



# The Sizewell C Project

## 9.48 Written Submissions Responding to Actions Arising from ISH1: Draft Development Consent Order and Deed of Obligation (6 July 2021)

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

## 1.1 Introduction

1.1.1 This document contains the Applicant's written submissions responding to actions arising from Issue Specific Hearing 1 (ISH1) on the Draft DCO and Section 106 Agreement / Deed of Obligation held on 6 July 2021.

1.1.2 This document corresponds to the Applicant's **Written Summaries of Oral Submissions made at ISH1** (Doc Ref. 9.41) submitted at Deadline 5.

## 1.2 Approach to Management Plans/ Mitigation

1.2.1 **Appendix A** of this report describes the structure of control documents and subsequent approvals which are part of the wider legal framework which governs how Sizewell C will be constructed and operated.

1.2.2 In relation to the use of 'general accordance' in respect to complying with documents, Schedule 2 requirements in the **draft Development Consent Order** (DCO) (Doc Ref. 3.1(D)) have been updated as follows:

- Requirement 2: **Code of Construction Practice** (CoCP) (Doc Ref. 8.11(C)): the requirement has been updated to confirm that works would be carried out 'in accordance with' the CoCP. The CoCP has also been updated in order to make commitments clearer, enforceable, along with clarifying the approach to how and who subsequent approvals would be obtained from.
- Requirement 3: Archaeology and Peat: the requirement has been updated to reflect wording that has now been agreed with SCC. This includes the need to submit site specific WSIs for agreed works. The use of 'General Accordance' has been retained, as this allows for a degree of flexibility that both SCC and SZC Co. are comfortable with, whilst ensuring that harm to heritage assets is minimised.
- Requirement 8: **Construction Method Statement** (CMS) [AS-202]): has been clarified that the temporary buildings and structures would be 'in accordance with' the Construction Parameters, along with new parking limits. The 'general accordance' has been retained for construction sequencing, as this is necessary for the delivery of the project. This flexibility is limited by only those changes that would be substantively consistent with the CMS. Other limits and controls would then provide additional limits and controls. Monitoring and

reporting would be issued to the Planning Group and Environment Review Group.

- Requirement 9: Construction Lighting: the requirement has been update to state that works would be carried out ‘in accordance with’ Section 1.3 of the **Lighting Management Plan** [APP-182].
- Requirement 15: Operation Lighting: the requirement has been update to state that works would be carried out ‘in accordance with’ Section 1.4 of the **Lighting Management Plan**.

1.2.3 Other uses of ‘general accordance’ in the requirements are now limited to where subsequent details must be submitted and approved to either ESC or SCC. This therefore provides assurance that only minor deviations from the relevant documents would be approved. In practice this would mean that changes would be limited those only those which can be shown to be substantively the same or better would be agreed with ESC or SCC.

### 1.3 Approach to ‘Reasonable Endeavours’

1.3.1 A separate note has been prepared on issues related to the Implementation Plan. This note explains the SZC Co framework of control and how a comparable framework within the Hinkley Point C DCO has operated to manage the acceptable implementation of that project, where the equivalent Implementation Plan is committed to through a “*reasonable endeavours*” obligation in the S.106 Agreement. Please see **Appendix B** of this report.

### 1.4 SZC Co. Response to the MMO’s oral submissions on marine measures in the CoCP

1.4.1 The CoCP includes marine measures that are relevant to the intertidal area. The CoCP seeks to bring in only those measures from the deemed marine licence (DML) that are relevant to the part of the coast where there are works near to the Mean High Water Mark.

### 1.5 Response to Council’s submissions on Implementation Plan

1.5.1 A separate note has been prepared on issues related to the Implementation Plan, as requested in the Hearing. Please see **Appendix B** of this report.

1.5.2 **Appendix B**, and the **Written Submissions in relation to ISH3** (Doc Ref. 9.43) set out SZC Co.’s view, explained at the Hearing but also record that SZC Co. is discussing with East Suffolk Council whether it may be possible to bring greater certainty to the delivery of worker accommodation and with Suffolk County Council whether revisions to the **CTMP** [\[REP2-054\]](#), the

CWTP [\[REP-2-055\]](#) and the provisions in relation to the role of the Transport Review Group might bring greater clarity and comfort in relation to the control of transport impacts.

