The Sizewell C Project

9.41 Written Summaries of Oral Submissions made at ISH1: Draft DCO and Section 106 Agreement/Deed of Obligation (6 July 2021)

Revision: 1.0

Applicable Regulation: Regulation 5(2)(q)

PINS Reference Number: EN010012

July 2021

Planning Act 2008
Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009

SizewellC
Doing the power of good for Britain
EDF CGN

CONTENTS

1 ISSUE SPECIFIC HEARING 1: DRAFT DCO AND DEED OF OBLIGATION

1.1 Introduction

1.1.1 This document contains the Applicant's written summaries of the oral submissions made at Issue Specific Hearing 2 (ISH1) on Draft DCO and Section 106 Agreement / Deed of Obligation held on 6 July 2021.

1.1.2 In attendance at ISH1 on behalf of the Applicant was:

- Hereward Phillpot QC of Francis Taylor Building (HPQC);
- John Rhodes of Quod (Planning Manager (Strategic));
- Richard Jones of Quod (Planning Manager (Main Development Site));
- Matthew Sharpe of Quod (Planning Manager (Development Consent Order)).

1.1.3 Where further information was requested by the Examining Authority (ExA) at ISH1, this is contained separately in the Applicant's **Written Submissions Responding to Actions Arising from ISH1** (Doc Ref. 9.48).

1.2 Articles 53/54

1.2.1 The ExA explained that articles 53 and 54 of the **draft DCO** (Doc Ref. 3.1(D)) create criminal offences. The ExA asked whether the scope of articles 53 and 54 fell within the scope of the exception to the prohibition on the creation of criminal offences identified in paragraph 32(b) of Schedule 5 of the Planning Act 2008.

1.2.2 HPQC explained that rather than seeking to give an '*off-the-cuff*' response to this technical question which was not on the agenda and not covered by any written question, he would endeavour to provide a response before the end of the day and, if not possible, would provide a post-hearing note in response. *[The Applicant's response was subsequently given orally as part of Issue Specific Hearing Note 7 and is set out in the **Written Summaries of Oral Submissions made to ISH7** (Doc Ref. 9.47) and relevant amendments have been made to the drafting of article 53 in revision 5 of the draft DCO (Doc Ref. 3.1(D)).]*

1.3 Agenda Item 2: Draft DCO – Securing mitigation, CoCP, oLEMPs and related documents

"Part" or "parts" and discharge of requirements

1.3.1 The ExA asked if it was appropriate in the context of Schedule 2, paragraph 1(5), which relates to discharging requirements in phases, for reference to be made to "part or parts of any of the sites".

1.3.2 HPQC explained that Schedule 2, paragraph 1(5) expressly provides that the plan submitted with the application to discharge has to identify a part or parts of any of the sites to which the application relates. Thus the requirement to identify the part of parts of the authorised development is already provided for in the drafting.

Requirement 14, landscape and ecology, and oLEMPs

1.3.3 The ExA highlighted that Requirement 14 relates to the landscape and ecology scheme for the landscape restoration area, which the DCO defines as being Work No. 1A, excluding the permanent development site. It was noted that paragraph (1)(vii) then requires the Landscape and Ecology Management Plan to be prepared in general accordance with the Main Development Site Outline Landscape and Ecology Management Plan, but that paragraph 1.1.1 of the document notes the oLEMP applies to the '*Sizewell application boundary'*, which is the entire site and asked for clarification if this was the case. Mr Sharpe clarified that the oLEMP was intended to relate only to Work No. 1A, defined as the '*Landscape Restoration area'*. It was not the intention that the LEMP produced pursuant to Requirement 14(1)(iiv) would relate to any land beyond the landscape restoration area and we would seek to clarify the drafting accordingly.

1.3.4 The ExA also sought clarification in respect of the Sizewell link road and two village bypass LEMPs and how these are secured. Mr Sharpe noted that these were intended to be secured by Requirement 22A, noting that the draft did include a typographical error that will be corrected at Deadline 5, where 'Ecology Management Plan' would be corrected to refer to the 'Landscape and Ecology Management Plan'. Mr Sharpe also confirmed that the LEMPs for these sites were currently titled outline LEMPs, but that there was no further detail or information that was needed. Those documents will therefore be renamed LEMPs for clarity.

"General accordance" as a standard

1.3.5 HPQC stated that, having considered the suggestion made on behalf of East Suffolk Council (ESC) at Deadline 3 (see [REP3-064] at page 6), the Applicant had concluded that there was some merit in defining "*general accordance"* as it is clearly intended to mean something different from "*accordance*".

1.3.6 SZC Co.'s Deadline 3 response to **ExQ1 DCO.1.158** (Part 4 page 97 of 261) [REP2-100] explains the purpose and role of the provision, and the reason why the degree of flexibility it imports is appropriate. HPQC stressed the importance of ensuring that the definition does not remove the very flexibility it is intended to define. The definition of "*general accordance*" must therefore properly reflect the underlying objective of the use of this different standard. Hence SZC Co.'s suggestion that the word "*substantively*" is added to ESC's suggested drafting so as to make clear that the key concept is the *substance* or otherwise of any inconsistency.

1.3.7 There are three contexts in which the term "*general accordance*" is used in the **draft DCO** (Doc Ref. 3.1(D)), and there are good reasons for its use in each case.

1.3.8 The first context is compliance with certain control documents, such as the **CoCP** (Doc Ref. 8.11(C)) (see Requirement 2, Requirement 3 and Requirement 9). Use of the term "*general accordance*" in this context allows for departures that are minor or inconsequential and not of substance, without giving rise to a criminal offence. For example, in the context of the **CoCP**, there may be certain situations where strict compliance is not possible. For example the **CoCP** as currently drafted contains a requirement that the wheels of all vehicles be free of contamination before arriving at site (page 63, Table 10.1, 5th row). If Requirement 2 was breached where any contamination was present, however minor and inconsequential, a criminal offence would be too easily committed. Experience showed, however, that there was benefit in drafting the terms of the **CoCP** itself in clear and straightforward language so that it could be readily understood and applied by contractors. The limited degree of flexibility given by the use of "*general accordance*" in the requirement ensures a proportionate approach.

1.3.9 The second context is for subsequent approval of details (see Requirement 11, Requirement 12, Requirement 12A, Requirement 12B and Requirement 13). The requirement is to be in "*general accordance*" with detailed design principles. It was explained that detailed design has not yet taken place, and there may well be scope for improvements which do not give rise to new or different environmental effects (e.g. as a result of changes in product

availability/selection at the time). The use of "*general accordance*" in this context allows for the possibility of design improvements between application and finalisation of details, and ensures that minor deviations from detailed design principles that are not substantive and do not give rise to new or different environmental effects do not represent breaches of the relevant requirements. In this context ESC would have an approving role pursuant to those requirements, which ensures any minor deviation is not substantive having regard to the EIA.

