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To the Applicant, Suffolk County
Council, East Suffolk Council, West
Suffolk Council, Natural England

Your Ref:

Our Ref: EN010012

Date: 6 May 2021

Dear Sir/Madam

Planning Act 2008 (as amended) and The Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) – Rule 17

Application by NNB Generation Company (SZC) Limited for an Order Granting Development Consent for The Sizewell C Project

The Applicant's draft s.106 agreement and related documents

The Examining Authority (ExA) has considered the Applicant's draft s.106 agreement [PDB-004] and draft s.106 Explanatory Memorandum [PDB-009] submitted on 7 April 2021 and requests that the Applicant provides responses to the questions at Annex SA below. There are questions in that Annex which are also directed to East Suffolk Council, Suffolk County Council and West Suffolk Council. One question is also for Natural England. The questions should be treated as though they are Examining Authority's Questions and the remarks in the Introduction and Navigation Document to ExQs1 [PD-016] and the Rule 8 letter of 21 April [PD-015] apply.

Responses should be made by **Deadline 2 on 2 June 2021**. The ExA requests that the Applicant, East Suffolk Council, Suffolk County Council, West Suffolk Council and Natural England enter their responses in the appropriate space in the editable Microsoft Word template that will be sent separately by email and that they submit both a PDF version for publication and an editable Microsoft Word version.

Draft itinerary for the Accompanied Site Visit [PDB-014]

Please can the Applicant provide by **Deadline 1 on 12 May 2021**:

- Clarity in respect of the points of interest/notes regarding the East Suffolk Line, as detailed in 'Table 3.1 – Unaccompanied Site Inspections - proposed locations'.
- Confirmation that all locations are on publicly accessible land and provide specific location information/grid references and annotate on a plan.
- Confirmation that both the Abbey Care Home and adjacent farm (MDS20) will be visited on day 1 of the Accompanied Site Inspection.

Yours faithfully

Wendy McKay

Wendy McKay
Lead Member of the Examining Authority, on behalf of the Panel

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SA.1. Section 106 Agreements	
Question to:	Question:
SA.1.0	<p>All the questions below are addressed to the Applicant. In addition, many are addressed to East Suffolk Council (ESC), Suffolk County Council (SCC) and West Suffolk Council (WSC). One question is also addressed to Natural England.</p> <p>If ESC, SCC or WSC wish to respond or comment on questions not addressed to them, they are free to do so.</p> <p>Please will the Applicant, ESC, SCC and WSC note the following which is important on terminology and in relation to the law.</p> <p>In this questionnaire the ExA uses the term planning obligation by reference to the tests for a planning obligation in s.106(1).</p> <p>Planning obligations are entered into using a s.106 agreement. Consequently, planning obligations are <u>contained</u> in a s.106 agreement, and a s.106 agreement is <u>not</u> a planning obligation.</p> <p>It is possible for a planning agreement to be made not only under s.106 but under other powers.</p> <p>A s.106 agreement may include promises not made under s.106, which are therefore not planning obligations. Such promises may be enforceable as a matter of contract law, or as a result of the agreement also being made under other powers. However, those promises will not run with the land (except in the highly unusual event of them being restrictive covenants). They will not be enforceable under s.106.</p>

SA.1. Section 106 Agreements		
	Question to:	Question:
		<p>The ExA uses the term Sizewell Special Arrangements to refer to the arrangements under a modified s.106 TCPA 1990 suggested by the Applicant in the draft 106EM [PDB-009].</p> <p>Abbreviations and terms defined in the ExQ1, Introduction and Navigation Document [PD-016] are used in this questionnaire. In addition: WSC is used as an abbreviation for West Suffolk Council and draft s.106EM for the draft s.106 Explanatory Memorandum, currently document [PDB-009].</p> <p>The ExA does not consider that the term development consent obligation adds anything as s.106(14) TCPA 1990 simply states that it means a planning obligation entered into in connection with an application for a DCO. Accordingly, it follows from s.106(14) that the s.106 agreement is not a development consent obligation and that only promises which are planning obligations can be development consent obligations.</p> <p>Please will the Applicant, ESC, SCC and WSC adopt the same approach to terminology in the interests of avoiding confusion between what are planning obligations and what is a s.106 agreement.</p>
SA.1.1	Applicant ESC, SCC, WSC	<p>The ExA reminds the Applicant, ESC, SCC, WSC and other IPs that s.106 TCPA 1990 makes promises which would not normally bind the land run with that land, provided the criteria in s.106(1) are met, and gives the planning authorities the power to enter the land so as to enforce the obligations which require operations to be carried out, by carrying out the obligations at the cost of the person against whom the obligation is enforceable. See section 106(3) and (12).</p>

SA.1. Section 106 Agreements		
	Question to:	Question:
		Please will the Applicant, ESC and SCC say whether they accept that and whether they consider there are any other legal purposes for s.106.
SA.1.2	Applicant	Please will the Applicant submit a plan showing the land within the Order Limits which it (a) owns, and (b) otherwise controls, for example by contract or option, showing which is which and which is freehold and which is leasehold.
SA.1.3	Applicant	Please will the Applicant show which of that land it can bind by a s.106 planning obligation whether or not the Applicant currently proposes to bind such land in that way. If there is land it cannot bind, please state why.
SA.1.4	Applicant	The Applicant states in the draft s.106EM (para 2.2) that it does not own all of the land within the main development site. It is not unusual for an applicant for planning permission or a DCO not to own the whole application site. In such circumstances the landowner usually enters into the s.106 agreement. Please will the Applicant explain why that cannot be done in this case.
SA.1.5	Applicant	If the consent of third parties to bind the land is also necessary, please identify the land so affected and explain the nature of the consent (e.g. that of a mortgagee).
SA.1.6	Applicant ESC, SCC, WSC	Has title to any land yet been deduced to ESC, SCC or ESC? What are the current conclusions of ESC, SCC and WSC on their title investigations?
SA.1.7	Applicant ESC, SCC, WSC	What consents would the Applicant need to obtain in order to enter into the modified s.106 arrangements it describes in its draft s.106EM [PDB-009]? What consideration and conclusions have been given or reached by ESC, WSC and SCC on this issue?
SA.1.8	Applicant ESC, SCC, WSC	How will the Sizewell Special Arrangements be enforced in the event of a breach, whether by the Applicant or a subsequent Undertaker?
SA.1.9	Applicant, ESC, SCC, WSC	What will be the enforcement position under the Sizewell Special Arrangements in the event that the Applicant or a subsequent Undertaker becomes insolvent?