- 1.5.3 Separately, SZC Co. is also reviewing the provisions for dispute resolution and governance in the **draft Deed of Obligation (DoO)** (Doc Ref. 8.17(E)). It is expected that SZC Co. will be able to update further on these discussions – and where appropriate offer revised drafting in relation to them – at Deadline 6.

## 1.6 Limits of deviation / Parameters

- a) **Main development site: Construction Phase: Temporary buildings and structures**

- 1.6.1 The **Construction Method Statement** [AS-202] 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**, secured by Requirement 8, limit the height of all construction activity on the Main Development Site [REP2-008].

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

- Sequence of the construction phases.
- Borrow Pits: The Construction Method Statement states at Paras 3.4.184-3.4.185 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 8m below existing ground level in parameter zones C5, C6 and C7.
- 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 (para 3.4.171, CMS [AS-202]).
- Cut-off wall: The purpose of the cut-off wall is to limit hydraulic connectivity with groundwater in the wider area. The CMS states that the cut-off wall would be installed to a depth of approximately 50m below existing ground level [Para 3.4.30, AS-202], which effectively creates an isolated zone within which excavation can take place without adverse environmental effects. As explained in

response to ExQ1 G.1.30, 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.

b) **Main development site: permanent development**

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

- **Requirement 11:** relates to those buildings where detailed design approval is sought. Subject to paragraph (2) (see below), Requirement 11 requires the development of those buildings to be carried out in accordance with the relevant plans set out in Schedule 7 (Approved Plans) and the detailed design principles set out in chapter 5 of the **Main Development Site DAS**. The relevant numbered 'Works' to which this relates are identified in Requirement 11, but for the avoidance of doubt they are as follows: Work Nos. 1A (a) to (e), Work No. 1A (q) and Work No. 1D (a) to (e) or Work No. 1E (a) to (d). The plans listed in Schedule 7 (Approved Plans) include the relevant details of the layout, scale and external appearance of those buildings. Further details are then secured by the obligation to develop in accordance 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].
- **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 chapter 5 of the **Design and Access Statement**.
- **Requirement 13:** relates to a number of ancillary buildings and structures within the nuclear island. These Works must be carried out in accordance with the **Operational Parameter Plans** [REP2-009] and associated tables [AS-202] and in general accordance with the Design Principles set by chapter 5 of the **Design and Access Statement**.

1.6.5 The Requirements identified above ensure that the Rochdale envelope used in the assessment of the buildings and structures within the MDS is

appropriately secured, and that the design of these buildings and structures is appropriately controlled.

c) **Main development site: Main access road**

- 1.6.6 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 need to be approved pursuant to requirement 14(1)(iii) and (iv). Illustrative levels are set out within the **Landscape Masterplan** [APP-027].

d) **Main development site: Ground levels**

- 1.6.7 Within the main platform, ground levels are defined by the drawings submitted for approval within the nuclear island and then outside of the nuclear island (within the Landscape Restoration Area) would need to be submitted for approval by East Suffolk Council pursuant to requirement 14(1)(iii). Illustrative levels are set out within the **Landscape Masterplan**.

e) **Rail infrastructure (Work No. 4)**

- 1.6.8 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 18 (Rail Infrastructure). Requirement 18 also requires the works to be delivered in general accordance with the design principles set out in Tables 2.1 and 3.8 of the **AD Design Principles** [REP3-023]. Paragraph (2) of Requirement 18 allows for alternative detailed designs to be submitted to ESC for approval. Any such alternative details must be within the defined vertical limits of deviation set by Article 4 of the Draft Order and in general accordance with the design principles set out in Tables 2.1 and 3.8 of the **AD Design Principles**. Article 4(1)(b) currently restricts the limits of deviation for Work No. 4C to no more than +/- 1m to the levels stated. Work No.s 4A and 4B do not yet have defined limit 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 in the ES.

f) **Offsite Associate Developments**

i. **Freight Management Facility and the Park and Rides (Work Nos. 9, 10 and 13)**

- 1.6.9 The development of the park and ride sites (Work Nos. 9 and 10) and the freight management facility (Work No. 13) is defined by drawings submitted for approval (Schedule 7) [APP-034, APP-036 and APP-053], which set the proposed finished levels. Maximum heights for buildings and structures are defined in the **Associated Development Design Principles** [REP3-023].

