Neutral Citation Number: [2023] EWHC 98 (Admin)

Case No: CO/755/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2023

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE KING
(on the application of)
AQUIND LIMITED

Claimant

and

SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

and

PORTSMOUTH CITY COUNCIL

Interested Party

- -
- -

Mr Simon Bird KC and Mr Hugh Flanagan (instructed by **Herbert Smith Freehills LLP**) for the **Claimant**
Mr James Strachan KC and Mr Mark Westmoreland Smith (instructed by **Government Legal Department**) for the **Defendant**
Ms Celina Colquhoun (instructed by **Portsmouth City Council**) for the **Interested Party**

Hearing dates: **22 and 23 November 2022**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 24 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MRS JUSTICE LIEVEN

Mrs Justice Lieven DBE :

1. This is an application for judicial review under s.118(2) of the Planning Act 2008 ("PA") of the decision of the Secretary of State for Business, Energy and Industrial Strategy ("SoS") dated 20 January 2022 to refuse development consent for UK and UK marine elements of the AQUIND Interconnector.

2. The Claimant is AQUIND Limited, the promoter of the interconnector project. The project is a new 2,000MW subsea and underground bi-directional electric power transmission link between the south coast of England and Normandy in France. It would 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.

3. Mr Bird KC and Mr Flanagan appeared for the Claimants, Mr Strachan KC and Mr Westmoreland Smith appeared for the Defendant, and Ms Colquhoun appeared for the Interested Party, Portsmouth City Council.

4. The application was considered by the Examining Authority ("ExA") which produced a detailed report finding compliance with National Policy Statement ("NPS") EN-1 and recommending approval. The ExA found that there was a need for the project and the harm found was outweighed by the need. The ExA considered alternatives which had been considered by the Claimant.

5. The Defendant considered the ExA report and made three Information Requests seeking further information on various issues. One of these related to the consideration that had been given to an alternative substation location at Mannington. Mannington, along with 9 other possible substations, had been considered by the Claimant at a much earlier stage, but had been rejected. The reasons for that rejection are contentious, but as a matter of fact, Mannington had been the substation which was intended to be used for a large offshore windfarm on the Solent called Navitus Bay. Navitus Bay was refused consent in September 2015.

6. The Defendant refused development consent for the interconnector on 20 January 2022. The sole ground for refusal was that the Claimant had failed to properly consider an alternative substation location at Mannington once Navitus Bay had been refused. The Defendant found that the Claimant had not properly considered alternatives and therefore the development should be refused.

Grounds of Challenge

7. The Claimant raises six grounds of challenge, the issues raised being whether in his determination to refuse development consent the Defendant:

    (i) made or was misled by his officials into making a material error of fact as to the potential feasibility of Mannington as a grid connection point for the proposed development; (Ground 1a)

    (ii) failed to take account of material evidence as to the feasibility of Mannington as a grid connection point; (Ground 1b)

(iii) failed to comply with the approach to decision-making mandated by section 104 PA; (Ground 2)

(iv) failed to apply his own NPS EN-1 policies to the proposed development; (Ground 3)

(v) failed in breach of his duty to take reasonable steps to inform himself as to the feasibility of Mannington so as to be able to discharge the requirements of section 104 PA; (Ground 4)

(vi) adopted a decision-making procedure which was procedurally unfair, causing the Claimant material prejudice; (Ground 5) and

(vii) failed to give proper, adequate and intelligible reasons for his decision (Ground 6).

8. Mrs Justice Lang granted permission for judicial review on all grounds.

The Facts

9. The interconnector is intended to bring electricity from France to link into the UK network. The nature of the project is that neither end point is fixed. In broad terms the elements of the project are the exit point on the French coast; the subsea cable; the landfall site in the UK; and the substation which allows the interconnector to link into the UK high voltage power network. Two important considerations in the planning of the scheme were the cost of the cable, and therefore the desirability of minimising length; and the need to minimise the crossing of busy shipping lanes. These factors, amongst others, led to a location near Le Havre for the landfall in France.

10. This then led to a consideration of potential landfall locations and substations along the English south coast, roughly between Hastings to the east and Weymouth to the west. Self-evidently the substations are fixed locations on the existing high voltage national transmission lines. There is a line which runs roughly parallel to the south coast, with the closest substation to Hastings being Bolney; a substation at Lovedean, north of Portsmouth and just outside the South Downs National Park; Mannington, north of Bournemouth; and Chickerell, north of Weymouth.

11. In December 2014 the Claimant requested National Grid Electricity Transmission ("NGET") to undertake a Feasibility Study of potential connections to the National Grid for the Claimant's proposed interconnector. The NGET Feasibility Study has been treated as confidential throughout the process and neither the Defendant nor the Court has seen it. Information about the Feasibility Study was subsequently given by the Claimant through the development consent process.

12. On 11 September 2015 the Navitus Bay offshore windfarm was refused. Navitus Bay was a very large proposed windfarm located off the coast at Bournemouth and relied on a potential substation connection to the National Grid at Mannington.

13. In January 2016 the final version of the NGET Feasibility Study was produced. In February NGET made a connection offer to the Claimant in respect of Lovedean as the connection point for the Project into the National Grid. Lovedean lies to the north of Portsmouth just outside the South Downs National Park.

14. In March 2016 NGET produced the Connection and Infrastructure and Options Note ("CION").

15. On 14 November 2019 the Claimant applied for development consent under the PA. The application was for a landfall location at Eastney, which is on the coast at Portsmouth, and a connection to the Lovedean substation.

16. The application documents included the Environmental Statement ("ES"). Volume 1 Chapter 2 of the ES is the "Consideration of Alternatives". This sets out the process by which the landfall and substation locations were arrived at. In relation to the substation location, 2.4.2.1 refers to the NGET Feasibility Study, meetings between the Claimant and NGET, and the criteria that were applied (2.4.2.2). These include the proximity of the substation to the South Coast so as to minimise onshore cable length and associated environmental disruption from the cable installation.

17. At Plate 2.2 ten substation connection sites are identified within the search area. 2.4.2.4 says NGET discounted seven of these, including Mannington, and says:

> *"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."*

18. Chapter 2 goes on to explain in more detail why Chickerell and Bramley were rejected.

19. Section 2.4.2 considers potential landfall sites. There are 29 locations considered, from Bognor Regis in the east to West Bay (near Bridport) in the west. These are ranked on various criteria. It is worth noting that the landfall locations were assessed at the point when three substations (Lovedean, Bramley and Chickerell) were still under consideration. One of the criteria for selection was distance between landfall and connection, and the preference being for no more than 35km. Given that Chickerell lies well to the west of Mannington, the list of possible landfall locations when Chickerell was still being considered was likely to be similar to the position if Mannington had still been subject to consideration. In other words, there would not have been additional potential landfall locations in play if Mannington had been under consideration.

20. In the light of the decision to proceed with Lovedean, the landfall search narrowed to six locations within 35km of Lovedean, those being between Lee and Selsey, all lying to the east of the Solent.

21. On 19 February 2020 Portsmouth City Council ("PCC") submitted representations, including raising concerns about the consideration of alternatives, but not referring to any specific alternative locations.

22. On 6 October 2020 the Claimant submitted the ES Addendum-Appendix 3 Supplementary Alternatives ("the Supplementary ES").

