJ stated:-

"52. It does not follow that in every case the "mere" possibility that an alternative scheme might do less harm must be given no weight. In the Trusthouse Forte case the Secretary of State was entitled to conclude that the normal forces of supply and demand would operate to meet the need for hotel accommodation on another site in the Bristol area even though no specific

alternative site had been identified. There is no "one size fits all" rule. The starting point must be the extent of the harm in planning terms (conflict with policy etc.) that would be caused by the application. If little or no harm would be caused by granting permission there would be no need to consider whether the harm (or the lack of it) might be avoided. The less the harm the more likely it would be (all other things being equal) that the local planning authority would need to be thoroughly persuaded of the merits of avoiding or reducing it by adopting an alternative scheme. At the other end of the spectrum, if a local planning authority considered that a proposed development would do really serious harm it would be entitled to refuse planning permission if it had not been persuaded by the applicant that there was no possibility whether by adopting an alternative scheme, or otherwise, of avoiding or reducing that harm.

53. Where any particular application falls within this spectrum; whether there is a need to consider the possibility of avoiding or reducing the planning harm that would be caused by a particular proposal; and if so, how far evidence in support of that possibility, or the lack of it, should have been worked up in detail by the objectors or the applicant for permission; are all matters of planning judgment for the local planning authority."

42. Other legal principles relevant to the claim are as follows:

a. A decision maker errs in law where expressly or impliedly required by legislation, or policy which has to be applied, to take into account a particular consideration, it fails to do so or where on the facts, the matter was so "obviously material" that it was irrational not to take it into account: *R(ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] PTSR 1709 at [99].

b. Where the decision maker makes a material mistake as to an uncontentious or objectively verifiable fact which gives rise to unfairness for which a claimant is not responsible, and/or where by reason of the mistake the decision maker fails to take into account a material consideration or takes into account an immaterial consideration, there is an error of law: *R v Criminal Injuries Compensation Board ex p A* [1999] 2 AC 330; *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [66].

c. The Secretary of State is under a public law duty to take reasonable steps to inform himself so as to be able to answer the question before him. The obligation includes the need to allow the time reasonably necessary to obtain the relevant information: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1065B; *R(CPRE*

Kent) v Dover District Council [2018] 1 WLR 108 at [62]; *R(Balagijari) v Home Secretary* [2019] 1 WLR 4647 at [70].

d. Any party to planning proceedings, including under the Act, is entitled (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case. If there is procedural unfairness which materially prejudices a party, that may be a good ground for quashing the decision: *Hopkins Development Ltd v SSCLG* [2014] PTSR 1145 at [62]; *Halite Energy Group Ltd v SSECC* [2014] EWHC 17 at [82].

e. Reasons given for a decision must be intelligible, adequate and enable the reader to understand why the matter was decided as it was: *South Bucks DC v Porter* (No 2) [2004] 1 WLR 1953. The question is whether the reasons given leave room for genuine, as opposed to forensic, doubt as to what was decided and why: *R (CPRE Kent) v Dover District Council* [2017] UKSC 79 at [42]. Reasons can be briefly stated and there is no requirement to address each and every point made, provided that the reasons explain the decision maker's conclusions on the principal important controversial issues. In circumstances where the Secretary of State disagrees with a recommendation from a planning inspector, there is no different standard of reasons: see *ClientEarth v SSBEIS* [2020] PTSR 1709 at [146] and *SSCLG v Allen* [2016] EWCA Civ 767 at [19]. However, "*if disagreeing with an inspector's recommendation the Secretary of State is required to explain why he rejects the inspector's view*": *Horada v SSCLG* [2016] EWCA Civ 169 at [40]. Reasons do not need to be given for the way in which every material consideration has been dealt with: *HJ Banks & Co Ltd v SSCLG* [2019] PTSR 668. However, if a decision maker is going to depart from a relevant policy, it must acknowledge that fact and give clear reasons so that the recipient of the decision will know why it is being made as an exception to the policy and the grounds on which the decision is made: *Gransden & Co Ltd v SSE* (1987) 54 P&CR 86 at 94.

