ID Number: 20026012

The Sizewell C Project, Ref. EN010012

Issue Specific Hearing 1 (6 July 2021) – (ISH1) The draft DCO and s.106 agreement / Deed of obligation

Post Hearing Submissions including written summary of Suffolk County Council's Oral Case

Suffolk County Council Registration ID Number: 20026012

Deadline 5 **23 July 2021**

Glossary of Acronyms

- **2VB –** Two Village Bypass
- **CoCP –** Code of Construction Practice
- **CWTP –** Construction Worker Travel Plan (Revision 2.0) [REP2-055]
- **CTMP –** Construction Traffic Management Plan (Revision 2) [REP2-054]
- **DCO -** Development Consent Order (Revision 4 tracked) [REP2-013]
- **EM -** Explanatory Memorandum to the DCO (version 3) [REP2-016]
- **ESC –** East Suffolk Council
- **HGV –** Heavy Goods Vehicles
- **oLEMP –** Outline Landscape Ecological Management Plan
- **SCC –** Suffolk County Council
- **SLR –** Sizewell Link Road

Issue Specific Hearing 1 (6 July 2021) - (ISH1) The draft DCO and s.106 agreement / Deed of obligation
Post Hearing Submissions including written summary of Suffolk County Council's Oral Case

Note: These Post Hearing Submissions include a written summary of the Oral Case presented by Suffolk County Council (SCC). They also include SCC's submissions on all relevant Agenda Items, not all of which were rehearsed orally at the ISH due to the need to keep oral presentations succinct. The structure of the Submissions follows the order of the Agenda Items but within each Agenda Item, the Submissions begin by identifying the main points of concern to SCC and then turn to more detailed matters and specific matters of drafting.

Examining Authority's Agenda Item / Question	Suffolk County Council's Response	References
Agenda Item 2 – DCO		
Securing Mitigation: General	SCC's main concerns in relation to mitigation are that there needs to be clarity as to what mitigation is to be provided and by when (in relation to stages of the project rather than calendar dates) and that the mechanisms for its delivery need to be secured and enforceable, but that the current documentation is not adequate for those purposes to be achieved. SCC notes that the primary vehicle chosen by the Applicant for the delivery of most of the mitigation (and in particular the transport mitigation) is the Deed of Obligation [REP3-027], and the subordinate documents it relies on, rather than the Articles and Requirements of the DCO [REP2-013]. Whilst SCC has no 'in principle' objection to such an approach if it can be demonstrated to be effective, it is a departure from the approach of most recent DCOs, and making most of the mitigation dependent on the performance (and enforcement) of contractual terms underscores the need for those arrangements to be robust. SCC notes that the Applicant agreed that it would produce a document at D5 which will address a number of the questions raised by the ExA in relation to securing mitigation. In	Deed of Obligation [REP2-060]/[REP3-027]; Implementation Plan (update, revision 2) [REP2-044]

	particular, SCC expects the document to provide a very clear explanation as to the way in which the sequencing set out in the Implementation Plan [REP2-044] will be secured and will (it is assumed) confirm that the HGV limits are absolute, explaining how that is secured. The ExA (Mr Brock) requested that the explanation really must drill down and deal with these issues and asked that if there are gaps in what is proposed, then the Applicant make sure that it shows the ExA how it is going to deal with it. As Mr Bedford for SCC explained in his submissions at ISH1, (and further elaborated at ISH 2 and 3), SCC also has particular concerns about those issues. SCC reserves its position on these and other matters which may be covered by the Applicant at D5, depending on what the Applicant says. SCC considers that a critical factor in seeking to achieve a balance between the benefits and harm of the project is through the mitigation that the Applicant proposes to deploy. In this context, the Council takes the view that the following considerations need to guide how the mitigation is secured: • Is the mitigation robust – does the mechanism have "teeth" that ensures that the agreed mitigation will be delivered? • Does that mechanism deliver a timely solution to any dispute – will whatever enforcement proceedings apply take so long to take effect that the infringement is no longer relevant? • Will the mechanisms be sufficiently flexible to allow pragmatic variation, that does not contradict the ES, to be agreed between the Applicant and the Councils in appropriate circumstances?	

	To achieve this, it may be appropriate that different mitigations are established through a variety of mechanisms: • Through reference in an article of the DCO; • Through inclusion in the Requirements in Schedule 2 to the DCO; • Through specific reference within the Deed of Obligation/s106; • Through a plan which is an appendix to the Deed of Obligation/s106.	
Securing Mitigation: HGV Caps as an example	An example of the above, which was raised on a number of occasions during ISH1, ISH2 and ISH3, is the issue of caps for HGVs using various parts of the highway network, which is seen as a critical element in ensuring that the objectives of the Transport Strategy are achieved. Representatives of the Applicant gave the impression at various points during ISH1, ISH2 and ISH3 that the HGV caps were firm commitments. For example, in ISH1 session 3, Mr Rhodes at 23:54: "We know that the HGV limit can't be breached. We know we have to manage the construction programme within that limit" and ISH3 session 1 at 33:33: "So if one's concerned about the impact of HGVs, for instance, there are absolute limits, not only on numbers, but on time, on routes and on peak hours as well." In some instances, the Applicant gave the impression that HGV caps were imposed and enforceable under the DCO. For example, in ISH2 session 1 at 1:28:43, Mr Flanagan: "We have controls in the DCO to control against harm, HGV limits being a principal relevant example, in this case." At present, the HGV caps are referred to in the CTMP, not listed as a Certified Document in Schedule 22 to the DCO, but as a 'subordinate document' to the Deed of Obligation [REP3-027].	CTMP [REP2-054]; Sched. 22 DCO; Deed of Obligation [REP2-060]/[REP3-027]

	In order to meet the considerations referred to above, SCC questions whether this is the right place for the CTMP and whether it would be better placed as a certified document in the DCO, in the same way as the Code of Construction Practice. This issue is also dealt with in SCC's post hearing submissions on ISH2 and 3.	
Securing mitigation: A new Requirement for Deed of Obligation to be complied with	During the ISH the ExA canvassed the suggestion of a new requirement which would require that the Deed of Obligation be complied with. SCC welcome this suggestion as a potential way forward but (a) SCC would have serious concerns about possible criminal liability for SCC in relation to its own obligations under the Deed which it would need to perform/discharge by reference to its assessment of the public interest, (b) there is the need for certainty as respects the wording of criminal offences (particularly with the possibility of the Deed being varied, and hence the offence varying without Secretary of State control), and (c) the proposal needs to be seen in the context of the overall package of controls, including the revisions to the Deed that SCC are expecting to see at D5, before SCC is able to come to a concluded position.	
Securing mitigation: Deed of Obligation binding transferees and lessees	The s106/deed of obligation is dealt with in more detail later but in terms of its relationship with the DCO, if the Deed of Obligation route is followed, SCC is concerned to ensure in particular that where it is appropriate, the obligations under the agreement will be binding on • the 3 parties named in article 8 as beneficiaries of the provisions of the Order in respect of certain works (Energy Nuclear Generation Limited, Network Rail and National Grid) and	Arts. 8, 9 DCO; Applicant's Obligations Enforcement Note [REP3-047]

