

## CONSULTATION ON DRAFT NATIONAL POLICY STATEMENT FOR PORTS

### 1. PURPOSE OF THIS REPORT

1.1 This report is based on a draft report to 3<sup>rd</sup> February Cabinet recommending a response to the consultation on the Draft National Policy Statement for Ports. This is a matter of great importance to this Council because of the recently restated intentions of Associated British Ports (ABP) to expand Southampton Port at Dibden Bay, despite the previous rejection of similar proposals following a long public inquiry in 2001/2. This report sets out some serious concerns regarding the Draft National Policy Statement for Ports and associated documents. The Cabinet is asked to consider the report and the draft recommendation and to make any further comments on a response.

1.2 The Draft National Policy Statement for Ports and associated documents can be seen at: [dft.gov.uk/consultations/open/portsnps/](http://dft.gov.uk/consultations/open/portsnps/). Matters of particular interest to this Council are referred to below in this report. The deadline for responses is 15<sup>th</sup> February. There was an interim response deadline of 15th January for any responses that it is wished to be taken into account by the House of Commons Transport Select Committee in formulating its own response. An advance response, as agreed with the Planning and Transportation Portfolio Holder, has been sent.

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This is attached as Appendix 3 to this report.

### 2. BACKGROUND

2.1 The Government issued late in 2009 a set of draft National Policy Statements dealing with major infrastructure matters relating to energy, transport, water, waste water and hazardous waste. The intention is to make clear Government policy on the need for nationally significant infrastructure projects thereby eliminating the need to debate this at public inquiries. Under the 2008 Planning Act, decisions on nationally significant infrastructure projects will be made by the Infrastructure Planning Commission (IPC). The National Policy Statements will be the primary consideration for all of the IPC's decisions.

2.2 The draft National Policy Statement on Ports is of particular relevance to this Council given the past history of, and likely future proposals for, Dibden Bay. Members will be aware that in 2004 ABP's proposal to build a major container port was rejected by the Secretary of State principally on the grounds of significant harm to international nature conservation designations at Dibden Bay and the potential to provide for national port needs elsewhere. Appendix 1 to this report summarises the key points of the 2004 inquiry decision. The grounds on which the 2004 decision were made are highly relevant to the response recommended in this report to the consultation on the draft National Policy Statement.

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2.3 Cabinet on 4<sup>th</sup> November 2009 resolved to object on various grounds to ABP's renewed proposal, in their Draft Port of Southampton Master Plan, to extend Southampton Port over Dibden Bay (relevant minute in Appendix 2 to this report).

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### **3. THE DRAFT NATIONAL POLICY STATEMENT FOR PORTS AND ASSOCIATED DOCUMENTS**

- 3.1 The Government has published several inter-related documents:
- Developing a Ports National Policy Statement: Consultation Document
  - Draft National Policy Statement for Ports
  - Ports: National Policy Statement for England & Wales – Appraisal of Sustainability (AoS) Report plus 5 appendices
  - Habitats and Wild Birds Directives and Regulations: Assessment of Ports NPS (Incorporating Appropriate Assessment)
  - Impact Assessment
  - Evidence Base.
- 3.2 The key issues for this Council in formulating its response are considered by officers to be:
1. The implications of the “market led” approach and the lack of locational detail in the National Policy Statement
  2. The interpretation of EU legislation regarding protection of internationally designated areas
  3. The apparent inadequate weight given to other national policies (e.g. setting of National Parks)
  4. Relationship of the guidance to previous decisions.
- 3.3 Each of these matters is considered in turn.
- 1. The implications of the market led approach and the lack of locational detail in the National Policy Statement**
- 3.4 The Draft National Policy Statement for Ports accepts that there is sufficient capacity for about 20 years but states that there is a compelling need for substantial additional port capacity over 20-30 years. The general approach of the draft National Policy Statement is based on a market-led approach to providing additional capacity. Unlike, for example the draft National Policy Statement on Nuclear Power, the Draft National Policy Statement for Ports does not indicate in any way the locations at which further port capacity could be provided. This is to be determined through competition “subject to developers satisfying decision makers that the likely impacts of any proposed development have been assessed and addressed.” (Para. 1.11.10 of draft National Policy Statement). Furthermore, “Effective competition requires spare capacity to ensure real choices for port users” (paragraph 1.11.10 of draft National Policy Statement on Ports).
- 3.5 In the view of your officers, this provides an inadequate basis for the Infrastructure Planning Commission to be able to properly determine proposals for nationally significant port development that come before it for decision. The National Policy Statement should be clearer about the appropriate locations for major port development, having regard to international designations, other infrastructure capacity (roads, rail), impacts on local communities and other relevant considerations. The National Policy Statement fails to provide the necessary basis for these very important decisions if it merely leaves the port operators to argue their individual proposals against a set of arguable criteria. The Policy Statement should set out the basis for decisions that will result in port capacity being provided at the most appropriate locations:

- where avoidance of damage to international designations will meet the requirements set out in EU legislation (as set out below),
- where the impacts on local communities and other interests will be minimised,
- where it is clear that the necessary related infrastructure (rail, road etc) can be provided at least cost and with the least damaging impacts;
- where the implications of related dredging and channel capacity issues between alternative locations have been properly considered; and
- where wider issues have also been properly taken into account including the impact of port development at alternative locations on the Government's policy to minimise CO2 emissions.