1.3.10 The third context relates to illustrative details that have informed the EIA (for example, Requirement 12C(2)(i)). The use of "*general accordance*" in relation to the illustrative design allows for the completion of the design development process and for deviations from the illustrative design that are not substantive and do not give rise to new or different environmental effects. It is important to note that the "*general accordance*" standard does not apply to the parameters (see Requirement 12C, paragraph 2, which is unqualified). Again, ESC would have an approving role, which ensures any minor deviation is not substantive having regard to the EIA (Requirement 12C(1)).

CoCP

1.3.11 The ExA raised questions in relation to the **CoCP** (Doc Ref. 8.11(C)) and the precision of some of the measures set out within it, including the use of *'would', 'will', 'should'*, along with '*practicable', 'feasible'* and *'practical'*. Clarification was also sought in respect of the role of the Ecological Clerk of Works and the relationship to the Sizewell C Co. Environment Manager.

1.3.12 Mr Sharpe noted that the **CoCP** (Doc Ref. 8.11(C)) sought to provide defined limits where these were needed for the ES, but that SZC Co. would review the **CoCP** to ensure that measures that secured important mitigation were appropriately drafted. It was important to note that the **CoCP** relates to best practice, guidance and desired outcomes, which means that there will inevitably be measures that would not always be applicable to certain works or activities.

1.3.13 The ExA also sought clarification as to the role and status of the subsidiary documents that are referred to in the **CoCP** (Doc Ref. 8.11(C)). SZC Co. undertook to review and clarify this as part of the Deadline 5 submission. *[This is contained in the **Applicant's Written Submissions Responding to Actions Arising from ISH1** (Doc Ref. 9.48).]*

1.3.14 The role of the Subject Specific Management Plans, Construction Environmental Management Plans and the approval process was discussed. Mr Sharpe clarified that the SSMPs and the CEMPs were part

of Sizewell C Co.'s environmental management system that would explain how the measures set out within the **CoCP** (Doc Ref. 8.11(C)) will be complied with. Performance against these would then be monitored and reported to the Councils as part of the Environment Review Group, secured by Schedule 17 of the **Deed of Obligation** (Doc Ref. 8.17(E)). This would ensure that the Councils have adequate oversight of the process and allow for effective enforcement if there were deemed to have been breaches of any of the limits or measures set out. The **CoCP** has been reviewed and updated in light of this discussion and is provided as part of the Deadline 5 submission.

Plans, Strategies and Monitoring

1.3.15 It was agreed that a note would be prepared that set out the various plans, strategies and monitoring proposals that were referred to across the application and how each are secured. This is contained in the **Applicant's Written Submissions Responding to Actions Arising from ISH1** (Doc Ref. 9.48).

"Reasonable endeavours" as a standard

1.3.16 HPQC explained that Schedule 9 to the **draft Deed of Obligation** (Doc Ref. 8.17(E)) provides that *"with effect from the Commencement Date, SZC Co. shall use reasonable endeavours to carry out and complete the Key Environmental Mitigation in accordance with the Implementation Plan*".

1.3.17 This specific use of the reasonable endeavours standard in relation to the Implementation Plan needed to be understood and considered on the basis that it forms part of a suite of inter-related mitigation and control measures, which works as a whole and within which different measures have differing degrees of flexibility.

1.3.18 The phrase "*reasonable endeavours*" is commonly used in contracts and in the protective provisions in Development Consent Orders. It has also been used in a requirement in the Northampton Gateway Development Consent Order, though SZC Co. had not found other instances in which it had been used in requirements. Nevertheless, its widespread use reflected its utility, and was in turn reflected in a body of caselaw dealing with its meaning and implications.

1.3.19 It is used in circumstances where it is recognised that whilst it is important to seek to achieve the objective in question, there may well be circumstances beyond the control of the individual on whom the obligation rests that mean this cannot be done, even though they have acted reasonably in trying to do so.

1.3.20 Thus it avoids that individual either being in breach of contract, or, in the case of a DCO, committing a criminal offence by breaching the terms of the DCO, if they have used reasonable endeavours to comply.

1.3.21 So far as the obligation to carry out and complete the Key Environmental Mitigation in accordance with the Implementation Plan is concerned, this needed to be considered in the context of the point neatly encapsulated in paragraph 31.1 of the **Joint LIR** ([REP1-044] at page 430):

"*In a project as complex and extensive as Sizewell C, the sequence and timing of different parts of the project are likely to be difficult to achieve precisely in the order that is anticipated in this proposal. This is the case even in a very well-run development and not achieving this could be a consequence of any number of unexpected circumstances from unpredicted adverse ground conditions to the failure of sub-contractors and the supply chain consequences of completely external factors such as we have seen with the recent pandemic and transport delays*".

1.3.22 Hence the need in this case:

a) to frame the obligation in terms of the use of reasonable endeavours rather than an absolute requirement to hit particular dates or to bring construction to a halt if one element of associated development slips behind schedule; and

b) to focus on the other controls and mitigation measures which are intended to cater for the inevitable uncertainties over precise construction sequencing.

1.3.23 That was the approach successfully adopted at Hinkley Point C, where delays in delivering some of the associated development have been managed and controlled appropriately using the other measures incorporated into the DCO and the section 106 obligation with that in mind.

1.3.24 There is no statutory definition of the term "*reasonable endeavours*", but there are principles that have emerged from case law which guide its interpretation in any individual case.

1.3.25 It is important to understand, however, that what it means in practice will depend on the particular facts and circumstances that exist around the particular contractual obligation. The obligation in question is to be assessed against the facts and circumstances which exist at the time of the proposed performance of the duty, rather than those which exist at the time of entering into the obligation.

1.3.26 The commitment to use "*reasonable endeavours*" in relation to the Implementation Plan is reasonable and proportionate and there is no public interest justification for going further. Some suggestions have been made (on behalf of SSC and the Heveringham Hall Estate) that "*all reasonable endeavours*" should be the required standard. It is notable that it is not being suggested by anyone that the obligation should be the unduly onerous "*best endeavours*". The meaning of "*all reasonable endeavours*" is less certain and controversial. Some cases have suggested that it is somewhere between "*reasonable*" and "*best*" endeavours (see *CIS General Insurance Limited v. IBM United Kingdom Limited* [2021] EWHC 347) but others have suggested that it equates with using "best" endeavours (see *Rhodia International Holdings Limited v. Huntsman International LLC* [2007] EWHC 292) and that in many cases there may be no discernible difference in practice (*CIS General*). In addition to the inherent reasonableness and proportionality of the "*reasonable endeavours*" standard in the circumstances here, the ambiguity as to whether all reasonable endeavours might in fact mean the same as best endeavours is a further reason why it would not be appropriate to insist on that obligation being imposed.