	• any transferee or lessee of the benefit of the Order under article 9. On article 8, the Applicant says that Network Rail and National Grid will not be signatories to the deed of obligation, which is a cause of concern unless arrangements are made for 'step in' rights or similar for the Applicant in the event that those bodies do not perform (either at all or in a timely manner) the matters for which they remain responsible. [See later for details] In relation to transferees and lessees under article 9 (consent to transfer benefit of the Order), SCC notes that paragraph (4)(b) says "save to the extent agreed by the Secretary of State, the Deed of Obligation completed pursuant to this Order, and any variations to it at the date of transfer or grant, shall be enforceable against the transferee or lessee as they would against the transferor". Detailed comments are made on this below under the heading "Transfers pursuant to Article 9 of the DCO and liability under the Evolving Approach". In response to SCC's continuing concerns about certainty of enforcement, and in particular the desirability of SCC having a direct contractual relationship with the transferee, the Applicant has [obligations note, in Comments on Responses to the ExA's First Written Questions (ExQ1) - Volume 2 – Appendices [REP3-047]] come forward with a further alternative (4)(b) in its deadline 3 submissions, which would require transferees and lessees to enter into a deed of adherence. SCC are considering this approach and has some initial observations. [See later for details]	

	On a related point, SCC notes the changes that have been made to article 9, in particular to paragraph (5), which appear to allow the benefit of the Order (or any part of it) to be transferred to <u>any</u> third party, if all the statutory compensation payable in respect of land acquisition and injurious affection etc has been paid and no further claims can be made. There is no other limitation as regards who the third party might be. All the transferor would need to do is notify the Secretary of State. This is highly unusual, if not unprecedented in DCOs, which usually require Secretary of State consent save for where there is a rationale for it (for example transferring powers to do utility works to a specified utility company). SCC considers that at the very least, the Applicant should explain the rationale for proposed paragraph (5)(b) of article 9 of the DCO generally and in particular in terms of the robustness of the DCO in terms of securing mitigation, and in terms of national security. Also, article 9(4)(b) appears to enable the Secretary of State to agree with the undertaker that on a transfer or lease, provisions of the Deed of Obligation could be "carved out" in so far as they enforceable against the transferee. Again, I rationale for this should be provided, and if it is intended only to apply to limited circumstances (for example because the transferee is only responsible for certain parts of the works), then the DCO should reflect that.	
Securing mitigation: Enforceability of documents subsidiary to the CoCP etc.	SCC notes that the Applicant said it will produce a short note on the relationship between the CoCP and subsidiary documents, including the environmental management plans. Although ESC is the discharging authority as regards the COCP, SCC may wish to comment on this note at a later stage.	

"Reasonable endeavours" in the Deed of Obligation	a. SCC's position is that use of "reasonable endeavours" by reference to the Applicant's obligations in any Deed of Obligation/section 106 agreement is not acceptable. b. This provides no certainty to SCC that the mitigation will be delivered and would make enforcement by SCC difficult. c. A "reasonable endeavours" obligation could simply require the Applicant to take one reasonable course of action to achieve an aim/outcome, not all of them (see: Rhodia International Holdings Ltd v Huntsman International LLC [2007] EWHC 292 (Comm)). A "reasonable endeavours" obligation does not require action to be taken which would disadvantage the Applicant. d. SCC acknowledges the Applicant's answer to SA.1.52 that the standard "reasonable endeavours" was used in the Hinkley Point C Section 106 Agreement. e. However, SCC is aware that the Hinkley Point C project has experienced several changes in the assumed construction programme for both the main site and its Associated Developments (including the Temporary Jetty) as a result of various external influences and causations. SCC understands that progress with and changes to the implementation plan for Hinkley Point C have been the subject of regular review and dialogue between the NNB and the Councils (in that case). The formal mechanism for this is set out in the HPC Deed of Development Consent Obligations which contains an obligation that NNB GenCo shall use "reasonable endeavours" to carry out and complete the Associated Developments in accordance with the Implementation Plan. In the case of HPC, the determination of courses of action rests with NNB GenCo taking into account any reasonable representations of the Councils. It should be noted that not all the Associated Developments at HPC	Deed of Obligation [REP2-060]/[REP3-027] CWTP [REP2-055]

	have yet been completed which raises a number of points: i. that the range of factors that will inform the Councils' representations could in some cases be outside of the direct control of the project. SCC understands that a live example at Hinkley Point C relates to the need for the timing of works contained in the Implementation Plan to be sensitive to works by others elsewhere in the locality; ii. the potential need to control the timing of works to ensure they are delivered in time to address impacts; and iii. the need to ensure the works themselves are obligated, regardless of timing. f. SCC is of the view that this phrase should not be used in the context of covenants in the Deed of Obligation and, instead, the Applicant should commit to delivering the relevant obligation by reference to a set trigger (related to time or a stage in the development), unless otherwise agreed in writing with SCC (or ESC, where relevant). In this way, if SCC (or ESC, where relevant) agree that a timetable for delivery should be altered following a request from the Applicant, then the timetable can be varied but otherwise the obligation should be performed in accordance with its terms. This provides an appropriate degree of flexibility to reflect any changed circumstances but also imposes sufficient control to ensure that the obligations are performed as intended unless there is a sound justification for a departure. For example, SCC noted the comment made by Matthew Sharpe on behalf of the Applicant at 36:00 in ISH1 Session 3 where in relation to habitat improvement being included as a requirement, it was said that where a cast iron guarantee is necessary it has been provided. It is SCC's current position (subject to review of the Applicant's D5 notes) that we want such "cast iron" assurances (subject to	

	variation with the approval of the Councils in due course) for all of the Key Environmental Mitigation mentioned in Schedule 9 of the Deed. g. SCC notes that the Applicant suggested at ISH1 that SCC (and ESC) had suggested an alternative of 'all reasonable endeavours' but that no one had suggested a 'best endeavours' clause, which the Applicant contended was 'clearly too onerous' [Transcript, Session 3 at 49:24]. SCC has put forward 'all reasonable endeavours' as a potential strengthening of some of the obligations (such as in Schedule 14) in REP3-083, but subject to its overarching point that the imposition of specific triggers is a preferable mechanism. SCC understands this term to be equated to 'best endeavours': see Jet 2 Com Ltd v Blackpool Airport Ltd [2012] EWCA Civ 417 at para 16. SCC also notes that in the CWTP [REP2-055] the Applicant has committed to use 'best endeavours' to meet the mode share 'aim' targets (para 6.4.1) and that in the Deed of Obligation [REP2-060] the Applicant has committed that it 'will implement' the CWTP during the construction period. There therefore seems to be some inconsistency in the Applicant's unwillingness to accept a 'best endeavours' or 'all reasonable endeavours' obligation. However, SCC's primary position is as set out at item f above.	
"Reasonable endeavours" in the DCO	The DCO contains 18 references to "reasonable endeavours"; however, none of these affect SCC. Each of the references is included in either Schedule 18 (protective provisions) or Schedule 20 (deemed marine licence under part 4 (marine licensing) of the Marine and Coastal Access Act 2009. One of the references concerns electricity, gas, water and sewerage undertakers; one concerns Network Rail, one concerns Cadent, and the remained concern the deemed marine licence.	Sch. 18, 20 DCO