3.6 In your officers' view, the National Policy Statement on Ports, as with the National Policy Statement on Nuclear Power Stations, should have been prepared after a proper and thorough investigation of the alternatives for providing any necessary additional port capacity. This comparison of alternatives should include a detailed examination of the impacts on nationally and internationally designated nature conservation sites. As drafted, with the proposed approach being "market led" in response to individual port operator's proposals, without any proper comparison of alternatives, it is understood that this may be contrary to the requirements of European legislation and regulations regarding the protection of internationally designated Natura 2000 sites (which include the foreshore of Dibden Bay).

3.7 This issue is compounded by the proposal that excess port capacity be provided in order to enable better competition between the ports. While this may be a good general economic principle, Cabinet is recommended to question whether it is appropriate to apply to a situation where, in order to provide the excess capacity, internationally designated nature conservation sites would be adversely affected. Such an approach is not understood to be consistent with EU legislation and regulations,

## **2. The interpretation of EU legislation regarding protection of internationally designated areas**

# 3.8 This consideration was the major factor in the Secretary of State's rejection in 2004 of the previous container port proposals at Dibden Bay (see Appendix 1). Dibden Bay and its foreshore are subject to a number of national and international nature conservation designations.

3.9 In rejecting ABP's proposals, the Secretary of State agreed with the Inspector that the disbenefits of the scheme, as borne out by its impact on internationally and nationally environmentally sensitive sites, outweighed the potential benefits. It was considered that there were other potential locations at which additional port capacity could be provided (and permissions have since been given at several locations: Felixstowe, Harwich, London Gateway).

3.10 The 2004 decision complied with EU legislation. This requires adverse impacts on international nature conservation designations to be avoided if possible. The 2004 Inquiry decision concluded that there would be significant adverse impacts on internationally and nationally designated sites. In such circumstances, the Habitats Regulations require that a project can only go ahead if the requirements of "Imperative Reasons of Overriding Public Interest" (IROPI) are satisfied. This requires alternative ways of meeting the needs of the project to have been considered and ruled out before "IROPI" comes into play. In the 2004 decision, the

- # Secretary of State clearly stated that the EU legislation regarding protected sites requires consideration of alternative sites, and that alternative sites to providing additional port capacity could be located even in different regions or countries (see Appendix 1, paragraph 51). The possible of alternative less-damaging locations at which additional port capacity could be provided was a key factor in the 2004 decision.
- 3.11 The draft National Policy Statement on ports appears to intend to change this position, although this is not clearly set out in the draft policy statement itself, but rather in the associated documents primarily the Habitats and Wild Birds Directives and Regulations: Assessment of Ports NPA (Incorporating Appropriate Assessment).
- 3.12 Paragraph 2.3.2 of the draft policy statement states that there may be alternative ways of meeting the need that any particular project is aiming to fulfil – including alternative sites. However, it goes on to say that there is no requirement for the decision maker (in this case the IPC) to establish whether the proposed project represents the “best” option amongst alternatives. It is acknowledged that there may be specific legal requirements under the Habitats or Water Framework Directives. Paragraph 2.3.3 implies that, if there are adverse impacts, these would not be relevant if they are likely to be the same wherever the project is sited. However, it is hard to see how the IPC could be sufficiently informed about the impacts of possible alternatives if it has before it for decision only one specific proposal. The previous Dibden Bay Inquiry was not able, to consider in detail the impacts of alternatives at London Gateway, Felixstowe and Harwich. However, the Secretary of State agreed with the Inspector that there were likely to be credible alternatives (which have since been permitted).
- 3.13 The Ports Policy “Consultation Document”, that accompanies the draft policy statement, seems to take things a step further, and appears to imply, in paragraph 44, that the decision-maker (the IPC) will only be in a position to consider alternative ways of meeting the needs of that specific project (e.g. consideration of alternative scales, designs and layouts). Within the proposed “market led” approach to providing additional port capacity, this appears to rule out serious consideration of alternative sites or locations. Such an approach is directly contrary to the Secretary of State’s conclusions in the 2004 Dibden Bay decision.
- 3.14 This apparent revision of government policy is further developed in the “Habitats and Wild Birds Directive and Regulations” Assessment document. This states:
- “...one cannot exclude the possibility that the integrity of one or more European sites will be adversely affected by a port development at some time.” (paragraph 25);
  - “Where impacts on protected sites cannot be avoided/mitigated in full, imperative Reasons of Overriding Public Interest (IROPI) may apply to the project/plan currently under consideration” (paragraph 26);
  - that with regard to port development, IROPI (i.e Imperative Reasons of Overriding Public Interest sufficient to over-ride significant adverse effects on internationally designated nature conservation sites) arise from the need to ensure sufficient capacity for the movement of goods and commodities (paragraph 27);
  - that alternative locations and approaches avoiding damage to European protected sites are not feasible (paragraph 31);
  - “for the avoidance of doubt, it cannot be excluded that future port applications may come forward in respect of estuarial or coastal locations not currently occupied by ports , and such locations may or may not entail potential adverse impacts on European sites.” (paragraph 32);

- “The Government therefore concludes that the possible alternative policies of prohibiting developments affecting European sites or directing developments to specific locations are either not feasible or would not be sufficient to prevent damage to sites within the Natura 2000 network, and that these factors severely limit the degree to which putative alternatives to any particular development could be relevant to the decision maker’s consideration of a development proposal.” (paragraph 34);
- that there are Imperative Reasons of Overriding Public Interest (IROPI) at “plan” level for new port developments to be provided for, generically, under the National Policy Statement (paragraph 35).