The Supplementary ES

23. This is a critical document in the case and a number of sections are relevant:

a. 1.1.1.8 points to the linear nature of the project where the changing of one aspect impacts on another, with cross over between the choices of different elements;

b. 2.2.1.10 states that the Claimant carried out the assessment of alternatives, but the decision took into account information provided by National Grid regarding connection points;

c. Chapter 3 deals with the approach taken to the consideration of alternatives and 3.1.1.1 states the approach was whether there was a realistic prospect of delivering the same infrastructure capacity in the same timescale, mirroring the language in EN-1;

d. 4.1.2.7 refers to the cables being the largest part of the capital expenditure for the project, and therefore minimising the cable length being an important consideration;

e. 4.1.3 sets out initial discussions with NGET and 4.1.3.5 states:

> *"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."*

f. Section 5 deals with the grid connection points (i.e. the substations) and the process of reaching Lovedean. Reference is made to the initial ten locations and at 5.1.1.4 it states three were selected to be taken forward to identify whether they were feasible connection points. 5.1.1.5 and 5.1.1.7 state:

> *"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."*

5.1.1.7 (above) is an important paragraph, which Mr Strachan heavily relies upon;

g. There is then a detailed consideration of Chickerell, which included issues around landfall locations to serve that substation.

25 January 2021 letter from National Grid Electricity Systems Operator

24. On 25 January 2021 National Grid Electricity Systems Operator ("NGESO"), submitted a letter to the ExA in response to a written question "regarding NGESO's limited scope of activities in relation to the Feasibility Study and subsequent Connections and Infrastructure Options Note (CION)". In April 2019 National Grid's role as the systems operator had been separated into NGESO. For the purposes of this case this simply means that NGET became NGESO.

25. The letter produced a transmission plan, similar but slightly larger than that in the ES. The letter then says:

> *""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."* [emphasis added]

26. On 1 March 2021 the Claimant submitted a Post Hearing Note to the ExA. This states it was produced in the context of on-going discussion with the South Downs National Park Authority to resolve outstanding queries in relation to the selection of Lovedean. The Note states:

> *"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."*

27. It then refers to all the other 7 locations and states in respect of Mannington:

> *"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."*

28. Mr Strachan makes the valid point that the Note neither gives prices for reinforcement works nor specific reasons for rejection that go beyond the more generalised comments about Mannington, and the Navitus Bay issue. The Note ends:

> *"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 the National Grid and the project and the time that it would take for the interconnector to become operational."*

29. It is worth noting, as part of the context, that Lovedean has a connection that runs north to Fleet substation and then north with connections into London and further

afield. Mannington is on the east-west South Coast line and does not have direct connectivity towards London.

30. On 8 June 2021 the ExA's report was sent to the SoS.

The Examining Authority's Report

31. The ExA recommended approval and the Examining Authority's Report ("ExAR") runs to 367 pages. The overall conclusion was "overall, the need case for the Proposed Development strongly outweighs the identified disbenefits" (12.2.1). The Report sets out the conclusions on each issue at the end of the relevant chapter. At each stage the ExA tested the proposal against the relevant National Policy Statement EN-1. Chapter 5 covers the need for the development and the consideration of alternatives; Chapter 9 has the conclusions on the case for development consent; Chapter 10 on compulsory acquisition, and Chapter 12 the overall summary of findings.

32. Chapter 5 records that:

    a. a number of objections ("Relevant Representations") argued that the ES did not provide a robust consideration of alternatives (5.4.15);

    b. NGESO confirmed the reasons behind discounting the other substations (5.4.24);

    c. At 5.4.31 the ExA said:

> *"The ExA is mindful of references to the consideration of alternatives in the NPS EN-1 including, at paragraph 4.4.3 (bullet 8), that where third parties are proposing an alternative, it is for them to provide the evidence for its suitability. In such instances it is not necessarily expected that the Applicant would have assessed every alternative put forward by another party. In this case, the Applicant has detailed a considered approach and provided additional commentary [REP1 – 152] to explain its position. Whilst offering criticism of the Applicant's approach, no party has offered substantive reasoned evidence to demonstrate that an alternative would be technically feasible or would lead to lesser environmental effects compared to the Proposed Development."* [emphasis added]

33. Ms Colquhoun makes the point that a number of the LAs impacted by the proposed development had raised the issue of alternatives, and whether they had been properly considered.

34. The ExA accepted the Claimant's need case, saying there was no substantive evidence to undermine that case (5.2.31). That case included that the proposed interconnector could transmit approximately 5% of the UK's current annual electricity consumption

(5.2.10). The proposal complied with the Energy White Paper 2020, which supported further interconnection with the European energy market, notwithstanding the UK's withdrawal from the EU.

35. Objections to the proposal had been raised in respect of a number of issues including traffic and highways; impact on heritage assets; impact on the South Downs National Park; and the impact on private interests by the use of compulsory acquisition powers. PCC were particularly concerned because the route of the connection between Eastney and Lovedean went through a densely populated area of Portsmouth. Although the connection itself is intended to be underground, there are structures at both ends, and the installation of the cables would have very material impacts during the construction phase.

36. In terms of negative impacts of the proposal the ExA concluded that there were:

    a. Temporary significant impacts on highways and traffic flows, which could be reduced to acceptable levels (9.2.17-19);

    b. Some minor temporary noise and vibration effects (9.2.15);

    c. A minor negative socio-economic effect (9.2.31);

    d. Some adverse significant landscape and visual effects on the setting of the National Park and the landfall location. The ExA gave these impacts moderate weight (9.2.54);

    e. Less than substantial harm to two heritage assets, to which the ExA gave considerable weight (9.2.62).

37. The ExA concluded on the planning balance:

> *"9.3.10. The ExA is satisfied that the identified adverse effects would be mitigated as far as is reasonably practicable and that the necessary measures could be properly secured through the Recommended DCO and the associated control documents, such that the identified significant adverse effects would be largely time-limited and reversible.*
>
> *9.3.11. Taking into account all relevant policy, the ExA concludes that the matters that are identified as disbenefits do not outweigh the significant benefits that are described, either alone or when considered together. The ExA therefore considers that the final balance indicates strongly in favour of granting development consent."*

38. The ExA fully considered the compulsory acquisition issues, including those raised by Mr and Mrs Carpenter who were subject to the proposed compulsory acquisition of 5.5ha of their land in the vicinity of Lovedean, and found that the compulsory acquisition was proportionate and justified.

39. In its final overall consideration of findings and recommendations at 12.2.1 the Report said:

> *"overall, the need case for the Proposed Development strongly outweighs the identified benefits."*

Third Information Request

40. The SoS made three requests for further information from the parties. The Third Information Request ("TIR") dated 4 November 2021 is the one relevant to this case. The statutory deadline for taking the decision had been extended to 21 January 2022. The Request included:

> *"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."*

41. The Claimant's Response was dated 18 November 2021. It started by referring to the history of consideration of alternatives, as set out above. At 2.6 the substance of NGESO's letter dated 25 January 2021 was set out verbatim and then 2.7 stated:

> *"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."*

42. At 2.11 the Claimant quoted the ES Supplementary Alternative Addendum para 5.1.1.7, as set out above at 23. The Response then went on:

"2.12. In this regard, having re-examined the precise chronology and to assist with explaining the Applicant's position that it was not reasonable and/or necessary to further consider Mannington Substation following the connection agreement for Navitus Bay offshore wind farm being confirmed to no longer be in place, the timeline was that the connection agreement remained for some time after the Feasibility Study request in December 2014.