Compliance with both the Approved Drawings and the AD Design Principles is secured by requirement 20. Together, these drawings and the parameters provided within the AD Design Principles provide clearly defined parameters. The Statement of Compliance that must be submitted to and approved by ESC to discharge requirement 20 would need to demonstrate that the final designs are within these defined limits.

- 1.6.10 Article 4 is expressed to be subject to Schedule 2 (Requirements). Variations to the details shown on the Approved Drawings (Schedule 7) would only be possible where ESC approved such changes pursuant to paragraph (3) of requirement 20.

ii. Sizewell link road and the two village bypass (Work Nos. 11 and 12)

- 1.6.11 The location and layout of the proposed Sizewell link road and the two village bypass is set out within the Work Plans and within the plans listed in Schedule 7 (Approved Plans), compliance with which is secured by Requirement 22 (Highway Works). These works cannot commence until detailed designs of the highway works have been submitted to and approved by SCC. These details must be in general accordance with the design principles set out in the **AD Design Principles**.

- 1.6.12 Paragraph (2) of Requirement 22 allows for alternative detailed designs to be submitted to ESC for approval. Any such alternative details must be within the defined vertical limits of deviation set by Article 4 of the dDCO and in general accordance with the design principles set out in the AD Design Principles. Article 4(1)(b) then provides a restriction of no more than +/- 1m to the levels stated in respect of Work Nos. 11 and 12. This limit of deviation is consistent with the Rochdale envelope assessed in the ES.

g) Parameter Plans, Works Plans and Approved Plans

- 1.6.13 A note will be provided at Deadline 6 demonstrating how the Works Plans listed at Schedule 4 of the **dDCO** submitted at Deadline 5 and the Approved Plans listed at Schedule 7 adhere to the Parameter Plans listed at Schedule 6 of the same document.

1.7 Evolving approach to liability

- 1.7.1 A separate note has been prepared on issues related to enforcement under the Evolving Approach, as requested in the Hearing. Please see **Appendix C** of this report.



## 1.8 Suffolk Constabulary response

### *Deeds of Covenant*

- 1.8.1 SZC Co. is grateful for Suffolk Constabulary's recognition that it would not be practicable for all recipients of funding or members of the governance groups to be party to the **DoO**.
- 1.8.2 Suffolk Constabulary expressed concerns in respect of the proposed Deed of Covenant, in particular that Suffolk Constabulary would not be able to bring enforcement action against SZC Co. in the event that it did not make the initial payment to the relevant Council.
- 1.8.3 Suffolk Constabulary's attention is drawn to Clause 2.1 of the draft Deed of Covenant, which is an enforceable covenant from SZC Co. to Suffolk Constabulary that it shall make the payment to the Council (for onward payment to Suffolk Constabulary).
- 1.8.4 Suffolk Constabulary also expressed concern that SZC Co.'s obligation to enter into such Deeds of Covenant was expressed by reference to the standard of "*reasonable endeavours*" and queried whether this was to account for situations where a third party refused to engage with SZC Co. or complete the Deed of Covenant.
- 1.8.5 SZC Co. considers that "*reasonable endeavours*" is the appropriate standard for the reason anticipated by Suffolk Constabulary. SZC Co. is not able to control the actions of the relevant third parties and so cannot accept an absolute obligation in this respect.
- 1.8.6 SZC Co. would be willing to seek to agree and enter into the Deed of Covenant with Suffolk Constabulary during the course of the Examination, which it hopes would allay any concerns in respect of SZC Co.'s intention to enter into such Deeds.