	Since the contents of these Schedules have either been agreed with, or are still the subject to negotiations with, the parties mentioned above, SCC does not consider it would be appropriate to comment on them. The Schedule to this note lists the provisions of the DCO which refer to "reasonable endeavours".	
"In general accordance with"	SCC support the ESC proposal that the term "in general accordance with" be defined to give greater certainty. SCC note that during exchanges in ISH1, the Applicant confirmed that it agreed in principle with the suggestion of a definition, but with some differences from the definition proposed by ESC. In particular, it was suggested that that the term "substantively consistent with" the various documents might be used. SCC reserves its position until it has considered this suggestion. "In general accordance with" is used in some requirements whereas "in accordance with" is used in others (and sometimes both are used in the same requirement). There doesn't appear to be a rule of thumb as to which is used when. "In general accordance with" is well precedented DCO language but is not used in all DCOs – see in particular Thames Tideway, where "in accordance with" is used throughout the requirements. [The Tideway Order is in the Applicant's responses to the ExA's First Written Questions (ExQ1) - Volume 3 - Appendices Part 7 of 7 [REP2-114] SCC have a specific concern with the use of "in general accordance with" in requirements 3(1) and (3) (archaeology and peat):	Thames Tideway DCO [REP2-114] Req. 3 DCO

	• R3(1): SCC sees no reason why site specific written schemes of investigation should not be in accordance with the overarching one (ie without the "general"). The overarching scheme sets out specific methodologies which should apply throughout and which should be picked up in the site specific schemes. • R3(3): Similar considerations apply here: there is no reason why the peat archaeological written scheme of investigation should not be in accordance with, rather than in general accordance with the Peat Strategy. • If "in accordance with" is used then some flexibility remains, because r3(2) and (4) allow SCC to agree that works need not be carried out in accordance with the approved site specific or peat archaeological schemes The Applicant has, since the completion of ISH1, provided SCC's Senior Archaeological Officer with a revised form of R3, which is currently being considered. On a related point, SCC consider that r3(2) should require that removal and reinstatement of the authorised development should be carried out in accordance with the site specific written scheme of investigation and reporting methods in the overarching written scheme.	
Agenda Item 3 – s.106 agreement / Deed of obligation		
The Sizewell Special Arrangements	<u>Scope of comments</u> 1. SCC has been in dialogue with the Applicant regarding the draft Deed of Obligation/s.106 agreement. 2. SCC intend to continue to work collaboratively with the Applicant on the draft Deed of Obligation/s.106 agreement.	Deed of Obligation [REP2-060]/[REP3-027] Applicant's Obligations Enforcement Note [REP3-047]

	3. No conclusions have been reached by SCC as to the acceptability of the Applicant's Evolving Approach at this stage. 4. SCC is also considering the evolving inter-relationship between the DCO and the Deed of Obligation. 5. SCC has reviewed the draft Deed of Obligation document submitted by the Applicant to the ExA at Deadline 2 and provided further comments. SCC has also reviewed the Deed of Obligation document submitted by the Applicant at Deadline 3 [REP3-027] and provides further detailed comments where possible at Deadline 5 (which are in anticipation of the Applicant's response to SCC's comments submitted at Deadline 2). 6. A lack of comment by SCC on any aspect of the draft Deed of Obligation should not be taken as meaning that SCC agree with that part of the document. 7. SCC is also aware of the updated Deed of Obligation submitted at Deadline 3 [REP3-027] and the Applicant's Obligations Enforcement Note which was submitted at Deadline 3 (At Appendix 26A to the Comments on Responses to the ExA's First Written Questions [REP3-047]). The Obligations Enforcement Note in particular raises some new points regarding enforcement options under the Deed of Obligation / Evolving Approach which SCC is considering. <u>Comments on the Evolving Approach</u> <u>Legal powers</u> a. SCC notes that the Applicant now proposes that the Deed of Obligation would not be entered into using the powers in section 106 of the Town and Country Planning Act 1990 ("1990 Act"). b. Whilst the Applicant has not provided title information to SCC, SCC notes from paragraph 4.1 of the Applicants explanation of the Applicant's Evolving Approach to	

	contractual commitments to mitigation referred to in response to SA.1 ("Applicant's Explanation") that the Applicant infers it owns some land within the Order Limits. c. SCC considers that it is not clear whether the Applicant intends for the Deed of Obligation to be entered into under section 111 of the Local Government Act 1972 only or whether the Applicant intends that ESC and SCC would enter into the Deed of Obligation pursuant to section 1 of the Localism Act 2011 too. Section 1 of the Localism Act 2011 is referred to in Clause 2.1 of the draft Deed of Obligation but is then not mentioned on the front page of the draft Deed of Obligation (submitted at Deadline 2) or in Clause 4.1 of the draft Deed of Obligation. However, SCC note that reference to section 1 of the Localism Act 2011 is now referred to on the first page of the Deadline 3 Deed of Obligation. d. SCC notes that the Applicant considers that one of the advantages of the Evolving Approach is that this removes the need to determine whether each of the commitments made in the Deed of Obligation meet the tests in section 106(1)(a) to (d) of the 1990 Act and whether as a result such commitments would be capable of running with the land as "planning obligations". SCC has two comments on the Applicant's view on this matter at this stage: i. It is not clear which of the "commitments" the Applicant considers could not be drafted to meet the tests in section 106(1)(a) to (d) and SCC would welcome confirmation from the Applicant on this. ii. In any event, it is usual practice for documents entered into using the powers in section 106 of the 1990 Act to also be entered into pursuant to section 111 of the Local Government Act 1972, section 1 of the Localism Act 2011 and all other enabling powers.	

	This is what the previous drafting of Clause 2.1 of the draft Deed of Obligation envisaged. If the Applicant was prepared to enter into an agreement pursuant to section 106 (when it is understood by SCC which of the commitments could not meet the tests in section 106(1)(a) to (d)), SCC could then consider whether any further drafting or provision would need to be discussed to protect SCC's position if obligations fell outside of section 106(1) (e.g. relating to the timing of the triggers for those commitments, the provision of bonded/guaranteed obligations, whether such commitments could be dealt with as requirements in the DCO or indeed whether SCC would be content to agree to those commitments being purely contractual pursuant to section 111 of the Local Government Act 1972 and section 1 of the Localism Act 2011). <u>Liability under the Evolving Approach</u> e. Any Deed of Obligation entered into pursuant to the Evolving Approach would not bind any land within the Order Limits (or any other land). f. SCC considers that one of the benefits of entering into a section 106 agreement is that this binds land and pursuant to section 106(3)(b) of the 1990 Act would automatically bind any person deriving title from the entity entering into such an agreement. This conventional approach provides some comfort that there would always be a party (i.e. a land owner) who SCC could enforce against (although it is acknowledged that an owner of land could possibly become insolvent or not have the resources to meet obligations when they fall due). g. SCC comment on enforcement and the implications of potential future transfers of the benefit of all or part of the DCO under the Evolving Approach below.	