Overarching National Policy Statement for Energy (EN-1)

43. NPS EN-1 (in Part 4) under the heading "Assessment Principles" provides that, given the level and urgency of the need for infrastructure of the types covered by the energy

NPSs the Defendant should start with a presumption in favour of granting consent to applications for such infrastructure. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs indicate that consent should be refused (4.1.2) **[-67]**.

44. Further, in considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the Defendant is required to take into account its potential benefits, including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits, and its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts (4.1.3) **[-67]**.

45. NPS EN-1 contains specific policy on alternatives to a given project in section 4.4. It provides that the relevance or otherwise to the decision-making process of the existence (or alleged existence) of alternatives to the proposed development is in the first instance a matter of law. NPS EN-1 from a policy perspective contains no general requirement to consider alternatives or to establish that the proposed project represents the best option (4.4.1) **[-71]**.

46. Where there is a policy or legal requirement to consider alternatives, the obligation on the applicant is to describe them. Given the level and urgency of the need for new energy infrastructure, the Defendant is then required to be guided by the principles set out in paragraph 4.4.3 of NPS EN-1 in deciding what weight should be given to any alternatives **[-72 to 73]**. Those principles include the following:

    a. The consideration of alternatives should be carried out in a proportionate manner;

    b. The Defendant should be guided in considering alternatives by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale as the proposed development;

    c. Alternative proposals which would mean that the necessary development could not proceed or which would not be physically suitable can be excluded on the basis that they are not important and relevant; and

d. It is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant).

47. Section 5 of NPS EN-1 deals with generic impacts and at section 5.8 addresses the historic environment. At paragraph 5.8.14, it provides that there should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be **[-115]**. Loss affecting any designated heritage asset should require clear and convincing justification. Paragraph 5.8.15 requires that any harmful impact on the significance of a designated heritage asset should be weighed against the public benefit of the development, recognising that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss **[-115 to 116]**.

GROUNDS OF CLAIM

Ground 1: (a) mistake of fact; (b) failing to take into account relevant evidence

(a) Mistake of fact

48. The four requirements for "mistake of fact giving rise to unfairness" as set out by Carnwath LJ in *E v SSHD* [2004] QB 1044 at [66] are made out.

(i) Mistake as to an existing fact

49. The Defendant's decision is founded on his mistake that the Feasibility Study concluded that Mannington substation was not considered to be technically suitable as a proposed connection point for the Proposed Development because, at the time of the Feasibility Study being undertaken, there was already a connection agreement in place for the Navitus Bay windfarm. Indeed, the Defendant goes so far as to assert that (DL4.8) **[CB1-78]**:

> *"The Feasibility Study notes that the substation was not considered suitable for the proposed connection agreement because, at the time, there was already a connection agreement in place for the proposed Navitus Bay offshore wind farm."*

50. Paragraph 4.8 of the DL expressly distinguishes between the Feasibility Study and the Addendum to the Environmental Statement i.e. the Supplementary Alternatives Chapter and, therefore, there can be no suggestion that the Defendant was intending to refer to the Addendum rather than the Feasibility Study **[CB1-78]**.

51. The Feasibility Study, which is commercially sensitive and subject to confidentiality requirements (as noted in the Supplementary Alternatives Chapter at 5.1.6.1), was not before the examination or the Defendant, but its relevant conclusions on the selection of the substation location were set out in the Application documentation and in documents submitted to the examination by the Claimant and NG ESO **[-265]**. The same is the case for the CION. Neither the documents nor evidence submitted by the Claimant stated that the Feasibility Study concluded that the connection agreement for Navitus Bay was the reason Mannington was not suitable to provide a connection point for the Proposed Development. Further, as a matter of fact, it did not.

52. The reasons why the Feasibility Study identified Mannington as unsuitable were clearly explained within the Application documents and later submissions made during the examination of the Application, as set out at paragraphs 17-26 above. A connection point at Mannington as with any other connection location to the west of Lovedean would have required additional reinforcement works involving new overhead lines or cables, additional operational equipment and/or multiple substation upgrades to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety, in addition to all or nearly all the same reinforcements as required for a connection to Lovedean substation. As NG ESO itself explained, this "*would likely have resulted in more overall reinforcements, which would therefore lead to more environmental impact, and increased costs to the GB consumer"* (see NG ESO submission of 25 January 2021, quoted at paragraph 19 above) **[-404]**.