1.3.27 *[A further response on the approach to "reasonable endeavours" is contained in Applicant's* ***Written Submissions Responding to Actions Arising from ISH1*** *(Doc Ref. 9.48).]*

Implementation Plan

1.3.28 HPQC explained that, as recognised by the Councils in paragraph 31.1 of the **Local Impact Report** [REP1-044] (see above), the sequence and timing of the different parts of the Project are unlikely to be achieved precisely in the anticipated order, given the complexity and extent of the Project. Any number of unexpected circumstances could have this result even where the development is well run, such as completely external factors (e.g. the recent pandemic and transport delays).

1.3.29 SZC Co. cannot in this context be expected to commit absolutely to particular dates or to a precise sequence of development such that construction would have to stop where a particular element of the associated development was delayed.

1.3.30 Therefore, the focus should properly be on the other mitigation measures and controls being provided to cater for this inevitable uncertainty over sequencing. This approach has been successfully applied at Hinkley Point C where delays have been appropriately managed and controlled using other measures to ensure that the environmental effects were not worse than those assessed.

1.3.31 HPQC responded to the proposal by ESC that the Implementation Plan should be secured by a pre-commencement Requirement, which would be an iterative plan [REP3-064], regularly approved by the councils. Although proposed drafting had not been provided for comment, an absolute Requirement to adhere would be neither realistic nor reasonable and would not be fairly enforceable under a criminal standard. Were an update to be required and the Councils were unwilling to agree, the consequences could require the Project to stop, with the associated consequences on the employment of the workforce, the community and the Project.

1.3.32 It was explained that SZC Co's position was not that implementation of the Project should not be regulated, but simply that the nature, extent and practical implications of the regulation must be considered carefully. Certain measurable hard limits, such as the HGV cap, are appropriate and accepted. These will enable unforeseen impacts to be avoided and incentivise the provision of the associated development. However, it would be unrealistic, unduly onerous and unreasonable in a Project of this scale, duration, complexity and cost, to provide an effective veto to the Councils over changes to the construction programme given that such changes are not necessarily within the control of SZC Co. This is even more inappropriate in a context of criminal liability and where an effective alternative approach has been demonstrated through successful implementation of the proposed approach at Hinkley Point C.

1.3.33 Mr Rhodes (for SZC Co.) explained that the Implementation Plan intentionally shows '*indicative dates*' and so it is not appropriate to seek absolute compliance. It provides the current best estimate of the programme and sequencing. However, delivery is not entirely within SZC Co.'s control and it relies on other approvals. The incentive for SZC Co. to provide the mitigation in the anticipated sequence is a practical one in that it is not possible to build the power station without doing so.

1.3.34 Mr Rhodes stated that he did not agree with the Councils' conclusion drawn from their recognition that dates may change within the construction programme that there must, therefore, be stringent controls as well as additional caps, restrictions and approvals. It is not appropriate or necessary for the Councils to control the construction programme – that should be the job of those uniquely qualified to do so. Multiple decisions will have to be made quickly in response to inevitably changing circumstances to ensure the efficient construction of the project and it would not be feasible for the construction sequence to be determined by or reliant on regular approvals from the two Councils in such a situation. The risks inherent in that approach would be unacceptable and would make the project undeliverable.

1.3.35 Mr Rhodes referred to the role of the DCO in creating the parameters within which the construction of the project can take place efficiently, whilst avoiding unacceptable adverse environmental effects. Those parameters define the acceptable limits of all activities that may give rise to impacts and can provide a clear set of rules within which the contractors can operate. The DCO should enforce those limits. If there is a delay in delivery of one element of associated development, but the other controls and mitigation measures are effective to avoid unacceptable adverse effects arising as a result, there is no need for an absolute requirement to adhere to the originally anticipated sequencing – with all of its undesirable consequences for the public interest.

1.3.36 The Councils have listed changes and delays to the implementation plan at Hinkley Point C but a proper analysis helps to explain that the DCO regime worked successfully there without the need for the control sought by the authorities in this case.

1.3.37 If Hinkley Point C was to be used as an example, it was first necessary to understand that implementation at Hinkley was affected by other factors. Agreement of the financing with the Government took longer than the Hinkley Point C implementation plan anticipated and commencement under the HPC DCO was delayed from 2013 to 2016. However, there was a planning permission for site preparation work granted locally which enabled certain development to start. This meant that works took place in a slightly different sequence to that in the Hinkley Point C implementation plan. Following the final investment decision in 2016, the infrastructure was provided rapidly and generally within the expected timescales. Importantly, where there were delays, the DCO "*worked*" to protect against unacceptable adverse effects. The Councils at SZC have drawn attention to delays but, notably, have not been able to evidence any adverse environmental consequence as a result of those delays. Mr Rhodes provided examples of how other controls prevented unassessed effects arising as a response to delays in the construction programme:

- The impacts of the delay to the provision of a park and ride at Junction 23 under the HPC DCO arose because site preparation proceeded in advance of FID so that the major infrastructure at Junction 23 was delayed and, as result, so was the J23 park and ride. However, unacceptable harm was avoided by: (i) the control on the number of car parking spaces at the main development; and (ii) the mode share targets in the CTMP which were enforceable by the Transport Review Group. In order to comply with those effective controls (and, just as importantly, to meet the practical requirements of the project), EDF applied for a separate planning permission for a temporary park and ride facility. The decision to grant this temporary

permission was within the control of the relevant Local Planning Authority and subject to assessment. Permission was granted and the temporary car park allowed site preparation works to continue and the mode share targets to be met.

- The jetty was also delayed. However, the HGV limits within the HPC DCO remained and were effective. The developer, rather than risk breaching the limits whilst the jetty was delayed, negotiated a temporary increase of the limit with the Councils, through a revised s.106 agreement with additional mitigation in respect of this increase, although, as it turned out, no increase was required. The decision was again within the control of the relevant Local Planning Authority. The terms of the DCO had prevented a harmful consequence of the delay.
- On accommodation, a non material change was necessary to the DCO in respect of the campus provision in Bridgwater. Once FID was declared, the campuses were provided faster than anticipated in the Implementation Plan. In practice, there was a greater concentration of workers locally than anticipated in the Gravity model (a lesson learned for SZC) but no harm arose due to the monitoring provisions in the DCO, the response of the market to provide bed spaces and the successful effect of the Housing Fund.

1.3.38 The experience from Hinkley Point C is that the DCO provided an effective framework to allow changes to occur but to ensure that no new adverse effects arose as a result. This Examination could take comfort from that experience and that example. At Hinkley Point C, the contractors and the Councils work closely together to regularly review the progress of the project and the implementation of the mitigation and controls in the DCO but it has never been necessary for the Councils to threaten enforcement of the obligation relating to the Implementation Plan.

1.3.39 Mr Rhodes confirmed that the HGV limits committed to at Sizewell C will be insufficient to enable SZC Co. to build the power station without first providing the rail infrastructure as early as possible and, shortly after, the BLFs. SZC Co. will be fully incentivised to provide these regardless of the need to comply with the Implementation Plan. Similarly, the Sizewell link road and two village bypass need to be provided in their own right but also to enable the HGV cap to be increased. The construction programme has been designed around these events happening.