	h. SCC note the comments in the Applicant's Explanation that the Deed of Obligation is proposed to bind the "relevant undertaker" at all times and one of the reasons why this is considered appropriate is that the DCO would be personal to the named undertaker as defined in the DCO. i. SCC also note that the Applicant proposes, under draft Article 8 of the DCO, to give three other entities the benefit of the DCO powers (Network Rail, National Grid and EDF Energy Nuclear Generation Limited) but that the Applicant considers that only NNB Generation Company (SZC) Limited should be bound by the terms of the Deed of Obligation. j. SCC notes paragraph 5.5 of the Applicant's Explanation as to why the Applicant considers that these three other entities should not (and apparently will not) be bound by the terms of the Deed of Obligation. SCC are considering the implications of draft Article 8 and the Evolving Approach in terms of the works pursuant to the DCO which these three entities would be permitted to carry out without taking on any liability under the Deed of Obligation. However, SCC have the following comments on this at this stage: i. SCC would welcome the Applicant's views as to what, if any, further drafting the Applicant would propose to the draft Deed of Obligation to ensure that any breach of the triggers relating to obligations in the Deed of Obligation by any or all of these three entities would be enforceable directly against the Applicant and how does the Applicant intend to ensure that these three entities comply with the terms of the Deed of Obligation. ii. Notwithstanding Clause 5 of the draft Deed of Obligation relating to the release of the Applicant from the obligations in the Deed being limited to	

	where it has transferred the entire benefit of the DCO pursuant to Article 9 of the DCO and the Applicant's response to SA.1.28, SCC is concerned about the practicalities of enforcing against breaches of the Deed of Obligation on the part of these three other entities. iii. Whilst there might be an ability to enforce against the Applicant in theory for breaches of the Deed of Obligation on the part of these three other entities if the Applicant has no control or ability to compel these other entities to comply with the terms of the Deed this might not be effective in practice. iv. SCC are particularly concerned about any obligations in the Deed of Obligation which would need to be carried out by these three entities. For example, if any of the Key Environmental Mitigation needed to be carried out and completed under Schedule 9 of the draft Deed of Obligation by Network Rail but it was not then SCC question the effectiveness of enforcing against the Applicant for such a breach where the Applicant may not have the power or control over the ability to meet such an obligation. v. Using the example above, this concern is exacerbated by the current drafting in Schedule 9 of the draft Deed of Obligation which simply requires *"reasonable endeavours"* to carry out and complete the Key Environmental Mitigation. SCC are concerned that if the Applicant has requested Network Rail to carry out and complete an element of the Key Environmental Mitigation but Network Rail either will not or cannot comply with that requirement it may then be argued that the Applicant (against whom the obligation would be enforceable) has used its *"reasonable endeavours"* to comply and there	

	would not be an effective route for the Councils to oblige this mitigation to be delivered. k. SCC note section 4 of the Applicant's Explanation with regard to the Applicant's position on using a section 106 agreement to bind the land within the Order Limits which it currently owns coupled with (what SCC consider would need to be) a DCO requirement restricting any development or utilisation of the DCO on land which is not bound into such a section 106 agreement unless a deed of adherence was entered into to bind that land into the terms of the section 106 agreement. SCC also note the proposed updated DCO Article set out in the Deadline 3 Obligations Enforcement Note to require a deed of adherence to be entered into before any transfer is made under Article 9, save to the extent agreed by the Secretary of State. SCC are considering whether the Evolving Approach could be considered a "simpler and equally robust" means of securing the obligations as the Applicant indicates at paragraph 4.2 of the Applicant's Explanation. At this stage, SCC has the following observations: i. As noted above, whilst the Applicant has not provided title information to SCC, SCC notes from paragraph 4.1 of the Applicants Explanation that the Applicant has indicated it owns some land within the Order Limits. This would appear to make the approach summarised above legally possible (given the Applicant appears to be "interested" in the land to be bound (as required under section 106(1) of the 1990 Act)). ii. Paragraph 4.1 of the Applicant's Explanation sets out that the Applicant considers it perverse to require the Applicant to take on an administrative burden of binding land pursuant to deeds of adherence in this	

	manner when it does not consider that future land owners should be bound purely by virtue of being a land owner. SCC comments on this are as follows: 1. SCC is not clear why the Applicant considers such an approach to be an "administrative burden" if it would be the Applicant itself who would be acquiring such land within the Order Limits (either by private treaty or compulsorily using provisions in the DCO) given that a simple precedent deed of adherence could be agreed at the outset and all that would presumably need to be reviewed by the Councils on a case by case basis would be up-to-date title documents to agree such deeds of adherence. 2. SCC needs further information to understand why a blanket exclusion for the liability of land owners would be appropriate in such a scenario. This is particularly so given that it would presumably be the Applicant who would be the land owner of land within the Order Limits that would need to be bound into any section 106 agreement. SCC considers that excluding certain classes of land owner from liability could be considered (e.g. agricultural tenants) on a case by case basis. Alternatively, the Applicant could instead offer a private indemnity to any land owners who required it, particularly given that the Applicant appears willing to take on full liability for the commitments in any Deed of Obligation/section 106 agreement given its position on not binding the three entities mentioned under draft Article 8 of the DCO. 3. In view of the Applicant's position and the indication on drawings SZC/LOU/15 Rev 01 and SZC/LOU/16 Rev 01 of land with an option for lease by SZC Co, SCC queries whether it is the	

	intention of the Applicant to acquire the freehold ownership of all of the land within the Order Limits or whether the Applicant is intending to enter into leases (instead of acquiring freehold title) in respect of some of the land within the Order Limits.	
Securing the participation of third parties	Further detailed discussions are required with the Applicant to agree the governance arrangements where third parties are to be a part of such arrangements. It is suggested that terms of reference for each group are agreed and included in the Deed. SCC notes the updated drafting of Clause 15 in the Deadline 2 version of the Deed of Obligation which looks to address the involvement of third parties both where they are due payments (which are first made to either ESC or SCC for onward transfer) and where they are entitled to nominate a member of a Governance Group. These provisions require ESC or SCC to use reasonable endeavours to enter into an agreement with that third party substantially in the form of the Deed of Covenant to be attached to the Deed of Obligation. However, if after using such reasonable endeavours ESC or SCC cannot enter into such Deed of Covenant before a payment is due to a third party or the date of the first meeting of the relevant Governance Group Clause 15.3 confirms that there will be no obligation on ESC or SCC to transfer monies on to the third party until a Deed of Covenant is in place and that ESC or SCC and the Applicant shall use reasonable endeavours to meet with that third party to discuss why a Deed of Covenant cannot be entered into. If no Deed of Covenant is entered into within a certain time (to be agreed) after the date when the payment was due to be paid or the date of the [second] meeting of the relevant Governance Group then the Applicant and ESC/SCC will meet to determine either alternative delivery of the relevant mitigation	Deed of Obligation [REP2-060]/[REP3-027]

	or an alternative form of mitigation and/or where necessary an alternative third party to nominate a member of the relevant Governance Group. The terms of the annexed Deed of Covenant are subject to further consideration by SCC. SCC questions whether the proposed clause could be more prescriptive about what "alternative delivery of the relevant mitigation or an alternative form of mitigation" might mean in practice, particular with regard to the delivery of key mitigation and/or payment of contributions due to the Councils to use towards such a purpose in the event the third party in question will not agree to the Deed of Covenant approach. In this regard, SCC notes the final part of Clause 7.6 of the Wylfa section 106 agreement which set out that "the Council shall work with the third party and Developer to agree an alternative method of securing the provisions in Clause 7.2 and ensure the provision of the delivery of the necessary Financial Contributions, and Contingency funds Payments under the relevant Schedule to the Deed." SCC is generally content with the requirement to use reasonable endeavours to get third parties who are to be part of Governance Groups to enter in the Deed of Covenant. However, SCC considers that the Deed of Obligation could be more precise about what happens if a third party does not agree to enter a Deed of Covenant in this way. At present Clause 15.3.3(B) allows ESC/SCC and the Applicant to determine "where necessary" an alternative third party to nominate a member of the relevant Governance Group. SCC envisage that the Governance Groups would be able to operate (in terms of quorum and voting, including proxy voting by ESC/SCC) without such third party involvement. In addition, some structure could be added to this mechanism whereby first the parties agree whether an alternative third party is necessary (with this being deemed to be the case if	