3.15 Putting all this together, this appears to be a significantly different national policy position from that taken in the 2004 Dibden Bay decision. It is recommended that Cabinet strongly objects to this apparent change in National Policy with regard to the interpretation of EU legislation and regulations.

3.16 Counsel's substantive advice on the European Community law issues has been sought and is expected shortly. Officers will report further to the Review Panel and to Cabinet in the light of its contents. Meanwhile, however, counsel has indicated that he has concerns about the following matters in particular:

a. The status of the Assessment document is unclear. It is not a formal part of the draft NPS, nor is it an Appropriate Assessment of an individual plan or project or a proper Strategic Environmental Assessment of the NPS;

b. In the context of the IROPI test, the Assessment advises an overly restrictive examination of alternatives. In particular it appears to disregard the Commission's advice that alternatives to a plan or project include the "zero option" as well as the possibility of meeting the need concerned in other regions or even countries, and fails to focus the criteria for comparison between alternatives on ecological rather than economic considerations; and

c. The implication that creating surplus capacity to ensure a competitive market, as opposed to providing sufficient capacity to meet projected need for port services, could form an "overriding" public interest.

### **3. The apparent inadequate weight given to other national policies (e.g. setting of National Parks).**

# 3.17 The draft National Policy Statement on Ports sets out “guidance for the decision maker” in relation to a series of relevant considerations (see Appendix 1).

3.18 Paragraph 2.2.5 states that the cumulative impact of a particular development in a particular location may be unacceptable, even in circumstances where each individual impact would not rule out the project.

3.19 Paragraph 2.2.10 states that: “If the decision-maker is satisfied that the adverse impacts identified, including any cumulative impacts, outweigh the benefits of a scheme, and that those impacts cannot be adequately avoided, reduced or compensated for, then the application for consent should be refused. The decision-maker should pay particular attention to proposals which may have adverse impacts on sites or species of national or international importance.”

3.20 These statements are very much to be welcomed and should be supported.

- 3.21 However, the “guidance for decision makers” in some instances seems to be over-focused on mitigation measures rather than recognising that the impacts may be unacceptable in principle with regard to other national policy.
- 3.22 This is particularly the case with regard to impacts on National Parks. Paragraph 2.23.10 states that port development projects outside National Parks that may have an impact on them “should be designed sensitively given the various siting, operational, and other relevant considerations”. This implies that impacts on a National Park could not rule out a project in principle. Dibden Bay adjoins the New Forest National Park. The 2004 Inquiry Inspector concluded that there would be a significant adverse impact on the (then) New Forest Heritage Area. Since then the South East Plan has been adopted included a statutory development plan policy (C1) that “Planning decisions should also have regard to the setting of the Park”.
- 3.23 Officers recommend that representations be made supporting the statements that cumulative impacts can rule out a port development proposal, but seeking strengthening of the guidance on individual impacts having regard to other national policy.

#### **4. Relationship of the guidance to previous decisions.**

- 3.24 The Habitats Regulations Assessment accompanying the draft Policy Statement states very clearly, in paragraph 19, that “The aim of the Planning Act reforms in relation to the ports National Policy Statement - is.....**not** to consent port developments which would previously have been refused.”
- 3.25 This statement is very much to be welcomed, given the previous refusal of port development at Dibden Bay because of its unacceptable adverse impacts. However, this statement of government policy should be included within the main National Policy Statement rather than included in the Habitats Regulations document.

#### **4. CONCLUSIONS**

- 4.1 Given the history of Dibden Bay, and the likelihood of future proposals, there are some serious concerns regarding the draft National Policy Statement and its accompanying documents. This particularly concerns the apparent redefinition of alternatives that need to be considered where a port development proposal would have a significant adverse impact on internationally designated nature conservation sites. The National Policy Statement should have full regard to the relevant EU legislation and regulations. There is no justification for departing from the national policy position basis in the 2004 Secretary of State decision rejecting port development at Dibden Bay.

#### **5. ENVIRONMENTAL IMPLICATIONS /CRIME AND DISORDER IMPLICATIONS/EQUALITY AND DIVERSITY IMPLICATIONS**

- 5.1 The environmental implications of the National Policy Statement on Ports could be enormous if it were to open the door to a permission for port development at Dibden Bay.

#### **6. FINANCIAL IMPLICATIONS**

- 6.1 None arising directly from this report, but the costs of a further major public inquiry at Dibden Bay would be very substantial.