SA.1. Section 106 Agreements		
Question to:		Question:
		Please include what will happen if the Applicant becomes insolvent and the SoS were to make the DCO without knowing that.
SA.1.10	Applicant	Please will the Applicant supply copies of the Thames Tideway Tunnel and Aquind s.106 agreements as executed and their DCOs. Please point the ExA to the relevant parts and any corresponding provisions in the DCO (or final draft DCO in the case of Aquind).
<i>Arrangements requiring third party involvement</i>		
SA.1.11	Applicant, ESC, SCC, WSC	<p>There are many proposals in the schedules which require the participation and involvement of third parties. Take for example the Economic Review Group in Sch 7 para 2.9. It is to have seven members. Whilst three are drawn from persons who are parties to the s.106 agreement, three are not. They are to be nominated by the New Anglia LEP, the Tier 1 Contractors and the Suffolk Chamber of Commerce. There is no requirement on those three parties to nominate members though presumably an obligation on the Councils to do so could be incorporated in the Sizewell Special Arrangements and with careful drafting a planning obligation to secure participation by the Applicant could be imposed.</p> <p>(i) What is to happen if the third parties fail to nominate, or later do not contribute to the group?</p> <p>(ii) The group is given various tasks by para 2.9.3 such as meeting quarterly. What is to happen if the Group fails to do so? What enforcement is envisaged?</p> <p>(iii) The group is not quorate unless five members are present. It cannot therefore function without the participation of the third party members. How are they to be compelled to participate?</p> <p>(iv) Can the group fulfil the functions and address the issues for which it is required if the third parties do not participate as envisaged?</p>

SA.1. Section 106 Agreements	
Question to:	Question:
	<p>Other examples of these types of issues include:</p> <ul style="list-style-type: none"> • the Community Safety Working Group (Sch 4 para 5) which needs the participation of Suffolk Constabulary, Suffolk Fire and Rescue Service and East of England Ambulance Service Trust; • the Health Working Group (Sch 6 para 4) which needs the participation of Public Health Suffolk and the Ipswich and East Suffolk Clinical Commissioning Group; • the Environment Review Group (Sch 11 para 9.2) requires participation of the Environment Agency and Natural England; • the Natural Environment Awards Panel (Sch 11, para 12.2) requires participation of Natural England and the Area of Outstanding Natural Beauty Partnership; • Sch 14, para 1.1 - Suffolk Community Foundation (a registered charity) to appoint a Community Fund Project Officer; • the Tourism Working Group (Sch 15, para 12.2) requires The Suffolk Coast Ltd, Visit Suffolk, Suffolk Coast and Heaths AONB Partnership (is this the same as the Area of Outstanding Natural Beauty Partnership referred to at para 12.2 of Sch 15) and the New Anglia Local Enterprise Partnership to appoint representatives; • Sch 16, para 1.1 envisages Marlesford and Little Glemham Parish Councils (sic) and Wickham Market Parish Council to participate in working groups; and • Sch 16, para 3.1.3 also requires third party involvement - Highways England to nominate a representative to the Transport Review Group. <p>(v) Please will the Applicant explain in relation to all of these how the promises it makes and the involvement of the third parties is secured and delivered</p>

SA.1. Section 106 Agreements		
Question to:	Question:	
<i>Allocating tasks / functions to bodies which are not legal persons</i>		
SA.1.12	Applicant, ESC, SCC, WSC	<p>By Sch 7 para 2.2.1 and 2.5.5 respectively the Regional Skills Coordination Function is to submit a draft Annual Workforce Delivery Implementation Plan and to allocate funds. The “Regional Skills Coordination Function” does not appear to be a legal entity. What happens if the task is not performed?</p> <p>Similarly, at Sch 17 the Governance schedule, various groups are required to do various things. For example the Delivery Steering Group is to consider reports submitted to it, monitor Groups, assist them, identify risks, and facilitate communication. This group is made up of representatives of ESC, SCC and SZC Co. Where is the obligation on those bodies to nominate and perform? Presumably this can easily be rectified by a covenant from each of them in the s.106 to do so.</p> <p>The same goes for the Oversight Partnership (to be established by ESC and SCC). But what obligations will there be on the members of that Partnership?</p> <p>There are also to be a Planning Group and a Social Review Group – see Sch 17 and the visual representation of the governance structure on p.100 (electronic page 103) of the draft s.106.</p> <p>Please will the Applicant explain in relation to all cases where tasks are allocated to bodies which are not legal persons how the delivery of the tasks is secured and delivered</p> <p>Again, ESC, SCC and WSC may also wish to respond.</p>
<i>Giving tasks to individuals</i>		

SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.13	Applicant, ESC, SCC, WSC	<p>Accommodation Co-ordinator(s). Their tasks are set out at Sch 3 para 1.1. But there is no mechanism for enforcing performance by the Accommodation Co-ordinator(s). They are not parties to the agreement. The Accommodation Co-ordinator(s) are appointed by SZC. Would a solution be to give the tasks to SZC who can then find an employee or contractor to discharge their promise? If not, how are any failures to deliver the tasks set out at para 1.1 enforced?</p> <p>There are similar issues at for example Sch 11 para 12.5 (Natural Environment Improvement Project Officer to attend meetings of the Natural Environment Awards Panel); Sch 15 paras 1.1 and 4.1 (Tourism Programme Manager to prepare Annual Tourism Fund Implementation Plan and other duties set out in (a) to (d) of the definition in para 1.1); Sch 16, paras 3.5 and 4 (Transport Co-ordinator will carry out the eight functions listed at para 3.5 of Sch 16. Other functions are added, e.g. to attend the Community Safety Working Group at para 4.1 and other groups at para 4, with responsibility for making the meetings of those groups happen. There are other functions allocated to the Transport Co-ordinator in other schedules. The Transport Co-ordinator is a SZC Co appointee. Why not simply put the obligation straight on to SZC Co?)</p> <p>Please will the Applicant explain in relation to all cases where tasks are allocated to individuals how the delivery of the tasks is secured and delivered.</p> <p>Again, ESC, SCC and WSC may also wish to respond.</p>
<i>The s.111 agreement</i>		
SA.1.14	Applicant, ESC, SCC, WSC	Definition of Development Consent Obligation.

SA.1. Section 106 Agreements		
Question to:	Question:	
		<p>(i) This terms the s.106 agreement as a Development Consent Obligation. As the Applicant, ESC, SCC and WSC will realise from the opening remarks above, this is a misnomer. Please, for clarity, could a different term be found? Please carry this through to other occasions when the phrase is used to describe the agreement whether in the s.111 agreement or the s.106 agreement.</p> <p>(ii) The s.106 agreement is to be in the Certified Form “subject only to such minor changes to references etc. as are necessary to reflect the Development Consent Order as granted”. This creates uncertainty notwithstanding the short timescale for execution by the Applicant and dispute resolution procedure.</p> <p>In a normal situation where an applicant is prepared to enter into a s.106 agreement in connection with a DCO application the s.106 would be executed before the end of the Examination. Is this provision for minor changes therefore justified in this case?</p>
SA.1.15	Applicant	<p>Definition of Implementation. Please will the Applicant explain how the exception for the Relocated Facilities Works is intended to operate and the result it is intended to achieve. How does this interact with the definition of Commencement in the s.111 agreement and the s.106 agreement?</p> <p>In recital F might it be better to say that by virtue of Art [x] the Undertaker will be prohibited from Commencing the Project?</p>
SA.1.16	Applicant, ESC, SCC, WSC	<p>Interpretation – are there any EIA issues as a result of the deemed approval provisions in CI 1.2.7. The Applicant ESC, SCC and WSC are reminded of the litigation in Wells v. Secretary of State [2005] All E.R. (EC) 323 and other cases in relation to multi-stage consents and deemed approvals under the review of mineral planning permissions.</p>

SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.17	Applicant, ESC, SCC, WSC	Conditionality – CI 2 - when is it envisaged that the s.111 agreement will be dated?
SA.1.18	Applicant ESC, SCC, WSC	<p>Execution of the s.111 agreement – CI 4</p> <p>(i) There does not appear to be any obligation by ESC, SCC or WSC actually to execute the s.111 agreement. Is this intentional? The obligation in CI 4.1 is only on ESC and then it is an obligation to coordinate. It is also difficult to see how ESC can compel SCC and WSC to execute.</p> <p>(ii) Please comment on whether such an obligation would be a fetter on their discretion and therefore unlawful.</p> <p>(iii) Please comment on whether in the event for example of a change of control by any of ESC, SCC or WSC any of them could lawfully decline to enter into the s.106 agreement.</p> <p>(iv) Does not CI 8 suggest that CI 4, if it does require ESC, SCC and WSC to enter into the s.106 agreement, is indeed a fetter on their discretion?</p> <p>(v) Is it envisaged that CI 1.2.7 applies to the execution by ESC, SCC and WSC?</p>
SA.1.19	Applicant ESC, SCC, WSC	Jurisdiction – CI 11. This states that English law applies and that the courts of England and Wales shall have exclusive jurisdiction. Will this not make enforcement in foreign jurisdictions difficult if not impossible? For that reason, was it not normal to give the courts of England and Wales non-exclusive jurisdiction?
<i>The s.106 agreement</i>		
SA.1.20	Applicant, ESC, SCC, WSC	“Councils”, CI 1.1 – should this not include WSC? There are a number of other places where the inclusion of WSC as a party suggests consequential amendments are necessary, for example CI 1.2 – successors to ESC and SCC are referred to but not successors to WSC.

SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.21	Applicant ESC, SCC, WSC	“Qualifying Interest”, CI 1.1 – this appears to include SZC’s land ownership, whatever it is. That would be the norm for a s.106 agreement, is consistent with CI 2.2 and the ExA has not seen any reason why that should not be the case, notwithstanding the other provisions of the Sizewell Special Arrangements, if it is decided to go down the s.106 route. Please will the Applicant insert the necessary provision to comply with s.106(9)(c)?
SA.1.22	Applicant, ESC, SCC, WSC	<p>CI 1.2.16 - restriction on commencing certain activities prior to payments. The ExA is grateful for the Applicant’s confirmation that this is intended to be a restriction under s.106(1)(a) (and its comment on the inevitability of the passage of time).</p> <p>Given that it is a s.106(1)(a) restriction might it not be better in a different part of the agreement, such as CI 4, rather than in the definitions and interpretation clause?</p>
SA.1.23	Applicant, ESC, SCC, WSC	Clause 2.2 Should the non-planning obligations also be stated to be enforceable?
SA.1.24	Applicant, ESC, SCC	<p>CI 2.3 “... the provisions of the Second Relocated Facilities Section 106 Agreement shall apply (save as modified by the Development Consent Order) as if ... “</p> <p>(i) Please will the Applicant enlarge on what is said in the draft 106EM about what this clause is seeking to achieve, and explain what the clause delivers and how?</p> <p>(ii) Please direct the ExA to the parts of the Second Relocated Facilities Section 106 Agreement which limit it to the works permitted by the Second Sizewell B relocated facilities permission.</p> <p>(iii) Is this a variation of the Second Relocated Facilities Section 106 Agreement which ought to be dealt with under s.106A TCPA 1990?</p>
SA.1.25	Applicant, ESC, SCC, WSC	CI 3.1.1 – drafting point; is not the effect with the words in square brackets [“with the exception of this clause 3 and clauses [●] and clause 4 insofar as it relates to obligations in the Schedules that must be complied with ... etc] circular? How can

SA.1. Section 106 Agreements		
	Question to:	Question:
		there be a requirement to comply if that requirement is in a part of the agreement which is conditional? It may be better to put this in the opening of CI 3.1.
SA.1.26	Applicant, ESC, SCC, WSC	<p>CI 3, conditionality, legal proceedings and redetermination. The drafting for any agreement dealing with this often presents difficulties. Please will ESC, SCC, WSC all consider it carefully and ensure that however it is drafted, if a DCO is in place and implemented following the exhaustion of however many rounds of challenge and redetermination take place, brought by whomsoever, the development is bound by the s.106 agreement. The ExA would be grateful for the express confirmation of ESC, SCC and WSC prior to the conclusion of the examination that they are satisfied that this has been achieved in any s.106 agreement which is presented, whether under the Sizewell Special Arrangements or otherwise.</p> <p>The ExA is sure that the Applicant is fully aware that it is in its interest also to ensure this and the ExA expects that it has access to suitable precedents.</p> <p>In relation to CI 3.2.3 and 3.3 the ExA draws attention to the words “subject to any variations to its terms necessitated through the redetermination process”. How would that work? Can the s.106 agreement be automatically amended? Is it necessary to use s.106A? If the Applicant is concerned that changes may be necessary is it not protected by not Commencing the Project until the variation has been agreed?</p> <p>Does Clause 3.4.1 cover the situation where there is a right of appeal against the refusal of permission to appeal?</p>
SA.1.27	Applicant	CI 4.1 – please will the Applicant explain how the development consent obligations can bind the Sites when the Applicant owns only part of them?

SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.28	Applicant	<p>CI 5.1 – release. The ExA notes also para 2.8 of the draft 106EM which states that the release operates only on transfer of the whole benefit to another party pursuant to Art 9 of the DCO, and the response to Observation 17 set out at the Appendix to the draft 106EM. Those contemplate transfer to only one party. Art 9 on the other hand allows transfer of parts to different parties. Clause 5.1 is ambiguous on this. What is proposed? The ExA notes that the Applicant is not released until all the benefit of the DCO has been transferred, which is the correct position under s.106(4).</p> <p>The ExA notes in passing that in Art 9 of the DCO the word “undertaker” is used to describe both the transferor / lessor undertaker and the transferee / lessee undertaker. Thus under Art 9(6)(b) a transferred benefit of the DCO is not enforceable against the transferor because they are the undertaker nor against the transferee because they too are the undertaker by virtue of Art 9(5). Please will the Applicant tidy up Art 9?</p>
SA.1.29	Applicant, ESC, SCC, WSC	<p>CI 8.2. The Applicant states in the Appendix to the draft 106EM, addressing Observation 19, that the dispute resolution procedure from CI 9.2 (now 8.2) onwards is permissive and therefore not compulsory. However, CI 8.2 does not appear to the ExA to be permissive. It allows any party to a dispute to serve notice referring the matter to binding expert determination. There is no option for the other parties to decline and, importantly, there does not appear to be the possibility thereafter to apply to the court for an injunction or other remedies. The expert’s decision is final and binding – CI 8.6.</p> <p>How in these circumstances can the process be said to be permissive and how can the host authorities obtain injunctions pending the expert’s determination?</p> <p>As the Applicant states that “SZC Co. does not consider that compliance with this Clause 9.1 would interfere with the Council’s ability to enforce the obligations in</p>

SA.1. Section 106 Agreements		
	Question to:	Question:
		the s106 Agreement by injunction or a claim for payment, nor has this been raised in negotiations with the Councils" should that not be made clear in the drafting.
SA.1.30	Applicant, ESC, SCC, WSC	CI 9.2 and other instances of a requirement for reasonability or deemed approval (such as para 6 of Sch 1). Are there any EIA issues as a result of a requirement for reasonability the deemed approval provisions in CI 9.2? The Applicant ESC, SCC and WSC are reminded of the litigation in Wells v. Secretary of State and other cases in relation to deemed approvals under the review of mineral planning permissions.
SA.1.31	Applicant, ESC, SCC	CI 12.3, notice of disposal of the Pakenham site. Why is such notice only to be given to WSC? Is it not of significance to ESC and SCC in whose areas the fen meadow to be lost is situated?
SA.1.32	Applicant, ESC, SCC, WSC	Clauses 12.2 and 12.3. What is the purpose of these clauses?
SA.1.33	Applicant, ESC, SCC, WSC	CI 12.4 – variation of trigger points. The proviso begins to address the EIA issue inherent in tailpieces; the ExA's questions in relation to that in the ExQs (DCO.1.73) apply here also.
SA.1.34	Applicant, ESC, SCC, WSC	<p>CI.14 – NPS policy tests for development obligations.</p> <p>CI 14 only applies to obligations which are development consent obligations. However, the Applicant acknowledges that there are obligations in the s.106 agreement which are not development consent obligations. Although para 4.1.9 of EN-1 is expressed to apply only to development consent obligations, please will the Applicant consider whether the non-development consent obligations it has included in the s.106 comply with the policy and modify CI 14 as necessary.</p> <p>Please will the Host Authorities state if there are any parts of the agreement, whether or not they are development consent obligations, which they consider are not policy compliant.</p>