	ESC/SCC consider such involvement is necessary) and then the ability for ESC/SCC to nominate such third party for the Applicant's approval (acting reasonably and subject to approval within a time period to be agreed). With regard to the Deed of Covenant, SCC consider that any funds relevant to the operation of the working groups and to be administered by the working groups should be deposited with SCC/ESC as appropriate and fall-back arrangements could be put in place which oblige the relevant Host Authority to step in and deliver the works should the working group arrangements fail to operate as envisaged. It is considered that where tasks are placed on individuals in the s.106 that there should be an obligation on the Applicant to procure that such a person performs against these obligations. In addition, consideration should also be given to a mechanism requiring an alternative arrangement (e.g., the Applicant stepping in to perform) if that individual does not perform.	
Enforcement practicalities – mechanisms, damages, injunctions and penalties	<u>Enforcement under the Evolving Approach</u> a. SCC is willing to engage with the Applicant as to the enforcement aspects of the Evolving Approach. b. SCC notes the Applicant's Obligations Enforcement Note submitted at Deadline 3. c. In general, SCC welcomes the direction of travel from the Applicant in moving closer towards a position where SCC would have the enforcement options open to it under a conventional section 106 agreement. However, whilst SCC continues to consider the Applicant's Obligations Enforcement Note in detail, its initial observations are that further discussion and work is required on this.	Deed of Obligation [REP2-060]/[REP3-027]; Art 9 DCO

	d. SCC notes the comments at paragraph 6.11 of the Applicant's Explanation as to the utility of enforcement options that would usually be available to SCC under section 16 given the scale of the likely contributions. e. SCC continues to consider whether it would be appropriate and necessary for the Applicant to provide bonds or guarantees to secure compliance with certain obligations in any Deed of Obligation/section 106 agreement agreed. With regard to the comments at section 8 of the Applicant's Obligations Enforcement Note, SCC would expect the provision of a bond/guarantee would be utilised to allow funds to be drawn down to allow SCC (or ESC where relevant) to deliver an item of mitigation if the Applicant did not delivery (or did not delivery satisfactorily) or to protect SCC's position if SCC took on responsibility for delivering mitigation and the payment from the Applicant was due in tranches (effectively to protect SCC from exposure in the event that contracts for delivery were let and the remaining tranches of payments were not made by the Applicant). f. SCC also notes paragraph 6.12 of the Applicant's Explanation and the comment that the governance arrangements would not be capable of being enforced or made to work without the active participation of the Applicant on an ongoing basis. SCC is considering whether fall-back arrangements to ensure these governance arrangements could continue to function if necessary in the event of the Applicant's insolvency (or where the Applicant could not participate) would be appropriate. g. SCC is considering the Applicant's Obligations Enforcement Note in detail and has the following initial observations on this:	

	i. SCC considers that the approach proposed by the Applicant is unprecedented. SCC does not consider this necessarily means the Applicant's proposals will not be acceptable in due course but considers that greater scrutiny is required here as a result. ii. Local Land Charges: SCC notes the Applicant's suggestion that land within the Order limits owned by the Applicant would be bound by a local land charge when it was acquired by the Applicant. This approach would need to include a mechanism whereby East Suffolk Council were informed by the Applicant each time the Applicant acquired any land within the Order limits so that a local land charge could be registered by East Suffolk Council. SCC also observes that further clarity is required on what the Applicant classes as "owned" by the Applicant and whether this provision would only apply where the Applicant acquired the freehold of land within the Order limits (and not, for example, where leases, licences or temporary possession was taken). iii. Charging orders: SCC notes the Applicant's comment at paragraph 3.5 of the Obligations Enforcement Note. However, SCC questions whether the Applicant could consider using the powers in section 120(5) of the Planning Act 2008 to modify section 106(12) to read "*Regulations [under section*	

	106(12) of the Town and Country Planning Act 1990] may provide for the charging on land of any sum or sums required to be paid under the Deed of Obligation". In this way, the Host Authorities could benefit from such regulations if they were introduced. However, SCC does note that consideration would need to be given to what "land" could be charged in this case and, based on the information that SCC has to date, this would presumably land controlled by the Applicant within the Order limits. iv. Injunction: SCC question whether this proposed provision should refer to "restrictions or requirements" as that wording appears to be linked to section 106(1) of the Town and Country Planning Act 1990 and moving away from that wording appears to be one of the Applicant's justifications for the Evolving Approach. Instead, SCC suggests wording such as the following is considered: "The terms of the Deed of Obligation [defined to include variations and replacement deeds] and any deeds of adherence to the deed of Obligation are enforceable by East Suffolk council or Suffolk County Council by injunction." v. Entry onto land: SCC notes the Applicant's proposals and is considering these in detail given they are novel in this context. SCC would normally expect warrants to be issued by	

	magistrates. SCC also notes that these provisions facilitate a possibility that the Host Authorities could enforce against a third party land owner who is not a party to the Deed of Obligation and then recover the expenses from the undertaker for doing so. Given the novel approach and additional work required in dealing with the issue of a warrant SCC would welcome confirmation from the Applicant as to whether they would be prepared to provide an indemnity against the Host Authorities' costs of taking such action. In this regard it is noted that section 13(3) of the Compulsory Purchase Act 1965 sets out that the costs accruing by reason of the issue and execution of the warrant are to be settled by the person refusing to give possession but in this case it would be more appropriate for the Applicant (undertaker) to meet those costs. <u>Transfers pursuant to Article 9 of the DCO and liability under the Evolving Approach</u> a. SCC notes the updated provision at draft Article 9(4) as follows: *(4) Where the undertaker has transferred any benefit ("transferor"), or for the duration of any period during which the transferor has granted any benefit, under paragraph (1) –* *(a) the exercise by a person of any benefits or rights conferred in accordance with any transfer or grant under paragraph (1) is subject to the same restrictions, liabilities and obligations under this Order as would*	

	apply if those benefits or rights were exercised by the transferor; and *(b) save to the extent agreed by the Secretary of State, the Deed of Obligation completed pursuant to this Order, and any variations to it at the date of transfer or grant, shall be enforceable against the transferee or lessee as they would against the transferor"* b. Notwithstanding the comments below, SCC question whether draft Article 9(4)(b) should refer to the Deed of Obligation as being entered into *"pursuant to this Order"* as SCC anticipate the Deed of Obligation may be entered into before such an Order was made. Instead, perhaps the definition of "Deed of Obligation" could also refer to the date of any such document in due course. c. In addition, SCC would require the definition of "Deed of Obligation" in the draft DCO to be updated to ensure that any variations (or replacement) Deeds of Obligation were also caught by these provisions as appropriate i.e. so a transferee is always bound to enter into the most up-to-date package of obligations. SCC notes footnote 3 in the Applicant's Obligations Note which confirms that Deed of Obligation would be defined to include variations to it. d. SCC notes the proposed updated drafting proposed for Article 9(4) set out in the Applicant's Obligations Enforcement Note to require a deed of adherence before a transfer under the Order, save to the extent agreed by the Secretary of State. SCC would want a further obligation for this document to be provided to SCC and ESC before the transfer.	