## **7. COMMENTS OF PLANNING AND TRANSPORTATION PORTFOLIO HOLDER**

7.1 The Portfolio Holder supports the proposed response to the consultation.

## **8. PLANNING AND TRANSPORTATION REVIEW PANEL**

8.1 The Planning and Transportation Review Panel at their meeting on 20 January supported the proposed recommendations.

## **9. RECOMMENDATIONS:**

The Cabinet is recommended to agree that a response be submitted to the Secretary of State for Transport on the draft National Policy Statement on Ports as follows:

- (i) Objecting to the over-emphasis on a market-led approach to providing (excess) additional port capacity, given that this could in some locations directly conflict with other national and international policy;
- (ii) Seeking a more locationally-specific national policy, that will result in port capacity being provided at the most appropriate locations:
  - where avoidance of damage to international designations will meet the requirements set out in EU legislation;
  - where the impacts on local communities and other interests will be minimised;
  - where it is clear that the necessary related infrastructure (rail, road etc) can be provided at least cost and with the least damaging impacts;
  - where the implications of related dredging and channel capacity issues between alternative locations have been properly considered; and
  - where wider issues have also been properly taken into account including the impact of port development at alternative locations on the Government's policy to minimise CO2 emissions.
- (iii) Strongly objecting to the apparent redefinition of relevant alternatives for consideration under the European Union legislation and regulations, as compared with the position taken by the Secretary of State in the 2004 Dibden Bay decision (see paragraphs 3.9 to 3.16 above);
- (iv) Supporting the statements that cumulative impacts can rule out a port development proposal, but seeking strengthening of the guidance on individual impacts having regard to other national policy;
- (v) Supporting the statement that the aim of the National Policy Statement is *not* to consent port developments which would previously have been refused, but urging that this statement of government policy should be included within the main National Policy Statement rather than included in the Habitats Regulations document.

### **For Further Information Please Contact:**

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### **Background Papers**

Published documents

## Appendix 1: The Public Inquiry into ABP's Port Development Proposals at Dibden Bay

1. Between November 2001 and December 2002 a major public inquiry took place into ABP's proposals to develop a container port at Dibden Bay. The Inspector reported in September 2003 and the Secretary of State issued his decision letter in April 2004. The development proposals were rejected.
2. NFDC had objected to the port development proposals at Dibden Bay, and presented evidence (jointly with Hampshire County Council) on grounds including:
  - Damage to international and national nature conservation sites. Need for development be of national significance to outweigh environmental loss. The conclusion of the applicant's Appropriate Assessment was considered flawed as the applicant failed to take account of alternative locations for development outside Southampton Water.
  - Potential to make better use of Southampton Port.
  - Harm to Totton and Waterside residents including effects of land access to Dibden Bay; scale and nature of development had the potential to not only adversely affect the amenity of the area but to cause a noise nuisance during both its construction and operation.
  - Visual Impact; Impact on many aspects of the landscape and on local communities. Failure to respect character of New Forest Coast etc. Scale and nature of development would have significant landscape impact; direct and indirect impacts on the New Forest Heritage Area and proposed National Park on a number of grounds.
3. Following a very long public inquiry, the Inspector recommended that the applications be refused, and the Secretary of State agreed. The Inspector's conclusions are referred to in the Secretary of State's decision letter from which key extracts are set out below (references within the quotation are to the full Inspector's Report).

### ***Need for the Project and overall port capacity***

21. *The Inspector noted in his summary the favourable contribution the Applicant's proposals would make to the development of the port of Southampton and to the national and local economy [36.648 - 36.651]. He considered that the development proposed at Dibden Bay would achieve the objective of the Harbour Revision Order and that there were no realistic alternative sites within the locality which would meet the needs of the port of Southampton for additional container handling capacity [36.319 - 36.322 and 36.649]. Nor would re-configuration or better management of present facilities within the port of Southampton be likely to achieve any more than a limited increase in container handling capacity [36.310 - 36.318].*

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23. *The Inspector considered that, with its present diversity of commercial activities – vehicle import/export, bulk imports and passenger cruise activity as well as the existing container terminal – the future of the port of Southampton would not be put at risk in the event of permission for a new container terminal being refused, though it would miss out on some benefits of additional traffic [36.295 - 36.300]. Nor did the Inspector consider that there would be a serious adverse effect upon the local economy and local employment, beyond the foregoing of direct opportunities, if the project did not go ahead [36.302 - 36.307].*

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### ***Environmental considerations***

25. *The Inspector attached considerable weight to the benefits of the project, which he saw as matters of public interest. However, he was in no doubt that the proposed terminal would do substantial environmental damage. The development would have an adverse effect on the amenity of local people, particularly as a result of noise disturbance, visual impact and delay at level crossings. These effects would weigh in the balance against the proposal but might not be sufficient to be determinative [36.652].*



26. *The Inspector attached greater significance to the damage that would be done to the character of the New Forest Heritage Area (note: now replaced by the New Forest National Park), a landscape subject to the highest level of protection. Although he recognised the Applicant's efforts to minimise potential harm to the landscape, he considered that the project would have an urbanising effect and that its impact would be apparent across a wide area [36.653].*

27. *The Inspector considered that the most significant harm arising from the proposed Dibden terminal would be to nature conservation interests. There would be direct impacts on sites of local and national conservation importance and on internationally protected sites, to which he attached paramount importance. He had no doubt that the proposed development would damage the integrity of the Solent and Southampton Water Ramsar site and Special Protection Area (SPA). He considered also that it could not be ascertained that the proposed development would not adversely affect the integrity of the Solent Maritime cSAC and the River Itchen cSAC [36.654].*