### *Community Safety Working Group*

- 1.8.7 Suffolk Constabulary further expressed concerns that SZC Co.'s participation in the Community Safety Working Group is necessary for meetings of that group to be quorate.
- 1.8.8 SZC Co. considers that it is necessary for it to participate in meetings of the Community Safety Working Group for these to function effectively.
- 1.8.9 Schedule 4, Paragraph 5 of the **DoO** provides mechanisms for members to attend meetings virtually or to appoint an alternate to attend a particular

meeting. Therefore, it is considered unlikely that SZC Co would be unable to attend meetings.

- 1.8.10 Furthermore, Schedule 17, Paragraph 2.1 of the draft Deed of Obligation expressly requires SZC Co. to participate in the Community Safety Working Group. A failure to participate would be enforceable by the Councils by injunction.

#### *Emergency Services Contingency Contribution*

- 1.8.11 Suffolk Constabulary expressed concern in respect of the process required to trigger a payment from the Emergency Services Contingency Contribution, in particular in regard to whether this mechanism creates an inappropriate delay to the provision of urgent mitigation or would require Suffolk Constabulary to provide sensitive information to Suffolk County Council or SZC Co.

- 1.8.12 The scope of the Emergency Services Contingency Contribution is limited to the proactive provision by the Emergency Services of public safety initiatives (such as speed awareness, security of premises and vehicles, drink driving) where the need is directly attributable to the Project. SZC Co. does not consider that the proposed mechanism would cause undue delay in these circumstances or that it is likely that sensitive information would need to be shared in order for Suffolk Constabulary to demonstrate that it was acting reasonably.

- 1.8.13 SZC Co. notes that in complying with the obligations in the Deed of Obligation, it is required to act in good faith and reasonably (see Clause 20 of the **draft Deed of Obligation**).

### 1.9 Appeals and disputes resolution procedure

- 1.9.1 In response to the ExA's question as to whether breaches of the DCO should be carved out of article 82 of the draft DCO, SZC Co. has included amendments in revision 5 of the **dDCO** to respond to this point and to align the carve out with article 48 of the Northampton Gateway DCO.

- 1.9.2 **Appendix C** to this report addresses the ExA's question as to whether an article or requirement requiring the undertaker to comply with the **Deed of Obligation** would be acceptable.

## APPENDIX A

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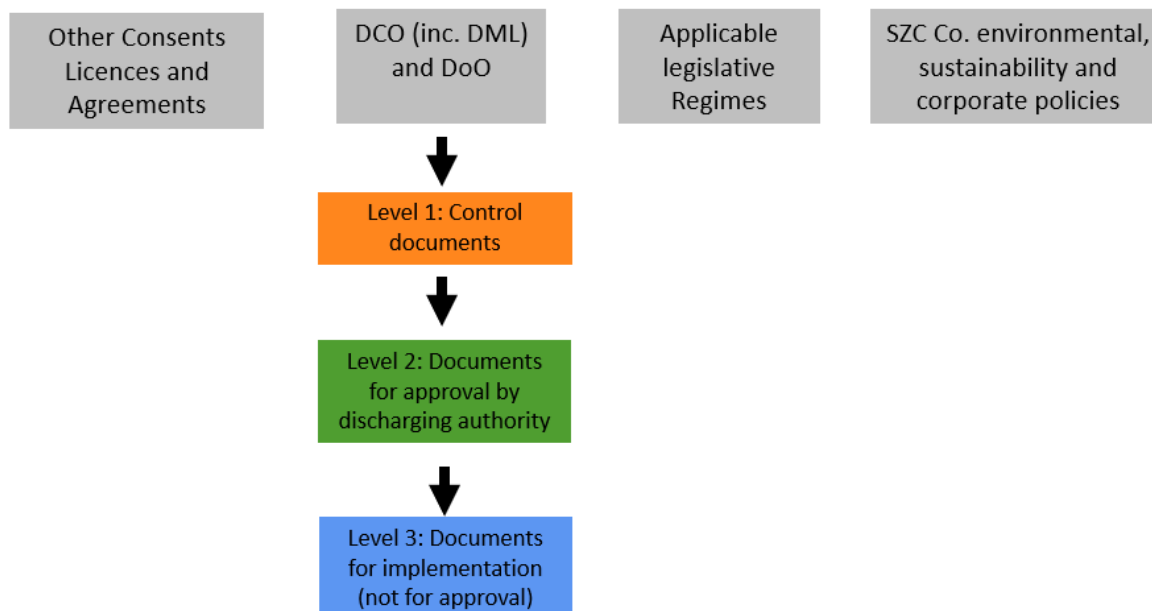
# 1 STRUCTURE OF CONTROL DOCUMENTS AND SUBSEQUENT APPROVALS