2.13. During this period the significant progress made advancing the proposals for Proposed Development was the preparation of the Feasibility Study itself together with the optioneering work that was undertaken by the Applicant alongside this, and which is most clearly detailed in Chapter 5 of the Supplementary Alternatives Chapter in relation to assessment of the grid connection points and paragraph 2.4.3 of the Alternatives Chapter in relation to the consideration of the potential landfall sites.

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 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."*

43. The SoS issued his decision letter on 20 January 2022. Between the receipt of the ExA Report and the issue of the decision letter there were a large number of internal departmental documents, which have been produced to this court pursuant to the duty of candour. Their detailed content is not relevant to the determination of the Court as to the lawfulness of the decision.

44. In the final submission to the SoS dated 14 January 2022 the Departmental officials set out four options. Option A was to agree to further consultation on a possible alternative substation at Mannington; Option B was a recommendation to grant consent for the interconnector. This followed the earlier submission dated 14 October 2021 which had recommended the grant of consent. Option C was to consent the entire scheme including the telecommunications equipment. Option D was to refuse consent for the entire project.

The Decision Letter

45. Section 1 of the Decision Letter ("DL") sets out the procedural history. Section 3 is a summary of the decision. DL3.3 gives a correct summary of s.104 PA. DL3.4- 3.6 states:

> *"3.4. In relation to the Application, the Secretary of State has had regard to the Overarching National Policy Statement for Energy ("NPS EN-1"). The Secretary of State has made his decision on the basis that making the Order would not be in accordance with his obligations under the Planning Act 2008.*
>
> *3.5. The Secretary of State notes that the ExA also considered at length the question of the planning balance under section 104(7) of the Planning Act 2008 i.e. whether the need for the proposed Development outweighed the planning harms inherent in the scheme and concluded that this was the case. The Secretary of State notes that the ExA identified planning harms associated with the scheme, which include less than substantial harm to the Fort Cumberland Scheduled Monument and the Grade II listed cottage known as Scotland, as well as impacts on tourism receptors, sports pitches and the Victorious Festival. The compulsory purchase powers sought by the Applicant would also result in private losses and could cause delay to the North Portsea Island*

> *Coastal Defence Scheme due to the overlapping of construction compound areas between this scheme and the proposed Development. The proposed development also has other potential adverse effects which are summarised in the ExA's report in the consideration of the planning balance [ER 9.3]. The Secretary of State agrees these adverse effects weigh against the proposed development.*
>
> *3.6. The Secretary of State has had regard to the case law in relation to the consideration of alternatives and is of the view that the alternatives, and in particular the Mannington substation initially considered by the Applicant, is an important and relevant consideration under s104(2)(d) of the Planning Act 2008. Given the adverse effects arising from the project and which have been noted above, and in particular the combination of impacts that result from the proposed landfall in an urban location, the Secretary of State considers that in the circumstances of this particular application it is exceptionally necessary to consider whether sufficient consideration has been given to whether there are more appropriate alternatives to the proposed route. In particular, consideration needs to be given to the alternative substations initially identified by the Applicant (and therefore alternative onshore routes avoiding the above harms) and whether these were adequately considered to determine whether the potential harms caused by the development from the selected route could have been avoided or reduced. In this regard the Secretary of State disagrees with the ExA's conclusion in relation to the consideration of alternatives and, as set out below, considers that there was a failure to adequately consider the original alternatives identified by the Applicant, such that it is not possible to conclude that the need for and benefits of the proposed Development would outweigh its impacts."*

46. Section 4 is headed "The Secretary of State's consideration of the Application". I note that all except the first paragraph actually deals with "the Consideration of Alternatives".

47. At DL4.2 two bullets from para 4.4.3 of EN-1 are set out verbatim. A summary is then given of the process of consideration of alternatives and at the end of DL4.5 it states:

> *"With regard to the location of the substation at Lovedean, the Secretary of State notes that National Grid Electricity System Operator's [sic] ("NGESO") submitted a representation to the examination confirming the reasons behind discounting the other substations [ER 5.4.24]."*

48. DL4.7 records the ExA's conclusion that the Claimant had undertaken an adequate consideration of alternatives and met the requirements of EN-1 in this regard.

49. DL4.8-11 states:

> *"4.8. The Secretary of State disagrees with the ExA's conclusion on this matter and considers that in this instance insufficient consideration was*

given by the Applicant to the alternative connection point at Mannington substation. 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 ("NGET"). The Secretary of State understands that the Applicant submitted a request to NGET for a Feasibility Study in December 2014, and that the final version of the Feasibility Study was issued in January 2016. The Mannington Substation was assessed as part of this Feasibility Study. The Feasibility Study notes that the substation was not considered to be suitable for the proposed connection because, at the time, there was already a connection agreement in place for the proposed Navitus Bay offshore wind farm. The Addendum notes that the Navitus Bay offshore wind farm project was subsequently abandoned but the grid connection agreement remained in place "for some time following the feasibility study" during which "significant progress" was made on the AQUIND interconnector project meaning that it was not reasonable, having regard to costs and delay, for the Applicant to re-consider the potential for a connection at Mannington at that later stage.

4.9. The decision to refuse development consent for the Navitus Bay development was taken by the Department of Energy and Climate Change on 11 September 2015. The Secretary of State requested information from the Applicant on 4 November 2021 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 proposed AQUIND Interconnector project was when the connection agreement ended.

4.10. The Applicant submitted their response to this request on 18 November 2021. At paragraph 2.6 of this response, the Applicant noted that the letter submitted by NG ESO on 25 January 2021 stated that "Options to the West of Lovedean required all or nearly all the same network reinforcements to either get the power to Lovedean or reinforcements to the west to Exeter substation and as far northwards as Minety", and that "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". At paragraph 2.7 of its response, the Applicant noted that in addition to these reasons from NG ESO as to why Mannington Substation was not taken forward for systems analysis, the shared connection point with the 970MW Navitus Bay offshore wind farm raised technical concerns around the suitability of Mannington Substation as well.