### **Legal and Policy Tests**

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29. *The Inspector concluded that there was no alternative solution, within the requirements of the Environmental Statement under Schedule 3 to the Harbours Act 1964, to the proposed project, the objective of which was to expand substantially container handling capacity for the Port of Southampton [36.40 - 36.45, 36.655]. But to go ahead the project had to satisfy the criterion of "imperative reasons of overriding public interest", in accordance with the Habitats Regulations. This reflected Government policy, as set out in "Modern Ports - a UK policy", on the protection of internationally designated sites [36.658].*

30. *The Inspector doubted that it could satisfy that criterion, for a number of reasons. There was no assurance the works would go ahead if authorised and no contract, provisional or otherwise, in place with a potential terminal operator [36.656]. Neither Government policy nor Regional Planning Guidance, nor local policies indicated that nature conservation protection policies would be overridden by the need for development specifically at the port of Southampton [36.659, 36.661].*

31. *The Inspector considered that a project satisfying a test of public interest might reasonably be expected to attract a substantial degree of support from bodies representing the public interest. However, he noted that with the exception of the Southampton City Council, no public body had expressed support for the Dibden Terminal project at the Public Inquiries. The weight of public opinion, as expressed at the Inquiries and in the written representations, was heavily against the proposed development [36.660].*

32. *The Inspector considered that if the foreseeable national need could be met without the Dibden Terminal, there would be no imperative reasons of public interest that should override the protection of the internationally designated nature conservation sites [36.662].*

33. *The Inspector recognised the potential adverse competitive consequences to the national economy of a failure to proceed with the proposal in the absence of sufficient container handling capacity at UK ports. The key question for the Inspector was therefore whether without the proposed terminal there was a reasonable prospect of sufficient capacity being provided at UK ports to handle the expected growth in the UK's container trade in the foreseeable future [36.663].*

4. The Inspector also made conclusions regarding alternative means of serving the public interest, by providing port capacity elsewhere to meet national/regional needs. He noted that there were other proposals to meet this capacity (since permitted). This aspect is specifically focused on in the Secretary of State's decision letter as set out below.
5. The Secretary of State commented, in his consideration of the Inspector's recommendations, that:

### **Alternative means of serving the public interest**

.....

47. *On the question of meeting a predicted short-term shortfall in capacity, the Secretary of State agrees with the Inspector's interpretation of guidance from the European Commission in Managing Natura 2000, which states that short term economic interests or other interests which would only yield short term benefits for society would not be sufficient to outweigh the long-term conservation*

interests protected by Council Directive 92/43/EEC of 12 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") [36.668]. He therefore concludes that a predicted shortfall in handling capacity for a short term should not be determinative in assessing imperative reasons of overriding public interest.

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#### **Consideration of alternatives**

50. The Secretary of State agrees with the Inspector's assessment of the alternatives to the project in so far as they are required to be considered for the purposes of Schedule 3 to the Harbours Act 1964, namely that it is legitimate to consider only those which would meet the needs of the port of Southampton [36.41 - 36.42] and that no suitable alternative which would meet that need exists within the locality [36.319 - 36.322].

51. The Secretary of State notes, however, that the consideration of alternatives for projects which would have a significant impact upon a site designated in accordance with the Habitats Regulations must necessarily range more widely. The Secretary of State agrees with the Inspector's conclusion that the Applicant's proposal would have a significant effect upon the integrity of designated sites. It follows that consideration of alternatives must concern alternative ways of avoiding impacts on the designated sites. The Secretary of State considers that such alternatives would not be confined to alternative local sites for the project. He draws attention to the European Commission's methodological guidance on the Assessment of Plans and Projects significantly affecting Natura 2000 sites, which interprets article 6 (4) of the Habitats Directive. The guidance states that a competent authority should not limit consideration of alternative solutions to those suggested by a project's proponents and that alternative solutions could be located even in different regions or countries.

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#### **6. The overall conclusions of the Secretary of State on the application for Harbour Revision Order were as follows:**

65. The Secretary of State agrees with the Inspector that, in accordance with the relevant conservation legislation, the project can only be allowed to proceed for imperative reasons of overriding public interest.

66. The Applicant asserts that other sites for proposed container terminals suggested by objectors as alternatives are not alternatives to this project, the object of which is to achieve expansion of container handling capacity in the port of Southampton. The Secretary of State agrees with the Inspector that this is the case with regard to fulfilling the requirements of Schedule 3 to the Harbours Act 1964 and similarly with the other orders and applications, though not with regard to fulfilling the requirements of the Habitats Regulations.

67. The Secretary of State has no reason to suppose that proposals for other container developments may not in time be put forward. There are three credible proposals in the South East of England already identified in the Inspector's Report. In considering impacts in this case, the public interest for which an internationally and nationally designated site would be adversely affected is different from the interests of the Applicant or of the port of Southampton. The Secretary of State considers the public interest to be of wider application and to include the economy of the South East of England and beyond. The Secretary of State agrees with the Inspector that there are credible alternatives for container port development, for the reasons already given in paragraphs 43 - 49 of this letter. While the Secretary of State agrees with the Inspector that it is not possible at this stage to determine whether other projects will be approved or proceed, he agrees there is equally no reason to rule them out as credible alternative proposals.