53. Despite this evidence, the Defendant has erroneously assumed that the outcome of the Feasibility Study was sensitive to whether Navitus Bay was consented (see paragraphs 17 and 22 of the Response to Pre-Action Protocol Letter dated 18 February 2022) **[CB1-111 to 112]**. NG ESO has confirmed in an email dated 1 March 2022 the reasons why the findings of the Feasibility Study were not sensitive to the cancellation of Navitus Bay as set out in their submission to the ExA **[-904 to 908]**. This letter was not before the Defendant, but its admission is justified by reference to the principles in *Ladd v Marshall* [1954] 1 WLR 1489. The decision-making process under the Act is one in

which the parties share an interest in co-operating to achieve the correct result. The purpose of this evidence is to confirm the factual accuracy of what NG ESO had stated in its 25 January 2021 submission and the Claimant had stated in its response to the Third Information Request and to explain that the assumption made by the Defendant, which the Claimant received no notice of prior to the Decision and could not reasonably have anticipated, is factually inaccurate.

(ii) Fact established in the sense that it was uncontentious and objectively verifiable

54. The relevant substance of the Feasibility Study was uncontentious. The Defendant notes NG ESO's reasons for discounting the other substations including Mannington without any adverse comment (DL 4.5) **[CB1-77]**. Had there been any doubt in the Defendant's mind as to the accuracy of the Claimant's and NG ESO's account of the factual position that could and should have been verified by him through a direct request to the NG ESO or the Claimant. No such request was made.

(iii) The Claimant must not have been responsible for the mistake

55. The Defendant, not the Claimant, was responsible for the mistake. It was evident from the Application documents, the submissions of the Claimant and NG ESO during the course of the examination and subsequently, in particular the Claimant's response to the Third Information Request, that the reasons why the Feasibility Study identified Mannington to not be suitable for the proposed connection was not because there was already a connection agreement in place for Navitus Bay. Rather it was due to the need for additional reinforcements to the transmission network that would be required to transport the power to Lovedean or Exeter substations (which are both located at junctions in the network so as to allow power to travel north, whereas Mannington is not). There was no evidence, technical or otherwise, that the cancellation of the proposed 970MW connection for Navitus Bay (less than half of the 2000MW capacity of the Proposed Development and involving the supply of power only) was capable of changing this fact, which is a consequence of the location of Mannington on the existing 400 kV transmission network.

56. The misunderstanding on the part of the Defendant with regard to the conclusions of the Feasibility Study first appeared in the Third Information Request issued on behalf of Defendant, as set out above at paragraph 23. At that point the Claimant, in its

response to the Third Information Request, specifically drew to the Defendant's attention the correct factual position. The Claimant provided clarification as to why Mannington was discounted as a suitable connection point for the purposes of the Feasibility Study undertaken by NG ESO and referred the Defendant to, and quoted from, the submissions of NG ESO's submissions of 25 January 2021. There was no justification for the Defendant persisting with this misunderstanding in his decision.

(iv) The mistake played a material (not necessarily decisive) part in the reasoning

57. The potential suitability of Mannington as an alternative grid connection point was the sole reason why the Proposed Development was refused consent. As is clear from the reasoning contained in DL 4.8 – 4.17, the central focus of the decision was the refusal of consent for Navitus Bay **[CB1-78 to 81]**. It is this reasoning which led to the conclusion in DL 4.18 that the Claimant had failed adequately to consider the alternative of Mannington as a connection point **[CB1-81]**.

58. NG ESO had explained that connection options to the west of Lovedean required additional network reinforcements, resulting in greater environment impact and increased costs. Mannington was only one of the options to the west which was discounted for this reason, with others being Nursling, Marchwood, Fawley and Botley Wood substations. The discounting of those substations for that purpose has not been challenged in any way by the Defendant, who has therefore accepted the reasoning in relation to those, but (without any explanation) not in relation to Mannington. The only distinguishing feature for Mannington relied upon, was the former connection agreement with Navitus Bay. Therefore the Defendant's mistaken belief as to the content of the Feasibility Study must have been, at the very least, a material factor in his decision.