## 1.1 Overview

1.1.1 This note responds to the questions raised in ISH1 and subsequent hearings about the status of the various “strategies” and “plans” relied on in the DCO Application. It sets out the levels of documents within the application and the status of each level. **Figure 1** sets the **Development Consent Order (DCO)** (Doc Ref. 3.1(D)) and **Deed of Obligation (DoO)** (Doc Ref. 17(E)) in the context of other controls on the Sizewell C Project and demonstrates how the different levels of documents relate to each other. **Table 1** lists out the plans and strategies referred to throughout the application, showing which level the document is, the documents it relates to, where it is secured and the relevant governance group.

1.1.2 The principles behind the consenting strategy are set out in Chapter 10 of the **Planning Statement** [APP-590]. The **DCO Explanatory Memorandum** (Doc Ref. 3.2(C)) and the **DoO Explanatory Memorandum** (Doc Ref. 8.20(D)) both explain the obligations within each document and the consenting approach that has been taken. The **Mitigation Route Map** (Doc Ref. 8.12(C)) sets out in full the commitments which are required to mitigate the impacts identified in the **Environmental Statement** and where these are secured. This note does not replace the **Mitigation Route Map** but instead focuses on the “plans” and “strategies” within the application.

Figure 1: Structure



## 1.2 Legal framework

- 1.2.1 The DCO would grant SZC Co the authority and necessary powers to deliver the authorised development. The Articles and Schedules of the DCO mandate the scope and limit of those powers as well as controls which must be complied with through the construction and operation of Sizewell C.
- 1.2.2 Schedule 2 (requirements) sets out a series of commitments and controls that relate to the terrestrial works. The marine licence (DML) is Schedule 20 of the DCO and will be deemed if the Sizewell C DCO is granted. The DML authorises certain activities within the marine environment but again includes limits and controls on those activities and how the activities are carried out. The **draft DoO** (Doc Ref. 8.17(E)) commits SZC Co to a further level of control and includes obligations on SZC Co to act in a certain way to minimise the impact of any harm resulting from the construction and operation of Sizewell C. SZC Co will be legally bound by all of the obligations listed in these documents as explained in **Appendix C** (Enforcement under the Evolving Approach) to the Written Submissions arising from ISH1 (Doc Ref. 9.48)
- 1.2.3 The DCO and DoO do not govern the delivery of Sizewell C in isolation. The **Schedule of other consents, licenses and agreements** [\[REP3-011\]](#) sets out the main relevant controls, license and agreements which are required to construct and operate Sizewell C which are required and enforced through different legal regimes. SZC Co will also be bound by all

relevant legislation at the time of construction and operation which includes environmental and health and safety legislation.

1.2.4 Draft protected species licences (and accompanying ecology mitigation strategies) and ecology method statements have been submitted to the examination, which have informed the monitoring and mitigation measures set out within the **Terrestrial Ecology Monitoring and Mitigation Plan** (TEMMP) (Doc Ref. 9.4(A)). These draft license applications and supporting strategies have been submitted to provide visibility to all stakeholders and they will be submitted to Natural England under the Wildlife and Countryside Act 1981 and consented and enforced under that legislation. Where a species is not protected under this regime, SZC Co. has committed to the appropriate protection through the **CoCP** (Doc Ref. 8.11(C)) and the **TEMMP**.

### 1.3 Level 1: Control Documents (Strategies and Plans Secured by the DCO and DoO)

1.3.1 The **Level 1 Control Documents** will either be certified under the **DCO** at grant or annexed to the **DoO** at the point of signing. They are either by topic or by site and set out the controls required over the project to ensure that the works are implemented within the limits of the environmental impact assessment. Some Level 1 Control Documents specify all measures assumed and needed by the EIA and therefore do not have Level 2 documents underneath them and works must be carried out in accordance with these documents.