4.11. The Applicant advises that the connection agreement for the Navitus Bay offshore wind farm at Mannington Substation remained for some time after the Feasibility Study request in December 2014. The

> *Applicant goes on to state at paragraph 2.14 of their response that, following refusal of development consent for the Navitus Bay offshore wind farm, the Applicant made enquiries with NGET on 14 October 2015 regarding the impact of that refusal on their Feasibility Study which was being undertaken and known to be near completion. However, the Applicant has not been able to locate a response to this enquiry, though the Applicant notes that it was understood that the refusal would have been subject to the six-week legal challenge period provided for by section 118 of the Planning Act 2008 and as such the connection agreement for Navitus Bay offshore wind farm would have remained in place. The Applicant was aware by January 2016 that the connection agreement was no longer in place (paragraph 2.15 of their response). The Application was submitted on 19 November 2019."*

50. At DL4.12-14 the SoS refers to the points raised by Interested Parties, including PCC, about the Claimant's consideration of alternatives, and in particular its reference to Navitus Bay and the timing of that decision and the failure to reconsider Mannington. At DL4.13 it is recorded that Winchester City Council proposed that the SoS should ask NGET for information. The DL states:

> *"The Secretary of State considers that the Applicant has access to any relevant information relating to discussions between the Applicant and NGET, and therefore considers that the Applicant would have submitted all available and relevant information on this matter and that there is therefore no requirement to seek views from NGET. The Applicant has had the opportunity to address the issue of this alternative and could have sought any information it required from NGET. It is the Secretary of State's view that it is not appropriate in the circumstances to further delay the decision for this purpose."*

51. DL4.16 to 21 states:

> *"4.16. The Secretary of State considers that at the point in the timeline (i.e. 11 September 2015) when consent for the Navitus Bay offshore wind farm was refused, that the Mannington Substation option should have been adequately explored. The Applicant states that it raised its enquiries with NGET around the impact of the refusal for Navitus Bay offshore wind farm on the Feasibility Study on 14 October 2015. At this point in time, the Feasibility Study had not yet been completed, and the six-week legal challenge period for Navitus Bay offshore wind farm was nine days away was expiry on 23 October 2015. The Secretary of State also notes that the Applicant's inability to provide a response to the enquiries it raised with NGET on 14 October 2015 regarding the impact on the Feasibility Study, means that the Secretary of State is unable to review in full the discussions that took place regarding this matter at the time.*
>
> *4.17. The Secretary of State notes the Applicant's view that it was not reasonable or necessary to further consider Mannington Substation as the grid connection point for the proposed development following the completion of the Feasibility Study. However, the Secretary of State*

considers that the Applicant should have pursued further the option to include Mannington Substation in the Feasibility Study given that the Applicant was aware that consent had been refused for the Navitus Bay offshore wind farm. 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. The Secretary of State considers that the Applicant has provided insufficient detail as to why further investigation into Mannington Substation was not undertaken. Whilst the Secretary of State understands that this could have resulted in further work for the Applicant, and the Applicant may not have been able to progress with regulatory and other submissions until that process was complete, the Secretary of State considers that the potential adverse effects of the proposed development (as identified by the ExA) necessitate the adequate consideration of those alternatives that the Applicant had identified. The Secretary of State also notes that the refusal of Navitus Bay was in September 2015 and the Application would not be made until over four years later.

4.18. As noted above, NPS EN-1 states that potential alternatives should be identified wherever possible before an application is made to the Secretary of State so as to allow appropriate consultation and the development of suitable evidence base in relation to any alternatives which are particularly relevant. However, the Secretary of State disagrees with the ExA's conclusion on this matter and considers that the failure to adequately consider the alternative of the Mannington Substation as a connection point is a material consideration. The Secretary of State consideration that this weighs significantly against the proposed Development as he is unable to conclude that the proposed route is justified.

4.19. The Secretary of State also acknowledges the implications of the Applicant's consideration of alternatives and the compulsory acquisition powers it seeks as part of the Application. Blake Morgan LLP submitted comments to the Secretary of State on behalf of landowners the Carpenters on 15 December 2021 which raised the concerns around the possibility of an alternative connection point at Mannington Substation and the implications this has for the compulsory acquisition of the Carpenters' land. In their comments of 15 December 20201, Portsmouth City Council noted its concerns that the Applicant had not made any assessment of the private loss to be suffered in consequence of the different options available and had not weighed that loss against the public benefits of the proposed development.

4.20. The Secretary of State acknowledges that alternatives are material in exceptional circumstances only. The Secretary of State considers that this test is met given the combination of adverse impacts from the proposed route through a very densely populated urban area. He considers that the change in circumstances relating to Mannington Substation was known by the Applicant at a sufficiently early stage of

> *the Feasibility Study, and that the change was of sufficient importance and scale. Therefore, further investigation should have been undertaken to ensure that sufficient evidence was available in its application documents to support the preferred choice of route taken forward by the Applicant.*
>
> *4.21. The Secretary of State acknowledges that if the Applicant had investigated a connection at Mannington Substation further, it may have concluded that it was not a feasible option. However, in the absence of sufficient evidence on this matter, the Secretary of State cannot grant consent for the AQUIND Interconnector project taking into account the adverse effects identified by the ExA and the possibility that a connection point at Mannington Substation might potentially have resulted in less adverse impact."*

52. In section 7 the SoS considered the planning balance.

    a. DL 7.1 correctly states that for applications under s.104 PA the primary consideration is the policy set out in the NPS;

    b. DL7.2 summarises the harm found by the ExA and agrees with their summary (Report 9.3.10), but then says "… a significant number of adverse effects remain. These remaining impacts, in the view of the SoS, make the consideration of alternatives exceptionally relevant to the SoS's decision in this case."

    c. DL7.3 and 7.4 state:

> *"7.3. In addition to these impacts identified by the ExA, the Secretary of State considers that the Applicant's failure to adequately assess the feasibility of Mannington Substation as an alternative connection point, means that the planning balance weighs against the Order being made, given the proposed development's obvious impacts on the City of Portsmouth and the possibility that a connection at Mannington Substation might have resulted in less adverse impact.*
>
> *7.4. Although the ExA found that the benefits of the proposed development would outweigh its adverse effects, the Secretary of State disagrees with this conclusion, as the alternative of a connection to the Mannington Substation has not been properly assessed and therefore he cannot conclude that the proposed route has been justified and determine the need for and benefits of the proposed Development would outweigh its impacts."*

<u>The law and policy</u>

53. The development was accepted as nationally significant and therefore fell within s.35 PA.

54. All parties agree that s.104 PA applies:

> "**104 Decisions in cases where national policy statement has effect**
>
> (1) This section applies in relation 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.
>
> (2) In deciding the application the Secretary of State must have regard to —
>
> (a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
>
> …
>
> (d) any other matters which the Secretary of State thinks are both important and relevant to the Secretary of State's decision.
>
> (3) The Secretary of State 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.
>
> (4) This subsection applies if the Secretary of State 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.
>
> (5) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would lead to the Secretary of State being in breach of any duty imposed on the Secretary of State by or under any enactment.
>
> (6) This subsection applies if the Secretary of State is satisfied that deciding the application in accordance with any relevant national policy statement would be unlawful by virtue of any enactment.
>
> (7) This subsection applies if the Secretary of State is satisfied that the adverse impact of the proposed development would outweigh its benefits.
>
> …"

55. There is a duty to give reasons under s.116 PA.

56. The relevant NPS is EN-1 *Overarching National Policy Statement for Energy*. At Part 3 this sets out strong support for energy infrastructure supported by the NPS. EN-1 is dated 2011 but remains the extant energy NPS. The Energy White Paper 2020, although not an NPS, provides specific support for interconnectors.