68. Subject to paragraph 69 below, the Secretary of State agrees with the Inspector's conclusions and accepts his recommendations. Overall, the Secretary of State agrees with the Inspector that the disbenefits of the scheme, as borne out by its impact on internationally and nationally environmentally sensitive sites, outweigh the potential benefits.

69. The Inspector concluded that there were considerable competing public interests at stake as to whether the proposals should be permitted and that ultimately there were value judgements to be made by Government [36.647]. The Secretary of State, while not disputing that he must make value

*judgements in balancing the public interests referred to, observes that the Inspector nevertheless considered that the conclusions he drew on the merits of the proposals on environmental grounds were clear-cut and determinative in recommending against the applications [36. 671]. For the reasons explained above, and because of the importance which the Government places on meeting its obligations under European Community law and the Ramsar convention, the Secretary of State accepts the Inspector's recommendation that the HRO not be made.*

7. The Secretary of State agreed with the Inspector that the other applications (including the planning applications) were contingent upon the application for the Harbour Revision Order and should therefore also be refused.
8. That decision referred to other “credible alternatives” for container development in other locations: at London Gateway, Bathside Bay (Harwich) and Felixstowe south. Since the Dibden Bay Inquiry, the Government has given the go-ahead to all of these “credible alternatives”.

## Appendix 2: Minute of Cabinet 4 November 2009.

### 43. PORT OF SOUTHAMPTON MASTER PLAN 2009 – CONSULTATION PAPER (REPORT B).

The Cabinet considered a response to a draft Port of Southampton Master Plan published by Associated British Ports (ABP). Master Plans are non statutory documents and are not subject to public examination. They provided an opportunity for port operating companies to outline their vision and future requirements for ports in their ownership and to clarify individual port's own strategic planning for the medium and long term.

The Planning and Transportation Portfolio Holder said that the draft response to the Master Plan clearly explained the Council's position. The previous proposals by ABP to develop a container port at Dibden Bay were rejected in 2004 following a major public inquiry. Since then the New Forest National Park Authority had been fully established. Their views on the Master Plan now complemented the Council's draft response and added strength to the environmental concerns. The Portfolio Holder also pointed out that ABP had formally objected to the Council's Core Strategy as it had not included a port allocation. At public inquiry this objection was dismissed and this further confirmed there should be no port development at Dibden Bay.

Members noted that the Government were about to publish a National Ports Policy, and that ABP's Master Plan was being drawn up in advance of this. A further report would be made to Cabinet with comments on that policy document in due course. It was not yet clear whether that policy document would be site specific. Strategic issues such as ports would now be considered by a newly formed Infrastructure Planning Commission and whilst the Council would still be a consultee they would not have a direct regulatory role.

#### **RESOLVED:**

(a) That, in response to the draft Port Master Plan, Associated British Ports (ABP) be informed:-

- (i) That an objection is raised to the master plan based upon the impacts that port development at Dibden Bay would have upon national/international nature conservation designations and its failure to fulfil the requirements of the 'Imperative Reasons of Overriding Public Interest' test;
- (ii) That an objection is made to the use of the demand forecasts based upon optimistic assumptions in the Port of Southampton Master Plan. Further work needs to be done to assess the realism of the forecasts particularly in the context of the current global economic downturn and other issues relating to world trade and transport costs. It is also essential that the Port Master Plan maximises the productivity of the existing port;
- (iii) That an objection is raised to the master plan for failing to provide the full context with regards to the regional policies that affect the port of Southampton. This is directly relevant to Dibden Bay. The final version of the master plan should make clear reference to policies NRM5, NRM8 and C1 in the South East Plan;
- (iv) That an objection is raised to the references to the local policy framework including paragraph 4.64 of the master plan. It is contrary to policies in the Council's adopted Core Strategy. Policy DW-C3 of the Local Plan ceased to have any effect when the Core Strategy was adopted by Council on the 26 October 2009. Policy EC6 of the Structure Plan ceased to have any effect when the South East Plan was adopted on the 9 May 2009. Paragraph 4.51 of the master plan as is outlined in paragraph 3.9 of Report B to the Cabinet acknowledges that the South East Plan has replaced the Hampshire Structure Plan Review. Paragraph 4.64 of the master plan should reflect the current local policy framework by referring to the New Forest District Core Strategy Development Plan Document (DPD). All references to policy EC6 in the Structure Plan and DW-C3 of the Local Plan are now outdated and should not be included;

- (v) That the Council does not make any detailed comments on the other environmental issues identified at this stage apart from some general comments including comments on the issues of 'Landscape impact on the National Park' which was a major consideration at the 2001/02 inquiry and on 'Impact on Local Communities';
  - (vi) That an objection is raised to proposals in the master plan for port development at Dibden Bay on the basis of landscape impact including on the New Forest National Park;
  - (vii) That an objection is raised to the inclusion of proposals for port development at Dibden Bay on the basis of the impact that the development would have upon the amenity of local people including transport impacts, noise disturbance and visual impact; and
  - (viii) That the Council objects to the use of land designated for employment uses within the Waterside area of the District being used for subsidiary activities such as transport depots, open storage, warehouses or distribution depots. Such uses would be contrary to the aims of the Council's Core Strategy, Economic Strategy and Sustainable Community Strategy
- (b) That, in response to the draft Port Master Plan, the Government be informed:-
- (i) That a copy of all of the above recommendations be sent to the relevant government departments; and
  - (ii) That the current national policy framework in relation to ports fails to set out a strategic position in relation to the Port of Southampton. Any reference implicitly or explicitly to Dibden Bay in the national policy statement on ports should take proper account of the internationally important nature conservation designations that affect the site.