59. Accordingly, the Defendant's decision to refuse development consent is flawed by reason of a mistake of fact giving rise to unfairness.

(b) Failure to take the evidence into account

60. The Defendant's mistake of fact itself justifies quashing of the decision. The Defendant has however compounded his error by failing to take into account relevant evidence on related matters. This constitutes an additional legal error which further justifies quashing.

61. In particular, the Defendant's further contention (DL 4.15) that the Claimant should have undertaken further work to assess the grid connection point at Mannington once it became aware of the consent refusal for Navitus Bay misunderstands or fails to have regard to the following facts **[CB1-80 to 81]**:

    a. Mannington had been identified by NG ESO in the Feasibility Study not to be feasible as a connection point for reasons unrelated to Navitus Bay.

    b. The Claimant was also aware of additional concerns or issues regarding Mannington at this point (see paragraphs 17c and 26 above), namely:

        i. The potential landfall locations to provide for a grid connection to Mannington were not preferable to those for a grid connection to Lovedean;

        ii. It would have been necessary for the submarine cables to be longer than to a landfall location to Lovedean;

        iii. Such longer submarine cables would have need to cross the major shipping lane in the English Channel for an increased duration;

        iv. The submarine cables for a connection to Mannington would also have needed to cross the IFA2 Interconnector;

        v. The submarine cables would have been subject to more difficult subsea conditions and increased environmental protections[1]; and

        vi. Concerns that Mannington may not be able to be extended as would be required to accommodate the Proposed Development given the position of existing Static Var Compensation (SVC) within the substation meaning it may not be suitable for an extension at all and because there are residential properties in close proximity on three sides.

62. This was explained in clear terms to the Defendant at paragraphs 2.17 to 2.19 of the Claimant's response to the Third Information Request and in the *Applicant's Post Hearing Notes – Appendix 6 – Technical Note – Consideration of Alternatives (Connections)* (1 March 2021), including that the matters identified at paragraph 61(b)

1 See Environmental Statement - Volume 2 – Figure 8.2 Protected Areas (MCZ, Ramsar and SAC) and Figure 9.9 Designated Sites **[[redacted]-241 to 242]**

(ii) – (v) were reasons why Chickerell was identified to not be a suitable connection point[2] **[-800; 408 to 413]**.

63. As such, the Claimant knew there was no sound reason to seek to re-investigate a connection to Mannington at that stage when considering alternatives in a proportionate manner.

64. Although Interested Parties made comments regarding the relevance of referring to the Jurassic Coast (DL 4.13, 4.14), the landfall at Eastney was preferable to all identified landfalls for a connection to Mannington as explained by the Defendant[3] **[CB1-80]**. Further, the Claimant's response to the Third Information Request set out the multiple other clear reasons why Mannington was not a feasible alternative connection point for the Proposed Development (see paragraph 25 above), none of which are relevant to or affected by the cancellation of a connection for Navitus Bay.

65. The Defendant further suggested in his Decision (repeated in substance in his Response to the Pre-Action Protocol Letter paragraphs 18 and 21) that:

> *"The Secretary of State notes that the Applicant understood the potential importance of the refusal of consent for Navitus Bay offshore wind farm, at the time, as it raised queries with NGET regarding the impact of this on the Feasibility Study."* (DL 4.17) **[CB1-112; 81]**

66. The Defendant appears to be suggesting based on the Claimant's response to the Third Information Request that the Claimant was concerned that the cancellation of the Navitus Bay connection to Mannington might have meant Mannington was a feasible grid connection point for the Proposed Development. That is not a fair or reasonable assumption to draw from the Claimant's responses, nor is it correct. The Claimant's enquiries made of NGET in October 2015 related to whether the refusal of consent for Navitus Bay might affect the cost benefit analysis of the proposed Lovedean connection having regard to the wider transmission network and in the context of a comparative exercise between connections at Bramley and Lovedean, recognising that changes to the wider transmission network might have an effect on that cost benefit analysis. It made no enquiry as to whether Mannington might have become a suitable alternative