57. Part 4 of EN-1 sets out the assessment principles that the SoS (when EN-1 was drawn up this was the IPC) should apply in making a decision. 4.1.2 states:

> *"Given the level and urgency of need for infrastructure of the types covered by the energy NPSs set out in Part 3 of this NPS, the IPC should start with a presumption in favour of granting consent to applications for energy NSIPs. That presumption applies unless any more specific and relevant policies set out in the relevant NPSs clearly indicate that consent should be refused. The presumption is also subject to the provisions of the Planning Act 2008 referred to at paragraph 1.1.2 of this NPS."*

58. Part 4.4 deals with the treatment of alternatives. 4.4.1 states:

> *"As in any planning case, 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, detailed guidance on which falls outside the scope of this NPS. From a policy perspective this NPS does not contain any general requirement to consider alternatives or to establish whether the proposed project represents the best option."*

59. 4.4.2 states:

> *"However applicants are obliged to include in their ES, as a matter of fact, information about the main alternatives they have studied. This should include an indication of the main reasons for the applicant's choice, taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility; in some circumstances there are specific legislative requirements, notably under the Habitats Directive, for the IPC to consider alternatives. These should also be identified in the ES by the applicant; and in some circumstances, the relevant energy NPSs may impose a policy requirement to consider alternatives (as this NPS does in Sections 5.3, 5.7 and 5.9)."*

60. 4.4.3 is critical in this case (I have added numbers to the bullet points for ease of reference):

> *"Where there is a policy or legal requirement to consider alternatives the applicant should describe the alternatives considered in compliance with these requirements. Given the level of urgency of need for new energy infrastructure, the IPC should, subject to any legal requirements (e.g. under the Habitats Directive) which indicate otherwise, be guided by the following principles when deciding what weight should be given to alternatives:*
>
> *1. the consideration of alternatives in order to comply with policy requirements should be carried out in a proportionate manner;*

> *2. the IPC should be guided in considering alternative proposals 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;*
>
> *3. …*
>
> *4. alternatives not among the main alternatives studied by the applicant (as reflected in the ES) should only be considered to the extent that the IPC thinks they are both important and relevant to its decision;*
>
> *5. as the IPC must decide an application in accordance with the relevant NPS (subject to the exceptions set out in the Planning Act 2008), if the IPC concludes that a decision to grant consent to a hypothetical alternative proposal would not be in accordance with the policies set out in the relevant NPS, the existence of that alternative is unlikely to be important and relevant to the IPC's decision;*
>
> *6. alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or alternative proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the IPC's decision;*
>
> *7. alternative proposals which are vague or inchoate can be excluded on the grounds that they are not important and relevant to the IPC's decision; and*
>
> *8. it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the IPC 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). Therefore where an alternative is first put forward by a third party after an application has been made, the IPC may place the onus on the person proposing the alternative to provide the evidence for its suitability as such as the IPC should not necessarily expect the applicant to have assessed it."*

The Grounds

61. There is a good deal of overlap and inter-connection between all the Grounds. The background to each Ground is the way the Claimant in the application process, and the SoS in the decision making, approached the issue of Mannington as an alternative. I will therefore set out my analysis of the factual process and then relate that back into the analysis of each of the Grounds.

62. As is set out above, the Claimant commenced the development consent process under the PA with a conventional analysis of alternatives in the ES. This included a number of relevant selection criteria both for substation connection and landfall locations. The position was inevitably made more complicated by the fact that there is an interrelationship between those two elements of the scheme. So if the connection

point changed, then the landfall might also change, and the cable length both undersea and on land would vary. The ES makes clear that cable length was a significant cost element of the scheme. The undersea cable location would in turn affect the impact on shipping lanes. It is immediately apparent that the analysis of ultimate route choice, and the rejection of alternatives, was a complex one, necessarily depending on a number of factors.

63. The ES Addendum is for that reason a complex document and has to be read as a whole to understand those interrelationships. I agree with Mr Strachan that Chapter 5 of that document, and 5.1.1.7 in particular, confuses the situation. It seems to suggest that the Navitus Bay connection was the factor which led Mannington not to be taken forward, and the fact the connection agreement remained in place for some time was what prevented Mannington being reconsidered. However, if one goes back to 4.1.3.5, set out in 23(e), it is clear that the position was more complicated, and that the rejection of Mannington did not simply turn on the Navitus Bay connection.

64. However, during the course of the ExA Examination, NGESO (as they had become) made their position clear, or at least much clearer, in the letter dated 25 January 2021. They refer to the need for additional network reinforcements for any options west of Lovedean, which necessarily includes Mannington, and that being the reason why the other seven substations (including Mannington) were not taken forward. I accept that this response left open further possible questions, such as how much would further such reinforcements cost, and more detail on environmental impacts. However, the critical point is that NGESO made no reference to the Navitus Bay issue and made entirely clear that there were significant reasons for not progressing with connections west of Lovedean, independently of anything to do with a connection to Navitus Bay.

65. The Claimant's Technical Note of 7 March 2021 repeats these points. It brings back in the Navitus Bay issue, but that is independent of NGESO's view as set out in that Note.

66. The TIR Response repeats again the information in the NGESO letter of 25 January 2021. It then states in terms that "in addition" the Claimant's preliminary view at the time was that the connection to Navitus Bay raised technical concerns about Mannington. The rest of that Response does refer at length to Navitus Bay, and perhaps with the benefit of hindsight should have been clearer that regardless of Navitus Bay, there were strong reasons to reject Mannington. However, to a considerable degree the Response is framed by the questions in the SoS's Request, which themselves focus on Navitus Bay. At 2.18 the Response does return to the point that NGET had already identified Lovedean as being the preferable site.

67. This was the information before the SoS when he made the decision.

Ground One

68. Ground One (a) is that the SoS made a material error of fact. This Ground turns on DL4.8 and the reference to the Feasibility Study noting that Mannington was not suitable because at the time there was an agreement with Navitus Bay. Ground One (b) is that the SoS failed to take into account relevant evidence, namely that NGESO had identified that Mannington was not feasible for reasons unrelated to Navitus Bay and that there were a number of other reasons Mannington was not suitable.

69. The Claimant submits that the SoS in DL4.8 wrongly stated: *"The Feasibility Study notes that the substation was not considered to be suitable for the proposed connection because at the time, there was already a connection agreement in place for the proposed Navitus Bay offshore windfarm."* In fact, the Feasibility Study, which was drawn up by NGET, did not rely on Navitus Bay and the SoS has confused the Feasibility Study with the Claimant's own work as set out in the Supplementary ES.

70. The Claimant says that this mistake meets the tests in *E v SSHD* [2004] QB 1044 at [66]. There are four limbs to that test:

    a. There is a mistake on an existing fact;

    b. The fact is uncontentious;

    c. The claimant must not have been responsible for the mistake;

    d. The mistake must have played a material part in the tribunal's reasoning.

71. The Claimant seeks to rely on two pieces of evidence that were not before the SoS. An email from NGESO dated 1 March 2022 together with a letter of 8 March 2022, and an email sent by the Claimant to NGET in October 2015. The SoS resists the admission of this material on the ground that it does not meet the test in *Ladd v Marshall* [1954] 1 WLR 1489.

72. The SoS accepts that the reference, in the sentence in DL4.8 quoted above, to the Feasibility Study is wrong, and it should be a reference to the Supplementary ES. Mr Strachan submits that this is a "referencing error" and that it is clear from reading the paragraph as a whole that the SoS was referring to the latter document. Further, and in any event, he submits that the other tests in *E* are not met.

73. In my view the real thrust of this Ground is not in the error in the sentence in DL4.8, but whether the SoS properly understood and took into account NGESO's position on Mannington, as opposed to simply the Claimant's process of consideration of Mannington.