## Summary of New Forest District Council's key concerns regarding the Draft National Policy Statement on Ports.

1. New Forest District Council (NFDC) is particularly concerned with the apparent proposed change in national policy regarding the need for proper consideration of alternatives when a port proposed would adversely affect internationally protected nature conservation sites. It also considers the appropriate assessment (AA) of the draft NPS deficient. This is the Council's interim response, outlining its key concerns with the Secretary of State's proposals, so that these can be taken into account by the Transport Select Committee. A more detailed response will be submitted to the Secretary of State following consideration by the relevant Council committees.
2. An application to develop a container port at Dibden Bay (which lies within New Forest District) was rejected by the Secretary of State for Transport in 2004 following a long public inquiry, largely on the ground that, having regard to potential alternatives, the project's harm to conservation interests protected by the Habitats and Wild Birds Directives outweighed its benefits and it thus failed the IROPI (imperative reasons of overriding public interest) test under the Conservation (Natural Habitats & c.) Regulations 1994 ("Habitats Regulations"). Central to this decision was the Inspector's conclusion (accepted by the Secretary of State) that there were potential alternative ways of providing extra port capacity elsewhere and thus alternative means of serving the public interest. The Secretary of State's overall conclusions are attached as Appendix 1 to this statement.
3. This position is understood to tie in with EU legislation and regulations.
4. The Draft National Policy Statement on Ports, read with its associated documents - in particular the Habitats Regulations Assessment (HRA) - appears to propose a significant change that would in effect rule out of consideration the fact that there may be more suitable alternatives for providing port capacity elsewhere. In this and other respects it seeks to restrict the IPC's examination of alternatives in a way that would breach the Habitats Regulations and the UK's obligations under the Habitats and Wild Birds Directives that the Regulations implement. NFDC has sought counsel's advice in relation to the Draft National Policy Statement on Ports and in particular the issues of compatibility with the Habitats Regulations, underlying Community legislation and relevant guidance. That advice can be summarised as follows.

5. First, the draft NPS is a “plan” requiring an AA under Habitats Regulations reg. 48(1). But the AA contained in the HRA is deficient. Notably, it fails to provide any quantitative information about the impact the Government’s proposed approach to capacity would have on coastal European Sites as a whole, and thus contains no evaluation of the differential impacts of that and alternative policy approaches. The function of an AA is to inform both the integrity test under reg. 48(5) and, where it is relied on, the test of “imperative reasons of overriding public interest” (IROPI) under reg. 49. Major port proposals are unlikely to satisfy the integrity test and thus will need to surmount the high threshold of IROPI under reg 49. The proposition that the creation of surplus capacity to promote competition over and above the capacity to meet projected need for port services can properly amount to an “overriding” public interest is itself doubtful. But at the very least, an AA of that policy approach must quantify the differing anticipated impacts on protected habitats of the “need” and “need plus surplus” approaches. The AA makes no attempt to do so. The Assessment of Sustainability (AoS) and its appendices fail to make good this omission. In any event, by analogy with case-law on EIA (*Berkeley v. Secretary of State* [2001] 2 AC 603), the key information must appear in the AA itself. The reader should not be sent on a paper-trail in order to understand the impacts evaluated by the decision-maker.
6. Second, the Government’s choice of a criteria-based rather than locationally specific policy approach makes it particularly important that the IPC should adopt a lawful and adequate approach to the IROPI test when individual proposals come forward for development consent. There must in each case be a sufficiently searching evaluation of alternatives to justify convincingly why they have been discounted in favour of the option chosen. The NPS, read with the HRA, creates a serious risk that the IPC will adopt an unlawfully restrictive approach to alternatives in a number of respects.
7. The Commission advises (in its “Managing Natura 2000” Guidance) that alternatives to a plan or project include the “zero option” as well as the possibility of meeting the need concerned in other regions or even countries. It also advises that the criteria for comparison between alternatives must focus on ecological rather than economic considerations. The HRA contain statements that conflict with that advice. That is compounded by the insistence in the NPS itself that alternatives are confined to alternative means of meeting the particular (by implication, localised) need the proposal is designed to serve. Moreover the AA of the draft NPS is itself affected by those shortcomings and must be regarded as defective for that further reason.