	e. Further, SCC note the ability for the Secretary of State to agree to vary the extent to which any Deed of Obligation is enforceable against a transferee. This could potentially allow for a transferee to take free from the obligations in any Deed of Obligation using a mechanism where SCC have no control or right to make representations on whether they consider the transferee should be bound. In light of this, if the Applicant wants to retain this flexibility, SCC are considering whether SCC should be given an opportunity to make written representations to the Secretary of State on this point before the Secretary of State could use its power to vary the enforceability of such a Deed of Obligation against a transferee. f. SCC questions whether the latest revisions to draft Article 9(5)(b) which exclude the requirement for Secretary of State consent to transfers of the benefit of any or all of the provisions of the DCO under Article 9(1) where time limits for claims for compensation have elapsed and certain other criteria have been met are appropriate. On the face of things, there may still be commitments/obligations in any Deed of Obligation which have not been discharged or are ongoing at that point in time and SCC would require protection against the liability under the Deed of Obligation being transferred at that point to an entity which SCC may not be able to enforce against (by reason of the resources of that entity or otherwise). For this reason, SCC are also considering whether: vi. The written approval of SCC should be required for any transfer under Article 9 to take effect (so SCC	

	could be satisfied that any transferee is properly bound into the Deed of Obligation (if considered necessary) and that such a transferee could meet its obligations under the deed of Obligation as they fall due); and/or vii. SCC should be given an opportunity to make representations to the Secretary of State before the Secretary of State grants consent for any transfer under Article 9(1), particularly as to the suitability of a proposed transferee to meet obligations under any Deed of Obligation. g. Notwithstanding the comments in paragraph 5.7 of the Applicant's Explanation, SCC considers further consideration is needed as to the liability of a transferee under Article 9 for the provisions in any Deed of Obligation, particularly if the benefit of only some but not all of the provisions of the DCO are transferred under Article 9. SCC comments are as follows: viii. Clause 4.5 of the draft Deed of Obligation (copied below) acknowledges that the Deed may be enforceable against a party to whom the benefit of the DCO has been transferred under Article 9. *The parties agree that the obligations contained in this Deed will not be enforceable against any party other than SZC Co save to the extent that it shall be enforceable against any party to whom the benefit of SZC Co's undertaking has been transferred pursuant to Article 9 of the Development Consent Order (unless otherwise agreed by the Secretary of State).* ix. However, there is no provision in the draft Deed of Obligation which clarifies whether a reference in the draft Deed of Obligation to "SZC Co" should be treated as incorporating any transferee of part (or all) of the benefit of the DCO pursuant to Article 9 of the DCO or	

	any provision stating that liability under the Deed of Obligation would be joint and several. This is considered important so that SCC is aware of which entities it may enforce against in respect of any breaches of any Deed of Obligation. SCC also questions whether it would be appropriate for an entity taking part of the benefit of DCO provisions should be treated as being able to satisfy obligations in any Deed of Obligation which SZC Co should be responsible for (e.g. attendance and participation in governance arrangements). x. In principle, SCC considers that the above point may be capable of being resolved by dealing with this in any deed of adherence which may be required under Article 9 (by being clear in such a document what obligations a transferee is covenanting to adhere to), although draft Article 9 would need to reflect that any such deed of adherence would need to be in a form acceptable to SCC (and ESC) before any transfer could take effect. xi. In this regard, SCC is aware of Clause 5 of the draft Deed of Obligation relating to the release of the obligations in the Deed only where it has transferred the entire benefit of the DCO pursuant to Article 9 of the DCO and the Applicant's response to SA.1.28. 2. Notwithstanding that Recital (A) in the draft Deed of Obligation indicates that this document would include the date of the DCO, SCC expect any such document to need to be agreed and completed before the close of the examination and before any grant of the DCO. SCC notes that this is acknowledged by the Applicant in the responses to SA.1.14 and SA.1.18. <u>Nature of enforcement (mechanisms, damages, injunctions and penalties)</u>	

	SCC's initial views on the Applicant's Obligations Enforcement Note are set out above. Whether a claim for damages can be pursued will depend on the obligation breached. However, injunctions are the normal remedy where a local planning authority is seeking to enforce a planning obligation as damages are normally inappropriate (as the local planning authority will not normally suffer damage) (see Avon County Council v Millard [1986] J.P.L. 21 and Newham London Borough Council v Ali [2014] 1 WLR 2743). SCC would consider its approach to enforcement on a case by case basis. For example, in respect of a failure to pay a contribution contractual enforcement to recover that sum as a debt might be the most appropriate option (subject to consideration of the dispute resolution mechanism in the Deed). SCC is considering the structure and triggers for compliance to allow for effective monitoring and enforcement (e.g. rather than an obligation to deliver mitigation by X trigger, an obligation not to permit Y activity (e.g. HGV movements over a certain level) until the mitigation is in place and operational/delivering. Use of bonds. The majority of the obligations in the draft Deed are not particularly well developed at this point and it will be sensible to wait to see what the Applicant says at D5 in response to Mr Brock's comments at ISH1 - particularly with regard to the Key Environmental Mitigation at Schedule 9. However, one potential example which may be considered as to the potential use of bonds to support the enforceability of obligations in the Deed at this point could be the Residual Healthcare Contribution at Schedule 6 - this is envisaged to be	

	paid annually for a number of years and presumably SCC could be committing to funding/contracts under its obligation at paragraph 3.2 of that Schedule in anticipation of receiving future tranches and if those future tranches were not paid (e.g. breach or insolvency of the Undertaker) then that could cause SCC an issue which could be suitably resolved by drawing down against a bond in place covering future tranches. Similar points could be made in connection with funds to be drawn down in the Deed on the occurrence of certain events such as the Contingent Effects funds. <u>Cross undertaking in damages:</u> SCC understands that the normal rule is that the party seeking an interim injunction must give an undertaking in damages (or "cross undertaking") that the claimant promises to pay damages to the defendant if it turns out that the interim injunction should not have been made. This is considered a disincentive to bringing claims for interim injunctions. However, the court has discretion whether or not to require a cross undertaking and this can extend to when public authorities are exercising the function of law enforcer in the public interest (see: Kirklees Metropolitan Borough Council Appellants v Wickes Building Supplies Ltd [1993] A.C. 227 and Financial Services Authority v Sinaloa Gold plc and others [2013] UKSC 11). SCC would not expect to have to provide a cross undertaking when enforcing obligations in planning agreements. Although SCC considers there is a judicial trend to not require public authorities to provide a cross undertaking when exercising powers in the public interest, SCC would welcome the views of the Applicant on the point and, in particular, whether the Applicant would be willing to agree to a covenant in the Deed of Obligation not to apply for an undertaking in damages should an interim injunction be sought by ESC and/or SCC to provide further comfort on this point.	