74. I accept Mr Strachan's argument that read reasonably benignly, the mis-reference in one sentence of DL4.8 could simply be a "referencing error", rather than a material error. The SoS does carefully distinguish between the documents in the paragraph, but the sentence is in substance repeating what was said in the Supplementary ES at 5.1.1.7. Therefore, it makes more sense for the DL to have intended to refer to the ES, rather than the Feasibility Study, and therefore this being a simple mistake of giving the wrong reference to the documentation.

75. The additional documents which Mr Bird seeks to rely upon, do not change this conclusion. In any event, I do not consider that they pass the *Ladd v Marshall* test because the Claimant could have submitted them to the SoS if it had considered them particularly relevant.

76. I also accept that some at least of the fault for the apparent confusion was the responsibility of the Claimant. In particular, 5.1.1.7 is confusing by muddling the

Feasibility Study (with no capitalisation and presumably referring to the NGET work) and the position of the Claimant. The true position can be worked out if one goes back to 4.1.3.5, and then appreciates that NGET's position was that there would be an overloading of the transmission lines to the west of Lovedean. But even then, on the basis of that information, the degree to which that was independent of Navitus Bay was not entirely clear from reading the Supplementary ES alone.

77. Therefore, applying the tests in *E* with proper rigour, the Claimant has not made out limb (a) or limb (c) of the tests in that case.

78. However, Ground One (b) has more substance. The Claimant submits that where DL4.15 says that the Claimant *"should have undertaken further work to assess the grid connection point at Mannington"* once it became aware that Navitus Bay had been refused, the SoS failed to take into account the material showing NGET/NGESO's broader reasons for not supporting Mannington.

79. The Claimant somewhat overstates its case by suggesting that NGESO had said in the Feasibility Study that Mannington was not "feasible" (Skeleton Argument para 33(a)). The SoS has not seen the Feasibility Study nor has the Court, so it is not known precisely what it says, or how the issues around Mannington are couched. However, NGESO had made clear in the letter of 25 January 2021 that there were significant issues with Mannington. Further, any fair reading of the Supplementary ES shows that if Mannington was chosen there would be a number of "knock-on" consequences such as the cost of longer cables; finding a suitable landfall; increased crossing of shipping lanes and crossing the IFA2 Interconnector. None of these problems are addressed by the SoS. This issue is very closely related to Ground (iv), the *Tameside* Ground (*Secretary of State for Education v Tameside MBC* [1977] AC 1014), and I will deal with it there. Even if the SoS was entitled in law not to take these problems with Mannington into account because he did not consider them to make Mannington an unrealistic alternative, he was in my view, obliged to make further inquiries pursuant to the principle in *Tameside* (and the subsequent caselaw) for the reasons I set out below.

80. Although DL4.5 refers to the NGESO submission, the SoS fails to show that he has taken into consideration the reasons for rejecting Mannington that had been put forward by NGET/NGESO quite independently of issues around Navitus Bay. This was a crucial issue in the decision-making process, and I therefore find that Ground 1(b) is made out.

Grounds Two and Three

81. Ground Two is that the SoS failed to comply with s.104 PA. Ground Three is that he failed to properly apply the NPS in EN-1. Much of the argument about s.104 turns on how the SoS approached EN-1, and I therefore deal with the two Grounds together.

82. The Claimant submits that the SoS failed to go through the structured analysis in s.104, and in particular failed to properly apply s.104(3) when setting out his reasoning in respect of EN-1.

83. Part 4 of EN-1 has a careful and highly structured approach to the assessment of projects. Mr Bird submits, and I agree, that the starting point is the presumption in

favour of granting consent for energy NSIPs (4.1.2). The DL makes no reference to this presumption. This is all the more surprising given that the ExA had found that the need case "strongly outweighs" the identified disbenefits (ExA 12.2.1). Therefore, the ExA had found that the case being advanced by the Claimant went beyond the simple policy presumption in terms of the benefits of the project.

84. Part 4.4 of EN-1 sets out a very detailed policy approach to alternatives. 4.4.1 states that the relevance of alternatives is a matter of law. 4.4.2 requires (as a matter of policy) that all main alternatives considered by an applicant should be referred to in the ES (a reflection of EU law as it stood at the time). I note that Mannington was referred to and it is no part of the Claimant's case that Mannington was not a relevant consideration within the terms of the caselaw or the policy.

85. 4.4.3 sets out how the decision maker should decide what weight to give to alternatives. 4.4.3 has unnumbered bullets, but I ascribe them numbers for ease of reference. Bullet (2) states that the decision maker should be guided by whether there is a realistic prospect of the alternative delivering the same capacity in the same timescale. The SoS did not deal with this criterion in the DL.

86. Bullet (6) is that alternatives which mean the proposal could not proceed, because they are not commercially viable or not physically suitable, can be excluded. This is the criterion which makes it of imperative importance to understand what National Grid's position was in respect of Mannington. It is apparent from the letter of 25 January 2021 that NGESO considered there were material difficulties with a connection at Mannington (or the other locations west of Lovedean) because of the need to make further reinforcements to the network. That could reasonably have been interpreted as meaning that the sixth bullet point was not met. Again, the DL does not address this issue.

87. Mr Bird submitted that in the DL, having failed to properly address EN-1, the SoS then failed to apply s.104(3) PA. Section 104(3) requires detailed consideration of whether any specific and relevant policies of the NPS indicate consent should be refused. He submits that only by undertaking that exercise and giving his clear conclusion could the SoS rebut the presumption in favour of development in EN-1 4.1.2.

88. Mr Strachan submits that the DL properly records the s.104 tests at DL3.1, 3.3 and 7.1 and therefore it must be assumed that the SoS understood the statutory tests. The DL concluded that the proposal did not comply with the EN-1 policy on alternatives in DL 4.2 and 4.6-8 and as such the SoS properly conducted the balancing exercise in s.104(7).

89. Mr Strachan relies upon *R (Clientearth) v Secretary of State for Business, Energy and Industrial Strategy* [2021] EWCA Civ 43 at [104]:

> *"First, the purpose of the balancing exercise in section 104(7) is to establish whether an exception should be made to the requirement in section 104(3) that an application for development consent must be decided "in accordance with any relevant national policy statement". The exercise involves a straightforward balance, setting "adverse impact" against "benefits". It is not expressed as excluding*

> *considerations arising from national policy itself. It does not restrain the Secretary of State from bringing into account, and giving due weight to, the need for a particular type of infrastructure as recognised in a national policy statement, and setting it against any harm the development would cause (see the judgment of Sales L.J. in Thames Blue Green Economy Ltd., at paragraph 16).”*

90. He submits that the obligation on the SoS was simply to apply a balance under s.104(7). There was no duty to start with the presumption under EN-1 para 4.1.2 because that paragraph expressly refers back to the provisions of the Planning Act 2008. The SoS did not disagree with the ExA's conclusions on need and he expressly took into account the benefits of the scheme at DL7.4.

91. Mr Strachan refers to *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) at [288] where Holgate J observed that policy in an NPS did not disapply the common law principles as to when alternatives are capable of being a material consideration. At [269] he referred to the common law duty to consider alternatives in certain cases, as set out in *Trusthouse Forte v Secretary of State for the Environment* [1987] 53 P&CR 293, and that the policy does not seek to, nor could, displace that duty.