8. Counsel advises that when issuing the NPS in its final form, the Secretary of State is bound to ensure that these defects are corrected. He should first adopt a lawful AA of the NPS itself, and given the significance of the change required to the current AA he should re-consult on the revised version before finalising the NPS. While neither the NPS nor the HRA can override the UK's Community obligations, it is important the documents avoid leading the IPC into error. The Secretary of State should therefore either (a) ensure that the NPS as issued contains lawful guidance to the IPC on the IROPI test, or (b) issue separately the necessary clarification and amendment of the problematic content of the HRA. Counsel further advises that the NPS would be vulnerable to a successful claim for judicial review if these steps were not taken. The UK Government would also be likely to attract a Commission investigation for failure to comply with the Habitats and Wild Birds Directives.
9. Having regard to that advice, NFDC considers that the draft National Policy Statement on Ports provides an inadequate basis for the Infrastructure Planning Commission to be able to properly determine proposals for nationally significant port development that come before it for decision. The National Policy Statement should be clearer about the appropriate locations for major port development, having regard to international designations, other infrastructure capacity (roads, rail), impacts on local communities and other relevant considerations. The National Policy Statement fails to provide the necessary basis for these very important decisions if it merely leaves the port operators to argue their individual proposals against a set of arguable criteria within a "market led" framework. The Policy Statement should set out the basis for decisions that will result in port capacity being provided at the most appropriate locations regionally and nationally:
- where avoidance of damage to international designations will meet the requirements set out in EU legislation;
  - where the impacts on local communities and other interests will be minimised;
  - where it is clear that the necessary related infrastructure (rail, road etc) can be provided at least cost and with the least damaging impacts;
  - where the implications of related dredging and channel capacity issues between alternative locations have been properly considered; and
  - where wider issues have also been properly taken into account including the impact of port development at alternative locations on the Government's policy to minimise CO2 emissions.



10. In the view of NFDC, the National Policy Statement on Ports, as with the National Policy Statement on Nuclear Power Stations, should have been prepared after a proper and thorough investigation of the strategic alternatives for providing any necessary additional port capacity. This requires alternative locations and policy approaches to have been considered, including a thorough evaluation of the impacts on nationally and internationally designated nature conservation sites.
11. The Council's full response will be sent by the 15<sup>th</sup> February 2010 deadline.

## APPENDIX 1 TO APPENDIX 3

### Secretary of State's Overall Conclusions following Dibden Bay Container Port inquiry.

1. Between November 2001 and December 2002 a major public inquiry took place into ABP's proposals to develop a container port at Dibden Bay. The Inspector reported in September 2003 and the Secretary of State issued his decision letter in April 2004. The development proposals were rejected.
1. Following a very long public inquiry, the Inspector recommended that the applications be refused, and the Secretary of State agreed.
3. The **overall conclusions of the Secretary of State** on the application for Harbour Revision Order were as follows:

*65. The Secretary of State agrees with the Inspector that, in accordance with the relevant conservation legislation, the project can only be allowed to proceed for imperative reasons of overriding public interest.*

*66. The Applicant asserts that other sites for proposed container terminals suggested by objectors as alternatives are not alternatives to this project, the object of which is to achieve expansion of container handling capacity in the port of Southampton. The Secretary of State agrees with the Inspector that this is the case with regard to fulfilling the requirements of Schedule 3 to the Harbours Act 1964 and similarly with the other orders and applications, though not with regard to fulfilling the requirements of the Habitats Regulations.*

*67. The Secretary of State has no reason to suppose that proposals for other container developments may not in time be put forward. There are three credible proposals in the South East of England already identified in the Inspector's Report. In considering impacts in this case, the public interest for which an internationally and nationally designated site would be adversely affected is different from the interests of the Applicant or of the port of Southampton. The Secretary of State considers the public interest to be of wider application and to include the economy of the South East of England and beyond. The Secretary of State agrees with the Inspector that there are credible alternatives for container port development, for the reasons already given in paragraphs 43 - 49 of this letter.*

*While the Secretary of State agrees with the Inspector that it is not possible at this stage to determine whether other projects will be approved or proceed, he agrees there is equally no reason to rule them out as credible alternative proposals.*

*68. Subject to paragraph 69 below, the Secretary of State agrees with the Inspector's conclusions and accepts his recommendations. Overall, the Secretary of State agrees with the Inspector that the disbenefits of the scheme, as borne out by its impact on internationally and nationally environmentally sensitive sites, outweigh the potential benefits.*

*69. The Inspector concluded that there were considerable competing public interests at stake as to whether the proposals should be permitted and that ultimately there were value judgements to be made by Government [36.647]. The Secretary of State, while not disputing that he must make value judgements in balancing the public interests referred to, observes that the Inspector nevertheless considered that the conclusions he drew on the merits of the proposals on environmental grounds were clear-cut and determinative in recommending against the applications [36. 671]. For the reasons explained above, and because of the importance which the Government places on meeting its obligations under European Community law and the Ramsar convention, the Secretary of State accepts the Inspector's recommendation that the HRO not be made.*

7. The Secretary of State agreed with the Inspector that the other applications (including the planning applications) were contingent upon the application for the Harbour Revision Order and should therefore also be refused.
8. That decision referred to other “credible alternatives” for container development in other locations: at London Gateway, Bathside Bay (Harwich) and Felixstowe south. Since the Dibden Bay Inquiry, the Government has given the go-ahead to all of these “credible alternatives”.