1.3.40 Mr Rhodes also confirmed that controls on parking at the main development site are fixed, so that the mode shares set in the CWTP can only be achieved with the timely delivery of the caravan park, the campus and the park and rides. The presence of these controls and their enforceability

through the CWTP would prevent unacceptable consequences in the event that the park and ride sites are delayed.

1.3.41 Mr Rhodes stated that whilst SZC Co. could not commit to providing the caravan park prior to undertaking any other development, as this would delay the Project by 15 months, SZC Co. is incentivised to provide this accommodation as soon as possible so that it can attract workers. The evidence did not suggest that the caravans were necessary sooner, even if this was physically possible. The assessment of accommodation impacts has been particularly cautious. The nature of the work, being civils works, during the period when the caravan park is being provided is expected to have a high level of home based workers and the overall workforce numbers would rise in that early period to around 800. This is equivalent to an outage at Sizewell B and no adverse consequences have been identified in respect of those regular events. However, a front-loaded Housing Fund has been provided to bring forward additional accommodation and further contingency funding is in place if the monitoring identifies housing stress.

1.3.42 In respect of the accommodation campus, Mr Rhodes confirmed that no delay to its provision was expected. The Local Authority submitted at Deadline 3 that it must be completed within 6 years of commencement or before a given number of workers are employed (whichever is soonest). This reference to a particular date is not acceptable as it would require the accommodation campus to be provided in isolation and without purpose in the event that the whole Project is delayed for a reason outside of SZC Co.'s control. Any suggestion that the number of workers should be limited was unacceptable, unnecessary, counter intuitive and contrary to policy.

1.3.43 If such a requirement was imposed, the consequence of a delay to the campus would require recruitment of workers to be suspended and the construction of an urgent and nationally significant infrastructure project to be delayed as a result. Such an outcome would be entirely contrary to the public interest, and was neither necessary nor proportionate when an established and acceptable alternative existed. The alternative approach proposed, with SZC Co. incentivised to provide the accommodation campus for practical and commercial reasons, a reasonable endeavours obligation, and monitoring and contingency funding to address any unanticipated impacts was far more sensible.

1.3.44 Mr Rhodes referred the ExA to the further explanation of these matters in the Response to the Local Impact Report at Chapter 31 [REP3-044]. The ExA stated that the framework of control suggested by Mr Rhodes was not apparent from the application and requested that a document was submitted at Deadline 5 describing that framework and how it would operate. This was agreed. *[This is contained in the Applicant's* ***Written***

Submissions Responding to Actions Arising from ISH1 *(Doc Ref. 9.48).]*

1.3.45 Mr Sharpe (for SZC Co.) explained that the intention is for the two ecological compensation areas included in the Implementation Plan, being the Fen Meadow Compensation Area and the Marsh Harrier Habitat Improvement Area, to be subject to Grampian requirements preventing vegetation clearance until a further plan has been approved by the Council. For the Fen Meadow Compensation Area, this is Requirement 14A. An equivalent requirement for the Marsh Harrier Habitat Improvement Area is included in the draft DCO included in the Deadline 5 submission. *[This is contained in the Applicant's* ***Written Submissions Responding to Actions Arising from ISH1*** *(Doc Ref. 9.48).]*

1.3.46 Mr Sharpe (for SZC Co.) explained that mitigation and control of the operation of the park and ride sites and the freight management facility is controlled through the **Associated Development Design Principles**, which are secured through Requirement 20. These set out a range of commitments, including operational controls that must be adhered to during the operation of these works. A statement of compliance, including how lighting would be managed to meet the AD Design Principles, would be submitted to the Council for approval in due course. Further details are provided in SZC Co.'s written responses submitted at Deadline 3 [REP3-046].

Other points raised by ESC relating to mitigation

1.3.47 In response to various additional points made on behalf of ESC, the following submissions were made on behalf of SZC Co.

1.3.48 ESC's suggested comparison of the phasing of the Sizewell C project with a phased planning application (e.g. multi-phase housing development) is inappropriate. Unlike such a development there is no practical or commercial logic to implementation in distinct phases, where each phase can be completed and occupied before the next is commenced. This is a single project with multiple complex inter-related parts which must be managed as a coherent whole. A more appropriate comparison is Hinkley Point C where the implementation plan and structure of mitigations around delivery were acceptable to the Secretary of State at decision stage and are working effectively in practice.

1.3.49 Removal of the HCDF (Work No 1A(o)) will be addressed in the coastal processes Issue Specific Hearing but in the meantime the ExA's attention was drawn to SZC Co.'s response in writing at [REP3-044].

1.3.50 The maintenance activities that form part of the Maintenance Activities Plan ("**MAP**") (Schedule 20, paragraph 34) relate to those parts of the development that fall within the MMO's jurisdiction. In response to ESC's request that the coastal works (i.e. HCDF, SCDF and BLF) should also form part of the MAP, HPQC agreed that a post-hearing note would be submitted providing an explanation of the scope of the MAP. It should be noted that this issue was also covered in ISH6 (Coastal Geomorphology) and that the summary of the oral submissions made on behalf of SZC Co. to that hearing includes the submissions made in respect of the MAP and the reason for the imposition of the relevant condition on the DML.

1.3.51 With regard to the definition of "*commence*", paragraph 3.6 of the **Explanatory Memorandum** (Doc Ref. 3.2(C)) and response to **ExQ1 DCO.1.0** [REP2-100], set out the rationale behind the definition and explain that the mitigation required for certain pre-commencement activities is already secured for the duration of construction activities (for example in the **CoCP** (Doc Ref. 8.11(C)) and Terrestrial Ecology Monitoring and Mitigation Plan (Doc Ref. 9.4(A))) and are not limited by the definition of "*commence*" (as updated at Deadline 2).

1.3.52 SZC Co.'s justification for the use of the term "*near*" the Order limits in relation to the felling and lopping of trees (article 79 of the **draft DCO**) can be found in its response to **ExQ1 DCO.1.50** [REP2-100].

1.4 Agenda Item 2: Draft DCO – Deemed Marine Licence

1.4.1 HPQC confirmed that a written response to the detailed points made in the MMO's Deadline 3 submissions would be submitted at Deadline 5.

1.4.2 In relation to the appeals procedure as set out in Schedule 20A of the **draft DCO** (Doc Ref. 3.1(D)), HPQC drew the ExA's attention to the response to **ExQ1 DCO 1.160** [REP2-100] and explained that:

- The ExA in **ExQ1 DCO.1.124** has noted (correctly) that the norm in the case of regulatory approvals is for there to be an appeal process on the merits before a right to review on the law is available.
- SZC Co.'s response to **ExQ1 DCO.1.149** explains the underlying purpose of Article 75A and Schedule 20A. These address non-decision, delay and the risk of a potential impediment to delivery for an indeterminable length of time.
- SZC Co.'s response to **ExQ1 DCO.1.160** articulates the following points (amongst others):

- Judicial review is clearly not an adequate remedy where a dispute arises as to the merits of a decision by the Marine Management Organisation (MMO) to refuse an application for discharge of a condition.