92. In my view, Mr Strachan's submissions rather miss the detail and the specificity of the issue in respect of alternatives. It is not being suggested that the SoS erred in law by referring to Mannington, nor that in principle he could not place weight upon it. Mr Strachan submits that the ExA had concluded that the Claimant had done enough in respect of Mannington but the SoS disagreed. That is simply a question of putting different weight on an issue, and as such, this falls within the SoS's lawful area of judgement.

93. However, that analysis is to ignore the requirements of the policy and of the statutory scheme. If the SoS was going to rely upon the failure to properly consider an alternative, as he did here, then he had to do so applying the policy approach in EN-1 4.4.3; or explaining why he intended to depart from the policy. It is a trite proposition that an applicant for development consent is entitled to rely on policy, particularly in this statutory scheme, an NPS, and if the decision maker wishes to depart from it, he has to explain why.

94. The SoS also had to properly apply s.104, which depends on at least considering whether the proposal was "in accordance with" the NPS, see s.104(3).

95. EN-1 para 4.1.2 creates a presumption in favour an energy NSIP, and therefore in principle in favour of this project. The ExA had found that the "need" case was very strong, and the SoS did not disagree with that conclusion. The DL makes no reference to the presumption in para 4.1.2. Save for the reference in DL3.4 that "*The SoS has made his decision on the basis that making the Order would not be in accordance with his obligations under the Planning Act 2008",* he does not make clear whether he considers the proposal to accord with EN-1 or not. Reading the DL as a whole, and considering the lengthy section on Alternatives, it may be fair to the SoS to assume that he did not consider EN-1 to be met, because of *"the possibility that a connection point at Mannington Substation might potentially have resulted in less adverse impact"* (DL4.21). However, he has not addressed and therefore apparently either has

not applied the presumption in para 4.1.2, or alternatively stated why it does not apply.

96. Further, in placing weight, indeed on the facts of the case determinative weight, on the possibility of Mannington as an alternative, he has not applied the policy in EN-1 para 4.4.3, in respect of the consideration of alternatives. DL4.2 does refer to this paragraph and quotes two of the bullet points. In some cases such a reference would be sufficient to satisfy the Court that proper regard had been had to the policy. However, there are two reasons in this case why such a reference is not sufficient. First is the carefully crafted policy in EN-1 to guide the decision maker as to how to approach alternatives. The policy requires a decision maker to engage with 4.4.3 if weight is going to be placed on potential alternatives. A promoter of development is entitled to rely on that exercise being undertaken. Secondly, the consideration of Mannington was the determinative issue in the case. It was not a side issue, or even merely "a" principal important controversial issue, it was in the SoS's decision the determinative issue. It was therefore vital that the SoS properly applied the policy in this regard.

97. However, the SoS does not address whether there was a realistic prospect of Mannington delivering the same capacity in the same timescale. NGESO had said in clear terms (letter 25 January 2021) that Mannington, and the other six substations, would require additional reinforcements to the west and potentially more environmental impact and more cost to consumers. The SoS does not refer to this view of NGESO (Ground 1(b)), but also critically does not apply this to the policy test in 4.4.3 (second bullet). It would have been open to the SoS to say he gave little weight to this issue, but he had to address it if he was going to apply the policy lawfully.

98. Similarly, in regard to 4.4.3 (sixth bullet) he had to address whether Mannington was commercially viable or physically suitable. It was open to him to say that he did not know, and therefore required further information, but he had to address the policy test. The DL fails to do so.

99. In respect of Ground Two, on the facts of this case I consider the SoS had to make clear whether he considered the proposal accorded with EN-1 or not, pursuant to s.104(3). It is important for the Court not to be too mechanistic in its approach to planning decisions, and not to require an obstacle course of analysis which then needlessly trips up decision makers. However, s.104 imposes a very clear structure on the decision-making process. The scheme of the Planning Act 2008 is to give a particular status in the decision-making process to a National Policy Statement. Part 2 of the Act sets out the process for adopting NPSs and s.9 establishes the Parliamentary requirements, which then give an NPS a particular status different from any other government statement of planning policy. Therefore, an NPS is not simply another policy document which is weighed in the planning balance and to which the SoS can give more or less weight. The amount of weight is a matter for him, but that is subject to the presumption in s.104(3) and the specific matters in subsections (4) to (7).

100. On the facts of this case, I consider there was a duty on the SoS to make clear whether he considered the application was or was not in accordance with the NPS for the purposes of s.104(3). Mr Strachan relied upon *Clientearth* and submitted that

Lindblom LJ's reference to the "balancing exercise" in s.104(7) meant that in such cases there was a simple planning balance to be applied. However, Lindblom LJ did not suggest that it was unnecessary to go through the statutory steps, including the application of s.104(3). In fact, in *Clientearth* the SoS in the DL had referred to the policy presumption in EN-1 para 4.1.2 (see [36]) and had carried out the s.104(3) analysis (see [42]).

101. In the present case, the ExA had concluded that there was a strong need case, and that it clearly outweighed any harm. Therefore, for the purposes of s.104(3) there was, in the view of the ExA, clear accordance with EN-1. The SoS simply went to s.104(7) and appears to have carried out an unconstrained planning balance. That is not what the statute requires him to do.

102. I reject Mr Strachan's submission that the SoS was applying the common law and was therefore entitled to take the prospect of Mannington as an alternative into consideration. The error of law here is not that the SoS took into account Mannington as a possible alternative, it is that he did not apply the statutory process set out in s.104 and that he did not apply the policy in the NPS when evaluating Mannington and deciding what weight to give it.

103. For these reasons I find that Grounds Two and Three are made out.

Ground Four

104. Ground Four is that the SoS failed to seek further information on the feasibility of Mannington and thus breached his duty to take reasonable steps to inform himself pursuant to the principle set out in *Tameside*. The Claimant submits that the SoS in the Third Information Request confined himself to asking about the connection agreement with Navitus Bay and what further inquiries the Claimant had made, but did not make the relevant inquiries, to the degree that he did not already have the information, about the feasibility of Mannington.

105. The test as set out by Lord Diplock in *Tameside* was as follows:

> *"the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"*

106. The correct approach to a *Tameside* challenge was considered by the Divisional Court in *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC Civ 1662, where, following *R (Khatun) v Newham LBC* [2005] QB 37, it was held that the approach to any *Tameside* challenge was that of *Wednesbury* irrationality. It is not for the court to decide upon the manner or intensity of inquiry to be undertaken. The law was helpfully summarised by the Court of Appeal in *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]:

> *"The general principles on the Tameside duty were summarised by Haddon-Cave J in R (Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin) at paras. 99-100. In that passage, having referred to the speech of Lord Diplock in Tameside , Haddon-Cave J summarised the relevant principles which are to be derived from*

> *authorities since Tameside itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge, it is for the public body and not the court to decide upon the manner and intensity of enquiry to be undertaken: see R (Khatun) v Newham LBC [2004] EWCA Civ 55, [2005] QB 37 , at para. 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further enquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further enquiries if no reasonable authority possessed of that material could suppose that the enquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."*

107. Mr Bird submits that this case meets the high test of irrationality set out in the caselaw. He relies on the duty under s.104(3) PA and the need for the SoS to answer the statutory questions in s.104. If he did not accept the position of the Claimant and NGESO as to Mannington, then the SoS needed to make enquiries about the feasibility of Mannington given the information that was before him and the policy and statutory schemes. The policy in EN-1, in particular para 4.4.3, sets out specific questions the SoS needed to address, and therefore the inquiries that any reasonable SoS had to make if he considered that he did not already have the relevant information.