1.3.2 There are some documents which are secured through the **DCO** which control the design of the Sizewell C Project. These documents are not included in this note but approach to parameters and securing design approval is set out in Section 2.6 of the **Written Submissions Arising from ISH1** (Doc Ref. 9.48).

1.3.3 The **CoCP** is a Level 1 control document. Although there are a number of “strategies” or “outline plans” which have informed the obligations included in the CoCP. These documents are:

- Outline Soil Management Plan [\[REP3-018\]](#);
- Conventional Waste Management Strategy [\[APP-194\]](#);
- Materials Management Strategy [\[AS-202\]](#); and
- Outline Dust Management Plan [\[APP-213\]](#).

## 1.4 Level 2: Subsequent Approvals (submitted post DCO/DoO)

1.4.1 On a project of this scale and complexity, it is not always possible for the Level 1 control documents to include the detail necessary to ensure that the correct practices and limits are applied in every context. Therefore, where appropriate, Level 2 documents must be produced for a further approval. In most cases the Level 2 documents submitted for approval must be in general accordance with the relevant Level 1 document. In their approval of Level 2 documents, the relevant discharging authority will consider compliance with the Level 1 control documents and whether any deviations are appropriate.

1.4.2 The **CoCP** includes requirements for a series of Level 2 documents which will demonstrate how the controls in the **CoCP** for particular environmental topics will be controlled across the project. These were collectively referred to as “subject specific management plans” and will be subject to approval from the local planning authority. The subject specific management plans are to demonstrate to the local planning authority how the measures within the **CoCP** will be implemented throughout the construction of the project.

1.4.3 The **CoCP** also refers to Level 2 documents which are secured and approved directly under the **DCO** or the **DoO** for completeness (e.g. the **Coastal Processes Monitoring and Mitigation Plan** (Doc Ref. 6.14(A)).

1.4.4 A number of ecological mitigation strategies, draft licences and licensable and non-licensable method statements for protected species at the main development site are appended to **Volume 2 Chapter 14** of the **ES** [\[APP-224\]](#) and **Volume 1, Chapter 2, Section 2.9** of the **ES addendum** [AS-181] and have been submitted at Deadline 5. Similar plans for the associated development sites are then also included within the ES. An Environment Review Group (ERG) is proposed to be established and secured by the **DoO**. The mitigation strategies would be submitted to the ERG for approval prior to relevant construction works commencing. Where protected species licences are required, SZC Co. will ensure that such licences are sought from Natural England prior to relevant works commencing. These include:

- Badger method statement [\[APP-225\]](#);
- Badger draft licence (Doc Ref. 6.3 14C3B(A));
- Bat Mitigation Strategy [\[APP-252\]](#);
- Bat Method Statement [\[APP-252\]](#);
- Deptford Pink draft licence (Doc Ref. 6.3 14C11(A));
- Great Crested Newt Method Statement [\[AS-209\]](#);



- Reptile Mitigation Strategy [[APP-252](#)];
- Reptile Method Statement [[APP-252](#)];
- Water Vole Method Statement (Doc Ref. 6.3 14C6B(A));
- Water Vole draft licence [[AS-209](#)];
- Natterjack Toad Mitigation Strategy [[APP-252](#)];
- Natterjack Toad draft licence (Doc Ref. 6.3 14C7B(A));
- Otter Method Statement (Doc Ref. 6.3 14C10(A)).

## 1.5 Level 3: Implementation Documents

1.5.1 SZC Co. will require its contractors to prepare Construction Environment Management Plans (CEMPs) for its approval. These plans will demonstrate to SZC Co. how the specific works will be carried out in accordance with all relevant legislation and guidance: including the relevant Level 1 and Level 2 documents (most notably the **CoCP**, **OWSI** [[REP3-022](#)], **TEMMP** and the **Construction Method Statement** [[REP3-013](#)]). The **CoCP** sometimes refers to particular elements of the CEMPS which are relevant to a particular topic to give context to SZC Co's confidence that the measure in the **CoCP** will be complied with. The CEMPs will include, among other things, specific method statements, health and safety plans, environmental incident response plans, soil resources plans, biosecurity risk assessments and non-native species management plans etc.