SA.1. Section 106 Agreements		
	Question to:	Question:
		Notwithstanding this declaration, the Applicant should address each of the obligations against the policy tests in the Certificate of Compliance, Execution and Enforceability which the ExA has requested in Observation 27. The declaration alone cannot make something which does not comply with the NPS policy tests compliant
SA.1.35	Applicant, ESC, SCC, WSC	<p>CI 15. The ExA notes the changes made in response to Observation 22. However, in the event that the third party persists in refusing to enter the deed of covenant, the mitigation – payment of money to that third party for a particular purpose – will not be delivered and alternative mitigation is to be devised under CI 15.3.3 thereby raising a tailpiece-like issue. Please will the Applicant and the host authorities continue to work to address this issue satisfactorily.</p> <p>The ExA notes that the deed of covenant provides for the return of unspent contributions. Whilst the ExA is familiar with such provisions, if the money is not spent at the appropriate time the mitigation it secures will be lost. As the mitigation will be required, should there not be an obligation on the recipient to spend it on the mitigation?</p>
SA.1.36	Applicant, ESC, SCC, WSC	<p>CI 17. This new clause is a large carve out for potential breaches of data protection law.</p> <p>It also relieves the parties of any responsibility to do anything required by the s.106 agreement if that would be contrary to “any other applicable legal requirements” of whatever nature.</p> <p>The ExA questions the appropriateness of this clause. Its presence removes the incentive on the parties and their legal advisors to draft so as to ensure the obligations can be performed without infringing other laws.</p>

SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.37	Applicant, ESC, SCC, WSC	<p>CI 21 – jurisdiction. Please see the ExA’s comments on the equivalent clause in the s.111 agreement.</p> <p>This point also applies to the jurisdiction clause in the deed of covenant (CI 9.2).</p>
SA.1.38	Applicant, ESC, SCC, WSC	Sch 1, para 4.1 – return of unspent contributions. Whilst the ExA is familiar with such provisions, if the money is not spent at the appropriate time the mitigation it secures will be lost. As the mitigation will be required, should there not be an obligation on the relevant host authority to spend it on the mitigation?
<i>General questions on the schedules:</i>		
SA.1.39	Applicant, ESC, SCC, WSC	Sch 4 generally. Please will the Applicant explain how the payments and provisions in this schedule are justified in both policy and legal terms. The ExA would appreciate it if the response would consider also the cases of Hall v. Shoreham UDC [1964] 1 WLR 240 and R v. Hillingdon ex p Royco [1974] Q.B. 720 and how they apply, or not. This question also applies to Schedules 5, 6, 7, 8, 10, 11, 12, 13, 14, 15.
<i>Specific questions on the Schedules and remainder of the s.106 agreement</i>		
SA.1.40	Applicant, ESC, SCC, WSC	<p>Sch 1, para 5.1. – this imposes an obligation on the host authorities to register the deed as a local land charge.</p> <p>A development consent obligation is a local land charge – see s.106(11). The local authority will normally register it. But in addition, a local land charge binds persons acquiring the land, whether or not the charge is registered (s.10, Local Land Charges Act 1975).</p> <p>Please will the Applicant and Host Authorities reflect on the implications of this and respond.</p>

SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.41	Applicant, ESC, SCC, WSC	Sch 1 para 6 – please see the ExA's earlier question on this paragraph and CI 9.2
SA.1.42	Applicant, ESC, SCC, WSC	Sch 2 – The ExA notes from the footnote 7 that Sch 2 is subject to further consideration and engagement with the Councils. The ExA would prefer to comment on a more settled draft
SA.1.43	Applicant	Sch 3, para 2.1 – ambit of the Housing Fund. By whom is the promise at para 2.1 given?
SA.1.44	Applicant, ESC, SCC, WSC	Sch 3 – the Housing Fund – this seems to be a fund held by SZC Co and from which payments are made to ESC under e.g. paras 2.6.2, 2.7.2 and 2.7.1 (i) Please explain how payment is enforced. (ii) Please explain how the fund is held pending payments and what would happen on insolvency. (iii) The same questions arise in relation to other funds, e.g. the Emergency Services Contribution in Sch 4. Please will the Applicant address these issues in relation to each and every fund.
SA.1.45	Applicant, ESC, SCC, WSC	Sch 3 – para 3.1 – this is an obligation to use reasonable endeavours to deliver the Accommodation Campus in accordance with the Implementation Plan? (i) Is reasonable endeavours an adequate obligation? (ii) In the event of failure, the relevant host authority would normally have a right of entry to do the work and recharge the person responsible. (a) Is the Accommodation Campus on land owned or controlled by the Applicant? (b) How does the Applicant propose that the obligation to deliver the Accommodation Campus is enforced?
SA.1.46	Applicant	Sch 3 para 6.1. How is this promise to establish the Accommodation Working Group enforced? It does not appear to be a promise within s.106(1).
SA.1.47	Applicant	Sch 3 para 6.2. Monitoring of accommodation matters. How is this obligation to survey and to produce a report to be enforced?

SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.48	Applicant	Sch 4 – para 2 and definitions. Where is the actual role and content of the On Site Security and On Site Fire and Rescue set out? How will it be known if it has been delivered and is performing?
SA.1.49	Applicant	<p>Sch 5. This schedule requires “third sector support for specific issues which the County Council considers (acting reasonably) are required as a result of potential effects arising from the Project and the Sizewell C Construction Workforce. There are other instances of community benefits across the s.106 agreement.</p> <p>Please will the Applicant consider and explain how are they consistent with R (oao Wright) v. Forest of Dean [2016] EWHC 1349 (Admin) affirmed in the Court of Appeal ([2017] EWCA Civ 2102 and upheld in the Supreme Court at [2019] UKSC 53 and any subsequent relevant caselaw?</p>
SA.1.50	Applicant	Sch 7, para 2.1 – this contains the phrase “On or before Commencement SZC Co shall ...”. Is this intended to be a restriction in development contemplated by s.106(1)(a)? If so, should it not be expressed as a restriction? The phrase appears elsewhere in the s.106. Please will the Applicant address the question for all of them.
SA.1.51	Applicant, ESC, SCC, WSC	Sch 7, para 3.2.1 - businesses based in a particular area, such as East of England. Please will the Applicant explain the test. For example, is a business with a registered office in Dublin and 95% of its workforce working in Lowestoft based in the East of England? Or the same scenario but only 10% of its workforce? Is an online business with a registered office at an accountant's office in Ipswich and 10,000 operatives, some salaried, some on zero-hours contracts and some on fixed term contracts, spread across Europe, Asia and Africa, based in the East of England?
SA.1.52	Applicant, ESC, SCC, WSC	Sch 9, para 2. Para 2.1 – this is an obligation to use reasonable endeavours to deliver the Key Environmental Mitigation.

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Question to:	Question:	
		<p>(i) Is reasonable endeavours an acceptable standard and if so, how?</p> <p>(ii) Please will the Applicant supply the Implementation Plan referred to.</p> <p>(iii) The ExA notes this includes the Fen Meadow Works which have a ten year timescale.</p> <p>Para 2.4. This provides for review of the Implementation Programme in the event of delays. Given that the mitigation is necessary, please will the Applicant say how changes to timescale are appropriate?</p>
SA.1.53	Applicant, ESC, SCC, WSC	<p>Sch 10, leisure etc.</p> <p>(i) Is the proviso in para 2.1.1 appropriate if the Leiston Sports Facilities are necessary?</p> <p>(ii) Design of the facilities is in the hands of ESC. Given that the design will presumably have to be approved under the DCO there appears to be a dual role. Whilst being mindful of the complexities of the General Regulations (SI 1992/1492) is there a need for separation in this case and if so how should it be achieved without complexity? Is this what para 2.2 is designed to achieve?</p> <p>(iii) What is the test for the “appropriate timescale” for delivery?</p> <p>(iv) Para 2.3.2 is a restriction on occupation of the sports facilities prior to ESC submitting a management plan to SZC Co for approval. Given that the facilities are necessary, how does this restriction incentivise the Applicant?</p> <p>(v) Para 2.3.4 then provides a further restriction on occupation whilst the Applicant decides whether or not to approve the management plan. Is this an appropriate control? If it is, what is the dispute resolution procedure?</p> <p>(vi) Para 2.4.2 this states the destination of part of the Annual Maintenance Payment. What is the destination of the rest?</p>
SA.1.54	Applicant, ESC, SCC, WSC	Sch 11 – Natural Environment.

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	Question to:	Question:
		<p>(i) Please will the Applicant supply the plan of the East Suffolk Natural Environment Improvement Area?</p> <p>(ii) "M22 fen meadow habitat". Would it be helpful to make the Rodwell document an examination document and have it certified in the DCO?</p> <p>(iii) Natural Environment Improvement Officer – this is defined as someone employed by SCHAONB. That is an area and a designation, not a person. Please will the Applicant provide the correct organisation and incorporate it in the next draft of the s.106 agreement. Please check other places where SCHAONB is used.</p> <p>(iv) The Natural Environment Improvement Fund. Please will the Applicant direct the ExA to where this is explained in the ES?</p> <p>(v) The East Suffolk Natural Environment Improvement Fund. Is this different from the Natural Environment Improvement Fund? Looking at para 2.5, is there a possibility that what is envisaged is a purpose trust? If so, what action is needed? The Applicant may wish to consider this also in the context of para 5 – review and long term management of the fund.</p>
SA.1.55	Applicant, ESC, SCC, WSC, Natural England	<p>Sch 11, para 8.</p> <p>(i) The Fen Meadow Contingency Fund. It appears that the fallback, if fen meadow is not successfully re-created, is the payment of money.</p> <p>(ii) How does this not disincentivise creation of replacement fen meadow? What other steps, incentives and sanctions are there to ensure that proper efforts are employed and implemented so that the Contingency Fund Payments do not have to be made?</p> <p>(iii) If the fen meadow is not successfully recreated by the Applicant is it realistic to suppose that others will have any greater success?</p>
SA.1.56	Applicant	<p>Sch 13. Resilience funds for the National Trust, Pro-Corda and RSPB. No purposes for these payments are specified as yet. When is it expected they will be set out? Earlier questions in relation to Wright v. Forest of Dean are repeated here.</p>