2 See section 5.2.5 of Environmental Statement Addendum – Appendix 3 – Supplementary Alternatives Chapter **[-273 to 277]**

3 See paragraph 2.4.3 of Chapter 2 of ES – Consideration of Alternatives, ES – Volume 3 – Appendix 2.2. Landfall Weighting and paragraph 2.9 of the Applicant's Response to the Third Information Request **[-177 to 179; 897 to 903; 799]**.

connection point, because it was aware that, as with the other substation locations that were discounted for the same reasons and for the multiple other reasons which were identified, it was not a feasible connection point irrespective of Navitus Bay. The witness statement of Kirill Glukhovskoy filed with this claim exhibits the enquiry made of NGET in October 2015. This was not before the ExA or Defendant, but its admission is justified by reference to the principles in *Ladd v Marshall* [1954] 1 WLR 1489. The decision-making process under the Act is one in which the parties share an interest in co-operating to achieve the correct result. The purpose of this evidence is to confirm the factual accuracy of what was said in the Claimant's response to the Third Information Request and to explain that the assumption made by the Defendant, which the Claimant received no notice of prior to the Decision and could not reasonably have anticipated, is factually inaccurate.

Ground 2: Failure to discharge the section 104 duty

67. The Defendant fell into legal error by failing to comply with the approach to decision-making mandated by section 104 of the Act.

68. First, section 104(2) and (3) of the Act required the Defendant in deciding the Application both to have regard to NPS EN-1 and to decide the Application in accordance with NPS EN-1 unless any of subsections 104(4) to (8) applied. An essential primary step in the Defendant's decision was therefore to decide whether the development did or did not accord with NPS EN-1.

69. The Defendant omitted that essential step and made no finding on whether or not the Proposed Development did or did not accord with NPS EN-1 judged on its merits.

70. Secondly, section 104(7) provides an exception to the obligation to decide the application in accordance with NPS EN-1 where the Defendant is satisfied that the adverse impact of the proposed development would outweigh its benefits. The relevant exception required a positive decision by the Defendant that he was *"satisfied that the adverse impact of the proposed development would outweigh its benefits"*.

71. The Defendant made no finding that he was satisfied that its adverse impacts outweighed its benefits. Instead, the reason given for his disagreeing with the ExA was that in the alleged absence of a proper assessment of a connection to the Mannington substation:

"*... he cannot ... determine that the need for and benefits of the proposed Development would outweigh its impacts"* (DL 7.4) **[CB1-85]**

72. The Defendant thereby misapplied section 104(7) by treating it as creating a different and further test for the Claimant to pass before being able to rely on the presumption in favour, namely demonstrating to his satisfaction that the need for the development and its benefits do outweigh its impacts. That is not what section 104(7) provides.

73. Accordingly, by his decision the Defendant both deprived the Proposed Development of the presumption in its favour without deciding whether it accorded with NPS EN-1 and subsequently misapplied section 104(7) so as to create an additional hurdle for the Proposed Development not found in the statute. In the DL, the Defendant consistently applied the wrong test of whether the need for and benefits of the development outweighed its impacts (see DL paragraphs 3.6 and 7.4) **[CB1-75 to 76; 85]**. The Defendant's approach was wholly erroneous in law.

Ground 3 - Failure to apply policy in NPS EN-1

74. It is clear from the decision that the Defendant has treated the alleged potential for a connection to Mannington in 2016 as an overriding objection to the making of the Order in 2022. In so doing, the Defendant has short-circuited the correct decision-making process, which results in his failing to apply his own NPS EN-1 policies as he was required to do and to undertake the balance of considerations which he was required to perform. The Defendant's error in respect of policy is twofold.

75. First, in accordance with the principles of assessment contained in Part 4 of NPS EN-1, given the level and urgency of the need for infrastructure that NPS EN-1 relates to, the Defendant should have started with a presumption in favour of the grant of consent unless any more specific and relevant NPS EN-1 policies indicated that consent should be refused (4.1.2) **[-67]**. Further, the Defendant was required by policy when weighing the adverse impacts against the benefits, to take account of the Proposed Development's potential benefits, including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits and its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts (4.1.3) **[-67]**.