108. Mr Strachan submits that the Claimant was given every opportunity to provide the relevant information on Mannington, particularly through the Third Information Request. The SoS acted rationally in concluding that the Claimant should have reconsidered Mannington in late 2015, particularly as the scheme of the PA is heavily frontloaded and thus requires developers to have undertaken extensive preparations before lodging an application.

109. I accept Mr Bird's submissions on this Ground. There are a number of reasons why the SoS's decision to refuse the application without making further inquiries about the feasibility of Mannington was irrational and was in breach of his *Tameside* duty.

110. Firstly, the ExA had found a strong need case in favour of the development which clearly outweighed the harm found. The consequence of this was that in the ExA's view there was a significant public interest in the development. It should be noted that the Claimant contended, and the ExA accepted, that the development could meet 4-5% of the UK's electricity need with the obvious public benefits that would follow. The level of this public benefit meant that any reasonable SoS would have inquired

into the feasibility and viability of Mannington before rejecting the development on the purely speculative basis that it might provide an alternative to Lovedean.

111. The SoS refused development consent on the sole ground that there might be an alternative sub-station location. He expressly accepted at DL4.21 that the Claimant might have found that Mannington was not feasible. Given the scale of the public benefits that the ExA accepted, it is in my view irrational on this point alone for the SoS not to have made further inquiries.

112. Secondly, the consequence of that finding was that there was very clear policy support, in the NPS, for the development. I have already addressed the ways in which the SoS failed to apply the relevant policies in a lawful manner.

113. Thirdly, the SoS had the quite clear statement from NGESO that there were difficulties, albeit unquantified ones, with using Mannington as the substation. Although NGESO do not say in terms that Mannington was not feasible, any fair reading of their letter alerts the reader to the significant difficulties of proceeding with that site. If the SoS thought, despite this letter, that Mannington should not be ruled out pursuant to the policy in EN-1 para 4.4.3, then it was again irrational not to make further inquiries so that the SoS could make his decision on a properly informed basis. The highly speculative nature of Mannington being a realistic alternative again points strongly in favour of any rational SoS seeking further information.

114. Fourthly, Mr Strachan characterises the SoS's position as being that the Claimant had been given full opportunity to explain the position in respect of Mannington, and that the Response to the Third Information Request did not state in terms that Mannington was not feasible. However, even if this was correct, the submission ignores the public interest which lies at the heart of the policy support for the project in EN-1. On the very stark facts of this case, the SoS should not be able to rely on the fact that the Response to the TIR could have been more clearly worded to reject a proposal which had the potential to make a very significant contribution to the UK's energy supply.

115. None of these factors mean that the SoS would have been obliged to allow the development if Mannington was not a feasible option. He was entitled to place weight on the harm from the development, subject only to Wednesbury irrationality principles. However, he was obliged, on the facts of this case, to ensure that he had the necessary information as to whether Mannington was indeed a feasible and viable alternative. It is important to note that the issue for any rational decision maker was not why the Claimant had rejected Mannington in 2016, and whether it should have re-evaluated the position after the Navitus Bay contract ended, but rather whether Mannington was in fact a feasible alternative in 2022.

116. In reaching this conclusion I take into account Ms Colquhoun's submissions on behalf of PCC as to the harm within Portsmouth and the surrounding area from connecting to the grid at Lovedean. The weight to be attached to that harm was a matter for the SoS, subject again only to rationality. However, whatever the weight given to the harm, the SoS still had to act rationally in his approach to any possible alternative sub-station.

Ground Five

117. The Claimant submits that the decision was procedurally unfair because the SoS did not give the Claimant a reasonable opportunity to respond to any unspoken view that Mannington was a potential feasible alternative. The TIR did not relate to the feasibility of Mannington and Claimant could not have reasonably anticipated that the SoS might require further information on that, given the information that had been provided both by the Claimant and by NGESO.

118. Mr Bird applied to amend his claim to add a ground that the SoS had breached regulation 19(3) of the Infrastructure Planning (Examination Procedure) Rules 2010. Regulation 19 (3) states:

> "**Procedure after completion of examination**
>
> 19. …
>
> (3) If after the completion of the Examining authority's examination, the decision-maker—
>
> (a) differs from the Examining authority on any matter of fact mentioned in, or appearing to the decision-maker to be material to, a conclusion reached by the Examining authority; or
>
> (b) takes into consideration any new evidence or new matter of fact, and is for that reason disposed to disagree with a recommendation made by the Examining authority, the decision-maker shall not come to a decision which is at variance with that recommendation without—
>
> (i) notifying all interested parties of the decision-maker's disagreement and the reasons for it; and
>
> (ii) giving them an opportunity of making representations in writing to the decision-maker in respect of any new evidence or new matter of fact."

119. Mr Bird submits that the issue around the Navitus Bay connection impacting on Mannington was a new matter not raised before the ExA. As such, pursuant to reg 19, the SoS should have notified all the parties and given them an opportunity to make further representations.

120. Mr Strachan relies on the TIR and submits this was an opportunity for the Claimant to explain why Mannington was not an appropriate alternative. He also points to the fact that other interested parties responded to the request, understanding that they could refer to Mannington as a feasible alternative.

121. In my view, this Ground takes the Claimant's case no further forward. It was apparent in the TIR that the SoS was considering the relevance of Mannington as an alternative to Lovedean. He could only have been doing this on the basis that he was considering refusing the proposal on the ground of a possible alternative substation at Mannington and the Claimant's failure to reconsider it after Navitus Bay had fallen away. Otherwise, the SoS's interest in Mannington, and his reference to the Navitus Bay refusal makes no sense. I note Ms Colquhoun's submission that the LPAs, including

PCC, had all understood the thrust of the SoS's questions about Mannington and Navitus Bay, and responded accordingly.

122. Therefore, the Claimant was given the opportunity to provide the SoS with information about why Mannington was not a feasible alternative. It is the essence of the Claimant's Ground 1(b) that it had provided the SoS with that information, in particular through the views of NGESO. This is therefore not a case which turns on any procedural unfairness, but rather with the SoS's failure to properly consider the information that he had been given.

Ground Six

123. The Claimant submits that the SoS failed to give proper and adequate reasons in the DL. The test for reasons in this context is set out in *South Bucks v Porter* [2004] UKHL 33 at [36]:

> *"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."*

124. Mr Bird submits that the DL failed to explain how the s.104 PA duty was discharged and whether the proposal accorded with EN-1.

125. I agree with Mr Strachan that these grounds do not materially add to the substantive Grounds dealt with above. As I have set out, the SoS erred in law in his approach to both the s.104 duty and compliance with EN-1. It therefore necessarily follows that he did not properly explain his reasoning in the DL. However, there are no separate issues that arise under the reasons Ground.