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	Question to:	Question:
SA.1.57	Applicant	<p>Sch 14 – the Sizewell C Community Fund</p> <p>(i) Please will the Applicant explain whether the intention is that the fund is taken into account as an important and relevant matter and if so address the issues in Wright v. Forest of Dean and Resilient Energy and subsequent case law.</p> <p>(ii) Please will the Applicant set out how it intends the funds shall be held from time to time, and the relevance, functions and reasons for the various legal mechanisms. For example, where is the Fund actually held, what is the purpose of the Deed of Transfer? If para 2.8 is triggered because SZC Co in its absolute discretion no longer wishes it to be administered by Suffolk Community Foundation, in whose hands is the fund at this stage? If held by SCF, how do SZC get it back? If it is held by SZC, how much is it?</p> <p>(iii) Para 2.5. Must all 10 of the criteria be met for every application?</p>
SA.1.58	Applicant	<p>Sch 15 – Transport.</p> <p>At para 2.1 this schedule requires implementation of various travel plans. Whilst the ExA is aware that it is common for s.106 agreements to address travel plans it is difficult to see that they are actually within the terms of s.106(1) TCPA 1990. The ExA has noted that the draft s.106EM asserts that compliance is not necessary owing to the modifications in the Sizewell Special Arrangements. However, the Sizewell Special Arrangements and the draft s.106 agreement propose that the Applicant enters into it by virtue not only of its status as undertaker (if the DCO is granted) but also as landowner of at least some land and the current drafting for the modification of s.106 set out in the Sizewell Special Arrangements and the DCO do not remove the necessity for the promises to fall within s.106(1) in order (a) to be “development consent obligations” as defined in the draft s.106 agreement [PBD0-004] and (b) to run with such land as is bound</p> <p>How therefore is delivery of and compliance with the travel plans ensured?</p>

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	Question to:	Question:
SA.1.59	Applicant	<p>Sch 15 – Transport</p> <p>(i) Para 3.3 – the transport review group. Para 3.3.5 contemplates a tied vote. Is the chair not to have a casting vote? Does this apply to all the other groups and committees created by the s.106 agreement and if so what is the resolution process in those cases?</p> <p>(ii) How is paragraph 3.5.2 (duty to promote objectives and benefits of the Transport Management Plans) and following (paras 3.5.3 – 3.5.8) enforced? Failure to perform is unlikely to sound in damages. Would an injunction be issued (leaving aside for the moment the fact that that person given the duties is not a person bound by the s.106 agreement).</p> <p>(iii) the ExA's questions above in relation to third party involvement, the allocation of functions to persons who are not a party to the agreement and to groups, SA1.10 -1.12) are also relevant here.</p> <p>(iv) Paragraphs 4.4 and 4.9 (and potentially a paragraph in the section on Marlesford and Little Glemham – 4.13 – 4.17) have considerable discretion over the schemes to be implemented. Please will the Applicant explain how this meets the policy and legal tests?</p> <p>(v) Para 5.2 – SZC Co to check road condition “regularly”? Please will the Applicant state how regularly? For example is it to be weekly, monthly or some other interval?</p> <p>(vi) How is para 6.1 and 6.2 a planning obligation?</p>
SA.1.60	Applicant, ESC, SCC, WSC	<p>Sch 17 – Governance.</p> <p>(i) Definitions – para 1. Please will the Applicant explain where ESC and SCC covenant to form the Oversight Partnership.</p> <p>(ii) Para 2.1 – this may just be a drafting point, but the opening words read as though the covenant is not made until some point “on or before the Commencement Date”. Is that the intention or is it that the covenant is made on</p>

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Question to:		Question:
		<p>execution to establish the Delivery Steering Group on or before the Commencement Date?</p> <p>(iii) Para 2.5.1 – what happens if the DSG fails to do these things? How is it enforced? Similarly the obligations on the Oversight Partnership in para 3 and all the other groups contemplated by Sch 17.</p> <p>(iv) Para 5.1.3 quorum; in the phrase “at least one of whom is a member representing each of East Suffolk Council, Suffolk County Council and SZC Co ...”, should “each of” be replaced by “any of”? The ExA is unclear what is meant by the current wording. A similar formulation is to be found elsewhere in the schedules.</p> <p>(vi) the visual representation of the governance structure. The Community Fund, Main Site Forum and Associated Development Fora are shown but not linked to anything. The sub-bodies below the Transport Review Group and Planning Group appear to be incomplete. What are the relationships between the Executive Level Steering Groups and Oversight Partnerships in boxes at the head of the figure and the other groups? Please explain the colour code.</p> <p>(vii) Footnote 42. “Executive Level Steering Group is already in existence and is not constituted in this Deed. It is shown in Figure 1 for informational purposes only.” Is not some provision to ensure it continues to exist necessary?</p>
SA.1.61	Applicant	List of plans and annexes. The ExA notes that many of these have yet to be provided. Please will the Applicant supply them or give a timetable for when they will be submitted to the Examination.
<i>The following questions relate to the draft s.106EM</i>		
SA.1.62	Applicant	The ExA thanks the Applicant for providing the draft s.106EM. In relation to the legal underpinnings, the ExA is seeking a guide, much like an EM for a DCO, of the purpose, policy compliance and legal powers for each clause, schedule and paragraph. Especially given not only the limitations of s.106 TCPA 1990 but also the approach in the Sizewell Special Arrangements, the ExA would be particularly