76. On the accepted findings of the ExA on adverse effects, the only specific and relevant policy which was in principle capable of disapplying the presumption in favour of the grant of consent was that contained in NPS EN-1 paragraph 5.8.14, namely the presumption in favour of the conservation of designated heritage assets **[-115]**. Whether or not this designated heritage assets presumption disapplied the presumption in favour of the grant of development consent, required the Defendant to weigh the less than substantial harm to the setting and significance of the two designated heritage assets affected (Scotland and Fort Cumberland) against the significant public benefits of the Proposed Development (NPS EN-1 paragraph 5.8.15) **[115 to 116]**. It was therefore critical that he undertook that balance to establish whether or not the Proposed Development benefitted from the presumption in favour of the grant of consent. The Defendant failed to do so.

77. Contrary to policy, the Defendant made no finding at all as to whether the Proposed Development benefitted from the presumption in favour of the grant of consent. Nowhere does he weigh the less than substantial harm identified by the ExA to just two designated heritage assets against the urgent and compelling national need for the Proposed Development as he was required to do.

78. This policy in NPS EN-1 was an obligatory material consideration. The Defendant's failure to apply it, and / or failure to give any reasons for departing from it, is an error of law.

79. Secondly, the Defendant failed to apply policy on alternatives in NPS EN-1. In so far as alternatives were material to his decision, it was necessary for the Defendant to understand correctly how a possible alternative bore on his decision-making process and, in deciding what weight to give to that possible alternative, to apply the policy in NPS EN-1.

80. Paragraph 4.4.3 of NPS EN-1 provides that, in deciding what weight to give to a possible alternative:

> "the [Defendant] should be guided in considering alternatives by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) in the same timescale as the proposed development" **[-72 to 73]**

81. As is clear from his decision, the sole ground on which the Defendant refused development consent for the Proposed Development in 2022 was the alleged failure on

the part of the Claimant to give greater consideration to Mannington following the refusal of Navitus Bay in 2015/6 or at a later stage and that further consideration of that site "*could", "might"* or might not (DL 4.15, 4.21, 7.3) provide an alternative to avoid the impacts of the Proposed Development **[CB1-80 to 82; 85]**. This the Defendant claims "*weighs significantly"* against it (DL 4.18, 7.3) **[CB1-81; 85]**. On this basis, the Defendant was apparently unable to reach any conclusion on whether or not the need for and benefits of the Proposed Development outweighed its impacts (DL 7.4) **[CB1-85]**.

82. The Defendant's decision was erroneous in law. In deciding to accord significant weight to the possibility of Mannington as an alternative, he gave no consideration as he was required to do by paragraph 4.4.3 of NPS EN-1 to **[-72 to 73]**:

    a. The urgency of the need found by the ExA;

    b. The important consideration of whether or not the same contribution to meeting need could be made by a connection to Mannington in the same timescale as required by NPS EN-1; or

    c. The prospects of Mannington being able to serve as the connection point for the Proposed Development, notwithstanding that NPS EN-1 required him to consider whether there was a "*realistic prospect*" of a claimed alternative meeting the same need. The Defendant failed to make any finding or any consistent finding on this matter in circumstances where the ExA had found that:

> *"... no party has submitted substantive reasoned evidence to demonstrate that an alternative would be technically feasible or would lead to lesser environmental effects compared to the Proposed Development."* (ExAR 5.4.31) **[1-515]**

83. In the circumstances of the absence of any proven realistic alternative and the inevitable significant delay in delivering the proposed infrastructure capacity which would result from his refusal of development consent, the Defendant's decision to refuse development consent involved a clear departure from relevant policy. Nowhere in his decision does the Defendant acknowledge this departure and no reasons, let alone any adequate reasons, were given by him for departing from relevant policy which was an obligatory material consideration.

Ground 4: Breach of *Tameside* duty

84. The Defendant's failure to seek further information on the feasibility of Mannington was a breach of his duty to take reasonable steps to inform himself so as to be able to answer the question before him (*Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 at 1065B).