	SCC has also noted the comments made by the ExA at ISH1 regarding the use of terms to compel the Applicant to comply with obligations it agrees to in the Deed of Obligation and whether the Applicant may wish to reconsider the use of the terms “may”, “might”, “should” and “will” to ensure certainty. SCC has made some comments and amendments on such wording in its Deadline 5 comments and would welcome the Applicant’s further comments on the use of these terms and any amendments the Applicant may propose as a result.	
Land currently controlled by the Applicant	This would seem to mainly be an issue for the Applicant to clarify for the ExA. However, SCC will be appearing at the Compulsory Acquisition Hearing (CAH) in respect of its land interests at Alde Valley Academy and Leiston Recycling Centre. In addition, SCC will consider land issues in respect of the Two Villages Bypass, the Sizewell Link Road, highway issues generally, public rights of way, and the Pakenham Fen Meadow.	
Other detailed points on or relating to the ISH1 agenda		
Approval of Parts: Question asked by ExA for host authorities: Schedule 2 paragraph 1(5) says for the purpose of discharging requirements in phases the undertaker may submit details, including a plans or plans, identifying a part or part of any sites to which each phase relates. Requirement 3, for example, says “no part of the terrestrial works may be commenced...”. Are the host authorities satisfied with restrictions on commencement of parts, rather than the whole of the authorised development in all cases, and how do you understand parts are going to be identified?	In paragraph 10.15 of the EM, the Applicant explains paragraph 1(5) by saying that discharge of a certain requirement may be required at different times for different Works through the construction programme as new information is delivered and the construction progresses. This allows the undertaker to prioritise discharging certain parts of requirements at the correct time in the construction programme. So far as SCC is aware, paragraph 1(5) is unprecedented. It appears to SCC that paragraph 1(5) and the wording used in Req 3 (and similarly in requirements 5(1) and (2) and 5A) are not connected. Looking first at Req 3, it begins “No part of any terrestrial works may be commenced until a site-specific written scheme	EM Req 3; Para 1(5) Schedule 2

	of investigation for that part has been submitted to Suffolk County Council...". The Council considers that this means that (using the SLR as an example) different written schemes could be submitted for different sections of the SLR (either at the same time or different times). So long as the written scheme specifically identifies which part of the works are covered by each written scheme, SCC is satisfied, as it is with Reqs 5(1) and (2) and 5A with the references to parts of works in these requirements. Paragraph 1(5) applies to all requirements which involve a discharging authority (including Req. 3 and the others mentioned above). Rather than taking that broad brush approach (which may cause conflict with the specific requirements mentioned above), SCC considers that it would be better if the Applicant identified each requirement where such a phased approach is relevant and then use wording similar to that in requirement 9 of the A303 Sparkford to Ilchester Dualling DCO 2021, which said: "No part of the authorised development is to commence until a written scheme of investigation for the investigation and mitigation of areas of archaeological interest for each area and/or each phase in that part, has been prepared by the undertaker. SCC would be content with that, again so long as it was made clear that each part or phase were specifically identified in the application. To that end, SCC suggests the following additional sub-paragraph in paragraph 1: "( ) Where an application is made to a discharging authority for any agreement of approval required by a requirement included in this Order and the application is made in respect of any part or any phase in any part of the authorised	

	development, the application must identify the part or phase to which the application relates."	
Code of Construction Practice, oLEMPs and related documentation	SCC has detailed issues with some contents of the OLEMPs that it has agreed will be the subject of further discussions with the Applicant and ESC. On the CoCP, it defers to ESC in respect of the terms of this document, but it is generally content with the way in which the provisions for these are handled within the DCO itself. In relation to the OLEMPs, SCC noted the exchanges between the ExA (Mr Brock) and the Applicant, where the Applicant confirmed that the only OLEMP referred to in the DCO is the one referred to in requirement 14(1)(vii) which in turn relates to the landscape and ecology scheme for the landscape restoration area in the Main Site. A landscape and ecology management plan for that area must be prepared in general accordance with the measures set out in the Outline Landscape and Ecology Management Plan. The Outline Landscape and Ecology Management Plan is, in turn, a certified document in Schedule 22. There are also references in Req 22A to separate "ecology management plans" (not mentioning landscape) for the 2VB and the SLR. SCC has sought clarification from the Applicant as to whether there should be a requirement for these plans to be in accordance with the two OLEMPs published in January [AS-261] and [AS-264] and that those OLEMPs be certified documents. SCC hopes that these issues will be addressed by D5.	Reqs 14, 22A, Sched 22 DCO
Limits of deviation and the parameter plans	SCC is content with the general approach taken on the two village bypass and Sizewell Link Road (and the Saxmundham to Leiston branch line works), ie the 1m up or down restriction on the vertical limits of deviation contained in article 4(1)(b). but like ESC, SCC considers that the reference to the "Approved Plans" should be replaced by a reference to the precise approved plans in question.	Art 4, Req 13 DCO; Drafting note 9 {REP2-111]; Main Development Site Parameter Plans [APP-018]; Chapter 2, volume 2 of the ES [APP-180]

	Article 4 (1)(a) says that the undertaker may deviate vertically to any extent found necessary or convenient for all other authorised development. That means one has to look to the requirements for height limitations on that other development. The Applicant's drafting note 9 explains the Applicant's approach, responding to the ExA's question DCO 1.21. [REP2-111] The ExA suggested that a close reading of the DCO was necessary to ascertain whether the requirements, by reference to parameter plans, impose a vertical limitation, and suggested that a general overriding rule that the development must not exceed the limits in the Parameter Plans would be helpful. SCC agree that it would be. In its response to the ExA's written questions, SCC said that it had identified one instance where it had concern over whether an element of the development is subject to any restrictions by way of parameter plans, namely the 5th pylon, outside the main development site. Since submitting that response, SCC now acknowledges, on a closer inspection of the requirements, of the sort that the ExA described, that there is a limitation on the 5th pylon's height, in requirement 13. But the difficulty SCC found in locating the restriction illustrates the point made by the ExA in some respects. Requirement 13 is the relevant requirement, which in turn directs the reader to the Main Development Site Operational Parameter Plan – SZB Relocated Facilities and National Grid Land [APP-018], which in turn, by further close examination, directs the reader to table 25 in Chapter 2, volume 2 of the ES [APP-180], where the maximum height can be found.	

	SCC would like reassurance from the Applicant that in every case where the parameter plans show a maximum height for a building or structure, then that is backed up by a requirement which ensures that the height will not be exceeded. SCC would like to know from the Applicant if there are any permanent buildings and structures mentioned in Part 1 of Schedule to the Order (numbered works) which are not governed by height restrictions in the parameter plans or in article 4.	
Requirements: detailed comments relating to securing mitigation	Requirement 2: Code of Construction Practice: • "temporary works": R.2 says the removal of "the temporary works" must be in general accordance with the CoCP – there appears to be no definition of "the temporary works" and this should be rectified. Requirements need to be precisely drafted, particularly as failure to comply is an offence • No comments at this stage on the detail of the CoCP: this remains under consideration Requirement 3: Archaeology and Peat: • In addition to the points made about "in general accordance with" SCC have suggested amendments to ensure that the site-specific post excavation assessments must have been completed no later than 3 years after commencement of the power station. Council officers recently had a productive meeting with the Applicant in respect of the archaeology concerns. Requirement 5: Surface and foul water drainage: • SCC have asked that this requirement be amended so that SCC are the discharging authority for surface	Reqs. 2, 3, 5, 5A DCO