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	Question to:	Question:
		assisted by this, however the eventual s.106 agreement turns out. Please will the Applicant include the s.111 agreement in the draft s.106EM.
SA.1.63	Applicant	Para 2.8. The current drafting of Art 9 of the DCO only makes planning obligations apply to a transferee. So, as things stand, it is necessary for the promises in the s.106 to meet the s.106(1) tests.
SA.1.64	Applicant, ESC, SCC, WSC	<p>At para 4.8 the draft s.106EM states: "While it may be possible, in principle, for elements of the s106 Agreement as drafted to be pulled out into requirements, we consider that in most, if not all, cases there is considerable practical advantage and merit in placing the commitments to plans etc together with the governance arrangements for approvals or amendments, and procedures for resolution of disagreements, which relate to them and which it would not be appropriate to draft into the DCO."</p> <p>Please will the Applicant explain further why it is advantageous to deal with these matters in the s.106 agreement rather than in the DCO.</p>
SA.1.65	Applicant	Response to Observation 6. The Observation was an open question. The ExA is aware of cases where only part of an application site is bound by a s.106 agreement and this can be made to work in some circumstances. They may turn out to be appropriate in this case.
SA.1.66	Applicant	Please will the Applicant say whether its response to Observation 25 on the effect of the Oxfordshire case (the ExA is grateful for the correction to the citation) has considered all other instances in the draft s.106 (e.g. Sch 3 para 2.3) where payments for administration, expenses and related costs are to be paid to any of ESC, SCC and WSC?
SA.1.67	Applicant, ESC, SCC, WSC	Observation 27 and title investigation by the Host Authorities. The ExA notes that the SZC Co's solicitors are willing to provide the confirmation document sought by

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Question to:		Question:
		<p>the ExA. The ExA looks forward to the submission of the draft at the earliest possible opportunity.</p> <p>In relation to title investigation, the ExA notes that the Applicant is discouraging the Host Authorities from carrying out title investigation. As the Applicant observes, the Sizewell Special Arrangements are a new approach. It is evidently evolving. In addition the final position on the s.106 agreement is not yet settled. The ExA will be asking the Host Authorities for their confirmation that they are satisfied with all of the provisions of any s.106 agreement, including its enforceability throughout the construction and operation of the Project, should the DCO be made. Therefore to allow and to carry out title investigation would seem prudent.</p>
SA.1.68	Applicant	<p>Please will the Applicant state how a future undertaker would know of the existence of this extensive s.106 agreement. Such an undertaker might only be a transferee of part of the benefit of the DCO and not acquire any land.</p> <p>How would a lender or an investor who is not an undertaker know of the existence of the s.106 agreement?</p>
SA.1.69	Applicant, ESC, SCC, WSC	<p>The ExA draws attention to s.106(6) which, where there is a breach of a requirement in a development consent obligation, gives the authority by whom it is enforceable the right to enter the land to carry out the operations. The host authorities, on the scheme in the Sizewell Special Arrangements, are the enforcing authorities of a s.106 agreement which is expressly stated to bind the Sites, i.e. the Order lands (see clause 4.1). Will they be able to exercise this power in relation to all the Sites?</p>
SA.1.70	Applicant, ESC, SCC, WSC	<p>Would execution of the s.106 agreement in escrow, with the making of a DCO pursuant to the Application being the escrow condition, be an appropriate</p>

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Question to:		Question:
		alternative to the proposed s.111 route, or are there obstacles to that route? If so, please explain what they are.
SA.1.71	Applicant, ESC, SCC, WSC	<p>The ExA makes the following further observations:</p> <ol style="list-style-type: none"> 1. This s.106 agreement is expressed to bind all the Sites (see Cl 4.1 and Cl 2.1 where it is said to do this by virtue of the Applicant's Qualifying Interest, which is its status as undertaker if the DCO is made and its status as a person with an actual interest in parts of the Sites. The status as undertaker would deem the Applicant to be interested in the whole Order land – see the new article for the DCO set out at para 2.6.1 of the draft 106EM. 2. The Sizewell Special Arrangements and s.106 agreement seek to create development consent obligations which are free floating and which do not bind the land. 3. The ExA has drawn attention to s.106(6) which, where there is a breach of a requirement in a development consent obligation, gives the authority by whom it is enforceable the right to enter the land to carry out the operations. The host authorities, on the scheme in the Sizewell Special Arrangements, are the enforcing authorities. It is not clear that they would be able to exercise this power in relation to the s.106 agreement for Sizewell. 4. The Applicant proposes that it enters into the s.106 both as undertaker with a deemed land interest and also as a landowner – see the definition of Qualifying Interest and clauses 4.1 and 4.2. Thus any promises which are development consent obligations because they fall within s.106(1) will run with the Applicant's title, whatever it is. 5. The development consent obligations in the s.106 agreement bind the Sites, that is to say the Order land. That is clearly stated at clause 4.1.

SA.1. Section 106 Agreements	
Question to:	Question:
	<p>6. The s.106 agreement refers to development consent obligations and planning obligations. By Clause 2 they are expressly made to run with the Applicant's land.</p> <p>7. The Applicant might propose further modifications to s.106, changing the extent of s.106(6) and changing s.106(11) so that its floating development consent obligation is not a local land charge.</p> <p>8. The Applicant states its intention for the s.106 agreement at para 4.3 of the draft s.106EM "... we do not intend the s106 Agreement to bind successors in title. It should be binding only upon SZC Co as the 'undertaker', being the only party who may lawfully implement the development authorised by the DCO, and anyone to whom the benefit of the DCO is transferred under article 9 of the DCO" (para 4.3).</p> <p>9. The ExA would summarise the aim as being to make the s.106 agreement run with the DCO rather than run with the land. To achieve this, major modifications are to be effected to s.106 TCPA 1990. But if the provisions were incorporated into the DCO they would run with it anyway.</p> <p>10. Given that the legal purpose of s.106 is to make promises run with the land it seems strange to choose that power but then to modify it so as to remove its legal purpose. The ExA does not understand the Applicant's apparent aversion to using the DCO.</p> <p>11. Of course there may still be a need for s.106 agreement if there are things which are needed which cannot be done in a DCO, in which case please will the Applicant explain which they are. That is something which could be looked at if it arises and conventional means of securing development consent obligations when only part of the land is controlled by an applicant could be explored.</p>