- The MMO has failed to identify any public interest rationale for creating a statutory instrument (the DCO) pursuant to which the Undertaker has a right of appeal in respect of a decision made on discharge of a DCO requirement, but not in respect of a decision on discharge of a condition on the DML.

    - The DCO is a single statutory authorisation which is intended to collect together in one document the permissions needed to implement the project.

    - Comparison with marine licences granted pursuant to a different statutory regime outside the PA 2008 does not provide a sensible or satisfactory answer, because Parliament has decided that NSIPs do not have to be authorised pursuant to that regime on the basis that different issues arise with projects of this scale and national importance, and that decision-making in such cases should be streamlined in order to deliver such nationally significant projects faster than would otherwise be the case.

    - Hence the DCO contains a *deemed* marine licence rather than a marine licence per se, which is contained in the same statutory instrument as the other forms of development consent which are required.

    - There is no difference between the DML and the remainder of the DCO in terms of the practical and public interest considerations in each case.

    - The subject matter of the conditions in the DML is not intrinsically different to the subject matter of the requirements in the DCO, indeed in some cases (e.g. the CPMMP) it is identical.

- If a dispute arises between the Undertaker and the MMO over the merits of a submission made to discharge a condition, it is unlikely that this would involve any public law error on the part of the MMO. It cannot be right, therefore, to suggest that delivery of a NSIP could potentially be significantly delayed by an unmeritorious and potentially unreasonable (but not

Wednesbury unreasonable) decision by the MMO, with no remedy for the undertaker whatsoever.

- A decision by the Secretary of State on this issue is not constrained by precedent. It is not a matter that has been determined by statute or by the courts. Previous decisions of the Secretary of State are relevant but neither binding nor determinative and must be considered on their own facts. It is a matter that needs to be determined by the Secretary of State by reference to the balance of public interest on the strength or otherwise of the substantive arguments advanced in this case.

- In response to SZC Co.'s written submissions, the MMO has advanced a number of points (see MMO's Deadline 3 response at paragraph 4.1.2 et seq [REP3-070]), none of which provide a satisfactory answer.

    - It is wrong as a matter of fact for the MMO to argue that '*appeals are already available'*.

        - An appeal must provide the ability to ask an independent decision-maker to review the decision afresh on its merits.

        - It is a basic principle of public law that judicial review is not an appeal.

        - The MMO's '*escalated internal procedure'* is not an appeal – it involves a complaint being made to the MMO about the MMO, with the MMO deciding if that complaint is justified.

    - The Norfolk Vanguard decision on which the MMO relies (paragraph 4.1.5) does not grapple with the arguments advanced by SZC Co. in this case. Nor does the ExA or the Secretary of State need '*evidence of any potential delays'* because the potential for delay can be deduced from first principles, i.e. there is no ability to break a deadlock if a dispute arises which concerns the merits. Such an impasse either leads to delay, or obliges the Undertaker to accept any decision of the MMO, however unreasonable. Neither outcome could properly be argued to be in the public interest.

        - It is important in this context to note that the MMO resists SZC Co. having the ability to appeal even if the MMO has not made *any decision at all* on an application after 4 months (SZC Co.'s suggestion) or *ever* (the MMO's position). The MMO suggests that

Judicial Review would be an adequate remedy if the MMO were to "delay unduly" (paragraph 4.3.3), but undue delay is not a ground on which an application for judicial review can be brought.

- The MMO's key performance indicator for determining an application for a marine licence is 13 weeks – there is no good reason why discharge of a condition on a DML should take longer than 4 months.

- Similarly, the MMO's reliance on the Hornsea Three decision (paragraph 4.1.6) is misplaced, because the ExAR in that case does not appear to have grappled with the points made on behalf of SZC Co. here.

- HPQC also drew the ExA's attention to the fact that the same issue has been debated at the recent Aquind examination, and that a decision on that application is expected in September. As and when that decision emerges, SZC Co. will consider and comment on its implications.

1.5 Agenda Item 3: Deed of Obligation

Converting the Obligations to Requirements

1.5.1 The ExA requested an explanation of why those obligations which SZC Co. considered would not fall within the legal test of Section 106(1) of the Town and Country Planning Act 1990, such as the governance arrangements, were not transferred into the requirements? These would be enforced by the criminal law, which may be a more attractive approach than reliance upon injunctions.

1.5.2 HPQC referred the ExA to the Explanatory Memorandum for the **draft Deed of Obligation** (Doc Ref. 8.20(D)) which sets out in some detail SZC Co's position in respect of particular obligations, their compliance (or otherwise) with Section 106(1) of the Town and Country Planning Act 1990, and whether they could be dealt with by means of a requirement.

1.5.3 It was explained that the transfer of certain obligations into the draft DCO to enable the remaining obligations to be secured under Section 106 of the Town and Country Planning Act 1990 would involve disaggregating a system of obligations which is intended to work together.

1.5.4 SZC Co. has given careful consideration to this suggestion, but considers it to be highly undesirable because the obligations that have been

negotiated over time are carefully inter-related and drafted in a way that is suitable for a contract and not easily transferred into a DCO.

1.5.5 SZC Co. has sought through these inter-related obligations to establish a system of monitoring and management of both impacts and maximisation of benefits. That is appropriate for a construction project of this length, scale and complexity. It reflects the approach that has been taken at Hinkley Point C which has proven effective at dealing with uncertainty and change on the ground post-consent. The system of governance groups will enable SZC Co. and the local authorities to react in a dynamic and timely way in addressing changing circumstances. There is considerable practical advantage in placing the commitments to plans etc (e.g. Schedule 3, Housing: 'Private Housing Supply Plan') together with the governance arrangements for approvals or amendments by relevant Governance Groups (e.g. the Accommodation Working Group) and procedures for resolution of disputes which relate to them, and payment of contributions.

1.5.6 Thus there is a practical advantage to securing all the proposed obligations together. Whilst disaggregation was not impossible, it would be highly undesirable and only something that should be done if it were necessary to achieve a satisfactory means of enforcing the relevant obligations. That was not the case here.

1.5.7 In the context of a DCO, dismantling the carefully constructed architecture of the Deed of Obligation to remove any obligations that do not fit within the scope of section 106(1) of the TCPA 1990 is not necessary, because of the very different relationship between the grant of development consent and the land to which it relates.