85. The Defendant at no stage took the opportunity in his multiple requests for further information to ask the Claimant for further information as to the feasibility of Mannington in the event that he had any outstanding concern as to the sufficiency of information, in circumstances where the issue had been thoroughly examined by the ExA. The Defendant instead confined himself to asking (in the Third Request for Information):

> "… *[The Defendant] would be grateful for clarification from the Applicant in respect of how long the connection agreement for the Navitus Bay development remained in place following that refusal, what enquiries the Applicant made in respect of the potential use of the Mannington substation following the refusal of the Navitus Bay project and at what stage the development of the AQUIND interconnector project was when the connection agreement ended.*" **[-790]**

86. No queries or concerns were raised in relation to the Applicant's evidence as to the feasibility or suitability of Mannington as a connection point for the Proposed Development, including by interested parties prior to the Defendant requesting information in relation to Mannington in his Third Information Request.

87. The Defendant's actions and omission thereby deprived himself of the opportunity to properly inform himself. By reason of his inadequate enquiries, the Defendant was left apparently unable to conclude whether Mannington was a feasible alternative (DL 7.3) **[CB1-85]**.

88. The ExAR had made a finding, not disputed by the Defendant, that there was an urgent and compelling need case for the Proposed Development. Refusing development consent without enquiring as to the feasibility of an alternative is wholly irrational in light of the urgent and compelling need and when a simple enquiry could have elicited the further information which the Defendant acknowledged could have resolved his concern (DL 4.21) **[CB1-82]**.

89. The Mannington alternative was the sole issue, on the Defendant's view, standing between the Proposed Development and the grant of development consent. The

Defendant's decision does not question the ExAR's assessment which led it to conclude that the balance weighed "*strongly*" in favour of development consent in any respect other than on the Mannington issue. For the Defendant to 'down tools' and refuse consent rather than seek information on this single possible stumbling block was irrational.

Ground 5: unfairness

90. The Defendant's decision is vitiated by reason of procedural unfairness causing material prejudice to the Claimant. The Defendant acted unfairly and contrary to the principles set out in *Hopkins Development Ltd v SSCLG* [2014] PTSR 1145 at [62]. Contrary to the Defendant's assertion (DL 4.13), the Claimant had no reasonable opportunity to respond to any unspoken view held by him that Mannington was a potential feasible alternative **[CB1-80]**. As noted above, the question in the Third Request for Information did not relate to the feasibility of Mannington and the Claimant could not reasonably anticipate that the Defendant might require further information on this issue given the detailed information already provided on the subject by both the Claimant and NG ESO, the absence of any contrary evidence, and the fact that the unfeasibility of Mannington as an alternative had not been challenged in the examination. In these circumstances, for the Defendant to treat one single alternative out of the very significant number of alternatives considered in the application and examination (both in respect of connection points, as well as all other scheme alternatives) as fatal to the Application required fair notice to the Claimant. None was given.

Ground 6: reasons

91. Nowhere in his decision does the Defendant explain why, even were Mannington in 2022 a reasonable alternative to the Proposed Development, it stood effectively as an overriding planning objection to it, given the limited number, range and extent of the Proposed Development's impacts when judged in the light of the compelling and urgent need which the ExA concluded resulted in the planning balance lying *"strongly in favour of granting development consent"* (ExAR 9.3.11) **[·692]**. In particular the Defendant failed:

    a. To explain why the Mannington substation alternative was treated as potentially suitable when it had been rejected for reasons which the Defendant accepted in

relation to the Nursling, Marchwood, Fawley and Botley Wood substations (paragraph 58 above) and in circumstances where the Claimant had advanced a number of unchallenged reasons as to why it was not suitable (paragraph 61b above);

b. To explain whether he had concluded that the proposed development complied with NPS EN-1 overall or, if he concluded that it did not, to explain which parts of NPS EN-1 which were said to be breached and why this justified a different conclusion on overall compliance to that reached by the ExA (paragraphs 75-78 above); and

c. To explain how he applied paragraph 4.4.3 of NPS EN-1 in relation to the Mannington substation alternative, as to:

   i. Whether there was a realistic prospect of the alternative delivering the same infrastructure capacity in the same timescales as the proposed development and, if so, on what basis;

   ii. If he did not find that there was such a realistic prospect, why he nevertheless concluded that significant weight be accorded to the alternative as a departure from policy (paragraphs 81-83 above).