	water drainage, which is their responsibility. Suggested drafting is contained in SCC's comments on draft DCO v4. Requirement 5A: Emergency Planning: • SCC have proposed that equivalent provisions to those agreed with the Applicant on East Anglia ONE and TWO should replace those proposed by the Applicant in this case. Arrangements under the existing Suffolk Resilience Forum Radiation Emergency Plan must be reviewed and if necessary updated before works commence, and the emergency planning arrangements specified in the Plan must be implemented in accordance with it. • The DCO at present merely requires a construction emergency plan to be "developed" (with no indication of SCC's role) and that a copy of it be provided to SCC. So, there is no input by SCC and no requirement to comply with any plan. Other detailed points on the requirements: SCC have a number of other points of detail on the requirements, set out in their comments on the draft DCO [REP3-082] and responses to the ExA's first questions [REP3-084] and may wish to raise others in due course.	
Appeals and dispute resolution	**Article 82: Arbitration** SCC has made no comment on the drafting of this provision. It appears that it would only take effect in relation to disputes arising under provisions for the protection of statutory undertakers, and in relation to protective works to buildings (article 24). SCC is not surprised to see the proposed deletion	Art. 24, 83, Sched 23 DCO

	of the paragraphs relating to disputes with the Secretary of State. **Article 83 and Schedule 23** SCC would comment as follows in respect of Schedule 23 – • Paragraph 2(3): The DCO places duties on the discharging authorities to consult other bodies under Schedule 2 (for example, in requirement 3(1), SCC must consult Historic England before approving a written scheme of investigation). The changes to paragraph 2(3) appear to require the undertaker (rather than the body carrying out the consultation) to issue the consultation, which seems unusual. The changes also appear to have removed any reference to requests for further information by the requirement consultee, so the revised sub-paragraph (3) does not now sit easily in paragraph 2. SCC considers the discharging authority should carry out the consultation, though the time limit of 3 days for the consulting body to issue the consultation, as set out in the previous draft of the DCO, should be increased to 10 working days. • Paragraph 3(5): for consistency with Advice Note 15, SCC considers the reference to “10 working days” should be replaced with “20 working days”. • Paragraph 3(2)(a) of the equivalent provisions in Advice Note 15 (concerning fees) is not included. SCC would welcome an explanation from the Applicant for the omission. • Paragraph 3(6): This is a drafting point. The provision only says “(6) Outcome of appeals” and so does not seem to serve any purpose. SCC considers it should be deleted.	

	• The definitions of "appeal parties" and "requirement consultee" are set out in article 2; however, these terms are only used in Schedule 23. Owing to this, it would be preferable if these defined terms were set out at the end of Schedule 23. **Other Disputes** Various provisions of the DCO provide that disputes be determined in accordance with separate general legislation (in particular in relation to compensation). SCC has no comment on that.	
Tailpieces and EIA	SCC understands that tailpiece requirements are not likely to be appropriate where the requirement deals with matters which go to the heart of the consent, for example, allowing post-consent changes to certified design drawings which set out the details of what is proposed to be consented. SCC understands this unacceptability is in part because the effect would be to allow a change (whether material or otherwise) to a consented DCO which should only be authorised in the prescribed way under s.153 of, and schedule 6 to, the Planning Act 2008. A risk with tailpieces is that they can allow development to occur which has not been applied for or assessed and SCC is obviously keen to reduce the risk of this happening. Schedule 2 (requirements) contains requirements with tailpieces which affect SCC, namely – • Requirement 3(2) and (4) (project wide: archaeology and peat); • Requirement 6A(2) and (3) (main development site: public rights of way);	Sch 2, Reqs 3, 6A, 13A, 22 DCO

	• Requirement 13A(1) (main development site: highway works); and • Requirement 22(1) (highway works). • Paragraph 1(3) of Schedule 2 states – "Where an approval of details or other document is required under the terms of any requirement **or where compliance with a document contains the wording "unless otherwise approved" by the discharging authority, such** approval of details or of any other document (including any subsequent amendments or revisions) or **agreement by the discharging authority is not to be given except in relation to changes or deviations where it has been demonstrated to the satisfaction of the discharging authority that the subject matter of the approval or agreement sought does not give rise to any materially new or materially different environmental effects to those assessed in the environmental information**". [Emphasis added]. The words "unless otherwise approved" do not appear in the tailpieces relevant to SCC. (Requirement 3(2) and (4) and Requirement 6A(2) and (3) include the words "unless otherwise agreed" and Requirement 13A(1) and Requirement 22(1) include the words "save to the extent alternative plans or details are submitted to and approved by [SCC]".SCC requests that the Requirements mentioned above are amended to include the words "unless otherwise approved" or paragraph 1(3) of Schedule 2 is amended to provide that it also applies to Requirements 3, 6A, 13A and 22. Provided these changes are made, SCC considers that the tailpieces would be acceptable because before any change was agreed, the undertaker would have to demonstrate that the change did not give rise to any materially new or materially	

	different environmental effects to those assessed in the environmental information. This would provide both security to SCC and flexibility to the undertaker. A further drafting point arises from this: since the tailpiece referred to in paragraph 1(3) includes the words "unless otherwise approved" the reference to "… or agreement by the discharging authority" in paragraph 1(3) should be changed to "or approval by the discharging authority".	
Ecological Clerk of Works	There was a discussion during the ISH about the role of the Ecological Clerk of Works and in particular whether the obligations of the clerk, where a breach is alleged, should be extended beyond simply informing the Applicant. SCC is of the view that it would be helpful if it were also informed so that it can monitor any patterns and raise concerns where appropriate.	
The deemed marine licence	No comments from SCC	
SCHEDULE: list of DCO provisions which use "reasonable endeavours"	The following provisions refer to "reasonable endeavours" – 1. Paragraph 5(3) of Part 1 (protection for electricity, gas, water and sewerage undertakers) of Schedule 18 (Protective Provisions) to the dDCO. 2. Paragraph 21(1)(b) of Part 3 (Network Rail) of Schedule 18 (Protective Provisions) to the dDCO. 3. Paragraph 63(3) of Part 6 (for the protection of Cadent) of Schedule 18 (Protective Provisions) to the dDCO. 4. Paragraph 11(3) of Part 3 (conditions) of Schedule 20 (deemed marine licence …) to the dDCO. 5. Paragraph 17(3) of Part 3 (conditions) of Schedule 20 (deemed marine licence …) to the dDCO.	

	6. Paragraph 18(3) of Part 3 (conditions) of Schedule 20 (deemed marine licence …) to the dDCO. 7. Paragraph 19(3) of Part 3 (conditions) of Schedule 20 (deemed marine licence …) to the dDCO. 8. Paragraph 20(3) of Part 3 (conditions) of Schedule 20 (deemed marine licence …) to the dDCO. 9. Paragraph 34(5) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 10. Paragraph 35(3) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 11. Paragraph 36(3) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 12. Paragraph 40(5) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 13. Paragraph 41(3) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 14. Paragraph 44(3) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO.	

	15. Paragraph 45(5) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 16. Paragraph 47(3) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 17. Paragraph 48(3) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO. 18. Paragraph 50(2) of Part 4 (during construction, operation and maintenance) of Schedule 20 (deemed marine licence …) to the dDCO.	