1.5.8 The main ostensible purpose of any such dismantling of the Deed of Obligation in that way would be to ensure that it all fits within s.106(1) so that the obligations run with the land.

a) That is obviously important in the case of a grant of planning permission which runs with the land and can be implemented by any landowner unless it is subject to a condition making it personal to a named individual (something that is wholly exceptional).

b) The benefit of the DCO as drafted will not run with the land, and is personal to the undertaker (see Articles 8 and 9 and the definition of the undertaker in Article 2). The existing landowners are not, and could not be directly involved in the implementation of the Project.

c) Hence the key difference between the draft DCO in this case and a planning permission is the personal nature of the former, which makes binding the undertaker rather than the land effective to ensure

adherence to (and enforcement of) the obligations contained in the Deed.

d) The utility of making the particular obligations contained in the Deed of Obligation run with the land rather than with the benefit of the DCO is very doubtful. In reality, it is hard to envisage anyone seeking to enforce these particular obligations (financial obligations, governance groups and decision-making) against a landowner who was not the undertaker and did not have the benefit of the DCO.

1.5.9 The Evolving Approach reflects the fact that the DCO would be personal to the undertaker, and effectively ensures that the obligations run with the undertaking. It binds the obligations to the benefit of the DCO. All obligations bind the primary undertaker and transferees by virtue of Article 9 without any need for ownership of land. No individual landowner could implement the DCO in part, and there would be no need to carve out liability for future landowners or mortgagees.

1.5.10 Although the Evolving Approach is novel and without direct precedent, this is not an obstacle in principle to its being adopted. Further, the principle of using the DCO to ensure the enforceability of an obligation when that would not otherwise be the case through the operation of section 106 is not novel. HPQC referred the ExA to the precedents of Thames Tideway Tunnel and the AQUIND Interconnector which both included provisions within the Development Consent Order deeming the Undertaker to have the necessary interest in land in order to engage the provisions of Section 106 of the Town and Country Planning Act 1990.

1.5.11 It was emphasised that SZC Co. is keen to ensure that the approach works, ensures the local authorities are provided with effective enforcement mechanisms and is legally sound. Counsel explained that SZC Co. is open to further comments and suggestions as to how these objectives might best be achieved, and gave an example that, in response to comments from the Councils, SZC Co. will be including a new provision in the draft DCO preventing the Undertaker from hindering or refusing entry to the Council seeking to enforce by carrying out works, subject to the Council's compliance with reasonable requirements such as the Nuclear Site Licence. The inclusion of this provision would be supplementary to the draft Article set out in the **Obligations Enforcement Note** [REP3-047] submitted at Deadline 3 (section 5, paragraph 5.4). It would remove what would otherwise be a residual difference with the s.106 regime, namely criminal liability for obstructing the enforcing authority when it exercises its power to enter land to carry out operations. The effect of the new provision would be that if the undertaker did refuse or hinder authority it would be in

breach of the terms of the DCO and thus an offence would be committed pursuant to section 161(1)(b) of the PA 2008.

1.5.12 In addition, HPQC submitted that although it would not be impossible to incorporate provisions within the DCO which address the essential objectives of the relevant obligations, the consequential change in the approach to drafting would mean that the overall effect is unlikely to be identical. The approach to drafting Requirements and other provisions within the DCO has to reflect the strictness of the nature of the criminal enforcement regime. It would also have to reflect the limitations of what can properly be drafted as a requirement. Related provisions would in some instances be separated into a combination of requirements, schedules to the DCO and obligations rather than being brought together in one place. The incremental effect of the myriad changes this would necessitate means that the end result would be different in the details, and in all likelihood less satisfactory to the parties who would have to operate (and if necessary enforce) the system over many years.

1.5.13 For example, certain obligations relating to the payment of funds would not be suitable to be included in a condition attached to a planning permission or by analogy to be secured through a Requirement. Indeed, the governance arrangements ultimately require payments of money. This creates a difficulty in transferring all of the obligations into the draft DCO.

1.5.14 There is no legal reason that a DCO Requirement must be used where the objective could be secured in another way, such as through a contractual obligation. It must be decided in the circumstances of the case.

1.5.15 In addition, the test for Requirements in EN-1 Paragraph 4.1.7 would need to be considered. Requirements may only be imposed that are '*necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects'*. If something can be achieved in an effective way that is also functionally better in achieving the outcome, then a Requirement may not be considered "*necessary*". SZC Co. does not agree that it is better in practice that a problem with the operation of a governance group should lead to a criminal prosecution. SZC Co. does not consider that approach would be reasonable or to be preferred in the public interest to using a contractual commitment. This is particularly the case where there is an ongoing and effective example of the proposed approach to such obligations functioning at Hinkley Point C. The evidence is that the participation in the groups has been successful and people have not had to be coerced to do participate, either through a contractual obligation or the criminal law. This suggests that recourse to a mechanism enforceable through criminal prosecution is neither necessary nor reasonable.

1.5.16 Finally, the obligations in the draft **Deed of Obligation** (Doc Ref. 8.17(E)) that are being negotiated are at a relatively advanced stage, although not yet finally agreed. It would be a major change to seek to redraft these for transfer into the draft DCO and renegotiate them with the Councils. If the Evolving Approach is sound, this exercise is unnecessary.

1.5.17 HPQC stated that further details of SZC Co.'s position in respect of the appropriateness of using Requirements in place of the **Deed of Obligation** would be provided in written submissions would be provided at Deadline 5. *[This is contained in the Applicant's **Written Submissions Responding to Actions Arising from ISH1** (Doc Ref. 9.48).]*

Availability of Injunctions as a remedy

1.5.18 HPQC confirmed that SZC Co. was happy to make it clear that injunctions are available as a method of enforcement and referred the ExA to Sections 4 and 5 of the **Obligations Enforcement Note** [REP3-047] where the proposed Article for inclusion in the draft DCO to secure this is provided. The inclusion of this additional provision would align the drafting of the DCO with s.106 and ensure there was no doubt that injunctions were available.

Injunctions: Cross-undertakings in damages

1.5.19 In response to a question from the ExA about SZC Co.'s approach to the need for the Councils to provide a cross-undertaking in damages in respect of an interim injunction application to enforce the **Deed of Obligation** (Doc Ref. 8.17(E)), HPQC noted that this issue would arise under the conventional approach as well as the Evolving Approach.

1.5.20 HPQC explained that Parliament has not made legislative provision to determine in advance whether a cross-undertaking in damages is required upon application for an interim injunction. It is left as a matter for the discretion of the court with regard to the public interest and equity. It would be unusual for this issue to be dealt with in advance with one position for all circumstances, and counsel was not in a position to commit SZC Co. to any particular approach.

1.5.21 It was submitted that in practice and having regard to the obligations in issue here, there were limited (if any) circumstances where a prohibitory injunction might need to be sought by the Councils to cease the ongoing development. Financial obligations would be enforced by actions for debt rather than injunctions. Meanwhile, where compliance is being sought to compel performance of a positive obligation, a mandatory rather than prohibitory injunction may be sought.