92. Further, given the context set out under Ground 3, the Claimant was entitled to proper, adequate and intelligible reasons as to the basis upon which the undisputed urgent national need did not outweigh the disbenefits. It was incumbent on the Defendant to explain by reference to the nature and extent of the particular impacts not only why alternatives fell to be taken into account but also, even if an alternative existed, its existence so reduced the benefits of the Proposed Development that the impacts outweighed them. In particular:

    a. The Defendant was required to reach a planning judgment on the Proposed Development on its merits;

    b. If the Defendant concluded that the Proposed Development was in conflict with NPS EN-1 when considered as a whole, it was incumbent on him to express that conclusion and explain why he reached that view, notwithstanding the judgement of the ExA. In the absence of any such conclusion it is to be inferred that the Defendant agreed with the conclusions of the ExA that there was no overall conflict with NPS EN-1;

c. In such circumstances, the reasoning should enable the Claimant to understand why the existence of a potential alternative scheme that might be even more acceptable should lead to a decision contrary to the presumption contained in section 104(3) in circumstances in which the Defendant has not been able to conclude that the adverse impacts of the development outweigh its benefits.

93. No such reasoning appears in the decision letter and it is entirely unclear how the Defendant's decision has been reached in accordance with section 104. Nowhere does the Defendant explain why, where it is to be inferred he has concluded that the Proposed Development is in accordance with NPS EN-1, this was a case in which it was *"exceptionally necessary"* by reason of its adverse effects to consider whether sufficient consideration had been given to whether there were more appropriate alternatives to the proposed routes (DL 3.6, 4.17, 7.2) **[CB1-75 to 76; 81; 85]**.

94. The Defendant did not disagree with the ExA's assessment of the significance of the impacts or how they fell to be assessed against the relevant policy tests contained in NPS EN-1. His only additional reference was to possible delay to the North Portsea Island Coastal Defence Scheme (DL paragraph 3.5) which was not an issue which had been raised before the ExA but which was one which was raised in his Second Information Request **[CB1-75]**. However, the DL does not identify how this possible impact fell to be applied against the relevant policy tests or what weight should be attached to it. Further, as an issue, it attracted no express reference in section 7 of the DL dealing with the Planning Balance **[CB1-85]**.

95. Insofar as the Defendant advances any reason for treating this as an exceptional case, he has simply stated that the residual impacts would arise "through a very densely populated area", i.e. Portsmouth (DL 4.20) **[CB1-82]**. However, the NPS EN-1 policy tests were devised to apply to relevant infrastructure wherever it might be proposed in urban and rural areas alike. Where relevant, the policies allow for the relative sensitivity of different receiving environments (whether because of density of population, presences of protected habitats or species, landscape sensitivity or otherwise) in reaching the decision as to whether NPS is complied with overall.

96. The circumstances here demanded an explanation from the Defendant as to why an exceptional approach was justified, but none was provided and the Claimant is unable to ascertain why the Defendant approached the decision as he did. The Claimant, and

indeed other developers promoting nationally significant infrastructure projects to which the policies apply, are significantly prejudiced by reason of being left unable to understand what was exceptional about this case.

REMEDY SOUGHT

97. For all the above reasons the Defendant's decision was unlawful and the Claimant seeks an order that it be quashed, with costs.

SIGNIFICANT PLANNING CLAIM

98. The Claimant requests that this claim is categorised as a "significant" Planning Court claim by the Planning Liaison Judge, pursuant to paragraph 3.1 of Practice Direction 54D. The claim satisfies at least three of the criteria within paragraph 3.2 of Practice Direction 54D (even though only one may be sufficient), namely sub-paragraphs (a), (c) and (d). The claim relates to infrastructure subject to the Planning Act 2008 regime and which is therefore by definition of national significance. The ExAR concluded that there is an urgent and compelling need for the Proposed Development due to its "*national benefits*" in terms of energy supply and interconnection, and accommodation of decarbonised electricity generation (ExAR 9.4.1) **[-693]**. The Proposed Development has generated significant public interest, including representations by a number of MPs. Finally, there is a significant volume of material of a technical nature, which is best dealt with by a Judge with significant experience of handling such matters.

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