1.5.22 HPQC stated that further details of SZC Co.'s position in respect of the enforcement options under the Evolving Approach would be provided in written submissions. *[This is contained in the Applicant's **Written Submissions Responding to Actions Arising from ISH1** (Doc Ref. 9.48).]*

Article 9(4) of the draft DCO

1.5.23 The ExA asked if it was appropriate for the Secretary of State to decide that the Deed of Obligation would not "run with the Undertaking" in a particular case (see Article 9(4) of the **draft DCO** (Doc Ref. 3.1(D)). The Secretary of State would not be able to make such a decision under Section 106 of the Town and Country Planning Act 1990. This could invite fragmentation of liability.

1.5.24 The ExA further questioned why a Deed of Adherence was required and suggested that the DCO could be used to provide that transferees were bound without this.

1.5.25 HPQC explained that Article 9(4) introduces a discretion for the Secretary of State to allow for part of the undertaking to be transferred free of the Deed of Obligation where the Secretary of State is persuaded this is appropriate in all the circumstances. In practice, this would only arise as a possibility in circumstances where it was clear that the limited extent of the transfer did not affect the compliance with the obligations in the Deed of Obligation. The principal undertaker in such circumstances would still be bound by the Deed of Obligation because they are not released until all of the interest in the Order is transferred (see Clause 5 of the **draft Deed of Obligation** (Doc Ref. 8.17(E))).

1.5.26 There is nothing in the draft DCO which would allow a transferee to take the benefit of the Order without the burden of the Deed of Obligation unless this is agreed by the Secretary of State. The Secretary of State would be acting in the public interest and is democratically elected and accountable. For the purposes of drafting the draft DCO, one should assume that the Secretary of State would act reasonably, taking into account the statutory context, and in the public interest. It should not be assumed that the Secretary of State would act unlawfully or unreasonably in exercising this discretion, and it would be inappropriate to remove the discretion on the basis that the Secretary of State might exercise it in that way.

Land owned by the Applicant

1.5.27 The ExA requested clarification of the land ownership plans provided at Deadline 2 [REF2-113] and the meaning of the blue lines.

1.5.28 It was explained that as set out in the key on the plans provided at Appendix 26B [REF2-113] there are two forms of shading used to indicate land within the control of SZC Co. Dark green is used to show the land to which SZC Co. owns the freehold interest (being the part of Aldhurst Farm within the Order limits on Sheets 2, 3 and 10) and light yellow/green is used where SZC Co. holds an option to lease the land (being the Park and Ride Sites and the Land East of Eastlands Industrial Estate).

1.5.29 It was confirmed that the part of Aldhurst Farm indicated in dark green is the only land within the Order limits in which SZC Co. has a sufficient interest to bind with planning obligations under Section 106 of the Town and Country Planning Act 1990.

1.5.30 The blue lines shown on the Plans are taken from and show the plot boundaries in the Land Plans [AS-108]. They do not indicate the land within the control of SZC Co.

Certificate of Compliance

1.5.31 The ExA asked for an update on the preparation of the Certificate of Compliance and Execution previously requested and which Herbert Smith Freehills LLP as solicitors for SZC Co. have confirmed in principle will be submitted to the Examination in due course.

HPQC confirmed that as the approach to the Deed of Obligation has not yet been settled, the requested Certificate of Compliance and Execution is not yet in a position where it can be taken to the relevant internal committee at Herbert Smith Freehills LLP for review. Therefore, the submission of this document is pending the agreement of the approach.

Other points relating to the Deed of Obligation raised by Suffolk Constabulary

1.5.32 HPQC explained that the mechanics of paying the contribution to the Suffolk Constabulary through the Council had its roots in the need to achieve compliance with Section 106(1)(d) TCPA 1990. So an advantage of the Evolving Approach would be that direct payments could be made if preferable.

1.5.33 It was noted that the Deed of Covenant mechanism was used at Hinkley Point C, although in that case it was felt appropriate not to require a Deed of Covenant in respect of third party participation in the governance groups. This has not proved to be an impediment to effective participation, and the requirement for third parties to enter a Deed of Covenant had been included in response to a request from Suffolk County Council.

1.5.34 SZC Co. undertook to respond to Suffolk Constabulary's detailed drafting points in writing. *[This is contained in the Applicant's **Written Submissions Responding to Actions Arising from ISH1** (Doc Ref. 9.48).]*

1.5.35 The substantive issues raised would be responded to at the relevant Issue Specific Hearings.

Points relating to the Deed of Obligation raised by Leiston-Cum-Sizewell Town Council

1.5.36 In response to a query raised by Ms Woolf on behalf of Leiston Cum Sizewell Town Council it was acknowledged that drafting for the proposed establishment of "Community Groups" is not included in Schedule 17, Paragraph 4 of the **draft Deed of Obligation** (Doc Ref. 8.17(E)). HPQC referred to the footnote included at that paragraph and that the role of Community Groups is subject to active debate but that the shared intention of the parties is that such Groups should have the opportunity to make their views known to the Delivery Steering Group so that there is an effective local voice into the governance arrangements. SZC Co. is seeking to reach agreement with the Councils and intends to provide details of this in the draft Deed of Obligation provided at Deadline 6.

1.6 Agenda Item 2: Draft DCO – Limits of deviations and parameter plans

Construction Phase: Temporary buildings and structures

1.6.1 The **Construction Method Statement** [REP3-015, Appendix 3D] and Construction Parameter Plans constrain the vertical limits of the temporary construction related development on the main development site to the extent that it is necessary to do so for the purposes of environmental assessment:

1.6.2 The **Construction Parameter Plans** limit the height of all construction activity on the Main Development Site [REP2-008].

1.6.3 **Construction Method Statement** controls the approach to construction – enacted by Requirement 8. This includes elements such as:

a) **Sequence of the construction phases**: For each construction phase of each sub area within the Main Development Site, Section 3 of the Construction Method Statement defines the construction activities, to

the extent that it is necessary to do so for the purposes of environmental assessment.

b) **Borrow Pits**: The Construction Method Statement states at Paragraphs 3.4.23-3.4.26 that an unsaturated zone of at least 2m will be maintained above the groundwater level. The maximum depth of excavation is likely to be to approximately 7 to 8 metres below existing ground level in parameter zones C5, C6 and C7.

c) **Water resource storage area:** The depth of the water resource storage area will be above groundwater level to ensure it is hydrologically separate and does not cause adverse effects to groundwater levels on-or off-site (Paragraph 3.4.11).

d) **Cut-off wall:** The purpose of the cut-off wall is to limit hydraulic connectivity with groundwater in the wider area. The Construction Method Statement states that the cut-off wall depth is at 50m below existing ground level (Paragraph 3.1.30), which effectively creates an isolated zone within which excavation can take place without adverse environmental effects. As shown in **Responses to the Examining Authority's First Written Questions** (**ExQ1 G.1.30**, [REP2-100], excavation depths are expected to range between 10 and 20 metres below existing ground level, which is very significantly above the depth of the cut-off wall barrier to the surrounding environment. The depth of the cut-off wall is defined by the depth of the low permeability London Clay Formation.

Permanent Development

1.6.4 The proposed buildings and structures within the MDS are defined and secured by requirements that ensure they must be delivered in one of the three ways:

1.6.5 **Requirement 11**: relates to those buildings where detailed design approval is sought. For the avoidance of doubt this relates to the following Work No.s: 1A(a) to 1A(e). Schedule 7 (Approved Plans) includes the relevant details of the layout, scale and external appearance of those buildings. The General Arrangement of the main platform is an approved drawing within Schedule 7 under the heading Site Layout Plan (Drawing ref. SZC-SZ0100-XX100-DRW-100089 Rev. 01) and controls the layout of the platform as a whole. All of these details for approval are within the parameters described below. Further details are then secured by compliance with the relevant design principles set out in the Design and Access Statement. Paragraph (2) of Requirement 11 then allows for alternative detailed designs to be submitted to ESC for approval. Any such alternative details must be within

the defined parameters set out in the **Operational Parameter Plans** [REP2-009] and **associated tables** [AS-202].

1.6.6 **Requirement 12**: relates to those buildings where detailed designs are not yet available and details of layout, scale and external appearance have been reserved for subsequent determination by ESC. These designs must be developed in accordance with the limits set by the **Operational Parameter Plans** [REP2-009] and **associated tables** [AS-202] and in general accordance with the Design Principles set by the Design and Access Statement.

1.6.7 **Requirement 13**: then relates to a number of ancillary buildings and structures within the nuclear island that must be developed in accordance with the **Operational Parameter Plans** [REP2-009] and **associated tables** [AS-202] and in general accordance with the Design Principles set by the Design and Access Statement.

1.6.8 The above ensures that the buildings and structures within the MDS are appropriately secured.

Rail infrastructure

1.6.9 The location and layout of the proposed rail infrastructure is set out within the Work Plans and within Schedule 7 (Approved Plans), which are then secured by Requirement 14 (Rail Infrastructure). Requirement 14 also then secures that the works must be delivered in general accordance with the design principles set out in the AD Design Principles. Paragraph (2) of Requirement 18 then allows for alternative detailed designs to be submitted to ESC for approval. Any such alternative details must be within the defined limits set by Article 4 of the Draft Order and in general accordance with the design principles set out in the AD Design Principles. Article 4(1)(b) currently restricts the limits of deviation, but it is proposed to also restrict these works to a limit of deviation of +/- 1m to the stated levels. This limit of deviation is consistent with the Rochdale envelope assessed by the Environmental Statement.

Main access road

1.6.10 The design and layout of the main access road is reserved for subsequent determination by requirement 14 (main development site: Landscape works). The details of the vertical and horizontal alignment would be secured by the details submitted pursuant to requirement 14(1)(iii) and (iv). Illustrative levels are set out within the **Landscape Masterplan** [AS-117].

Ground levels

1.6.11 Within the main platform, ground levels are defined by the individual building and structure drawings submitted for approval. Outside of the main platform (within the Landscape Restoration Area) ground levels would be secured by the details submitted pursuant to requirement 14(1)(iii). Illustrative levels are set out within the **Landscape Masterplan** [AS-117].

1.7 Agenda Item 2: Draft DCO – Tailpieces and EIA

1.7.1 The ExA asked how the comparison approach (as set out in paragraph 1(3) of Schedule 2 of the draft DCO (Doc Ref. 3.1(D)) and explained in **DCO Drafting Note 5** [REP2-111] can be justified in light of the approach taken in the Northampton Gateway DCO (article 44) and against the context of multi-consent cases including *R v North Yorkshire County Council, Ex parte Brown and Another* [2000] 1 A.C. 397 and *R (Delena Wells) v. the Secretary of State for Transport, Local Government and the Regions Case C-201/02*.

1.7.2 In response, HPQC made the following submissions:

- Paragraph 13 of Schedule 2 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 relates to situations there is a change to or extension of Schedule 1 development whereas paragraph 1(3) of Schedule 2 of the draft DCO (Doc Ref. 3.1(D)) relates to the discharge of individual requirements. It is accepted and commonplace to have this type of approach in these circumstances.

- **DCO Drafting Note 5** [REP2-111] addresses the question of what the reference point should be for the comparison of effects.

- The more substantive point is the suggestion that any application for approval of details under the requirements should be treated as if it was a "*subsequent application*" as defined in the EIA Regulations. This is not appropriate.

    - The subsequent application procedure is intended to provide a safeguard against new likely significant effects emerging at a secondary decision-making stage and not being assessed when deciding to approve those details.

    - The subsequent application procedure does not comprise a prohibition on the approval of such details, but instead ensures that any likely significant effects are assessed and taken into account when making the decision.

- The process and procedures set out to address such circumstances reflect that purpose and are thus deliberately rigorous.

- Here, the framing of the requirements specifically to prevent approval of details in those circumstances means that the underlying rationale for that process and procedure does not exist.

1.7.3 By ruling out the possibility of details being approved which give rise to new or materially different likely significant effects, there is no need or justification for the subsequent application procedure being incorporated. Instead, the proposed procedure is entirely adequate and fit for purpose for the reasons summarised in paragraphs 3.1 and 3.2 of **DCO Drafting Note 5** [REP2-111].

1.7.4 In response to a question raised by the ExA on what happens if the environmental baseline changes between the decision on the DCO and the discharge of a requirement, HPQC referred to **DCO Drafting Note 5** [REP2-111] which explains that any assessment would need to examine the position as it existed at that time. If new likely significant effects are identified then the limitation in paragraph 1(3) is engaged and the application cannot be approved.

1.7.5 In response to a question raised by the ExA on whether the approach to the Secretary of State's decision-making would need to be altered in light of the latest updates to the definition of "*environmental information*", HPQC submitted that it would not, and that the proposed new definition more closely reflected the approach to the use of environmental information in decision-taking pursuant to section 21 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017. Again, reference was made to the explanation set out in **DCO Drafting Note 5** [REP2-111].

1.8 Agenda Item 2: Draft DCO – Appeals and disputes resolution procedure

1.8.1 The ExA asked SZC Co. to consider the following points with a view to providing responses in SZC Co.'s post-hearing notes and which are contained in the Applicant's **Written Submissions Responding to Actions Arising from ISH1** (Doc Ref. 9.48):

- whether breaches of the DCO should be carved out of article 82 of the draft DCO and made reference to article 48 of the Northampton Gateway DCO; and

- whether SZC Co. would accept an article or requirement which required the undertaker to comply with the **Deed of Obligation** (Doc Ref. 8.17(E)) thereby making a breach of the DoO a criminal offence.