1.5.2 There are other Level 3 implementation documents which will be prepared by other bodies or groups under the **DoO**. These will explain how particular mitigation will be implemented where another body is responsible for the mitigation. These are as follows:

- Flood Risk Emergency Plans – prepared by the contractor and approved by SZC Co. in consultation with the Environment Agency;
- Private Housing Supply Plan - prepared by ESC and approved by the Accommodation Working Group;
- Tourist Accommodation Plan - prepared by ESC and approved by the Accommodation Working Group;
- PROW Communications Plan - prepared by ROW Working Group;
- Annual Tourism Fund Implementation Plan - prepared by ESC and approved by Accommodation Working Group; and

- Annual Workforce Delivery Implementation Plan - prepared by Regional Skills Co-ordination Function (SCC).

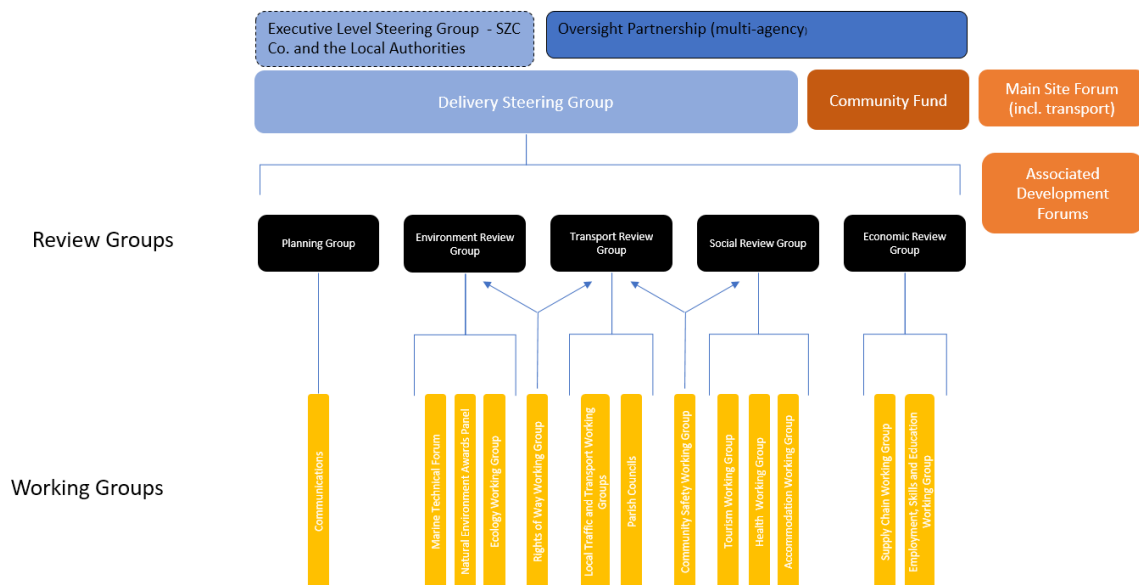
## 1.6 Monitoring, Reporting and Governance

1.6.1 Monitoring and reporting will be provided to ESC, MMO, SCC, the Ecology Working Group, the Environment Review Group and Delivery Steering Group, as relevant. The governance groups would be established by the **DoO**.

1.6.2 Through the Level 1 and Level 2 documents SZC Co has or will set out detailed monitoring and reporting regimes. As the construction period is 9 to 12 years it is not inconceivable that the environmental setting may change and the potential harms identified in the EIA either do not come to pass or are different from what was predicted. The monitoring regimes have been carefully designed to ensure that data is captured on sensitive receptors and identified areas of harm. It has been designed to provide appropriate oversight of the implementation of the project in order for the discharging authority and other relevant statutory bodies to review the effectiveness of mitigation and have regard to remedies that would be agreed with and implemented by SZC Co.

1.6.3 The **DoO** sets out a comprehensive governance structure (see **Figure 2**) which will review monitoring results and reports and agree any additional mitigation which is necessary as a result. The monitoring results will be reported to the relevant governance groups and the **DoO** gives authority to the groups to consider that data and instruct/agree particular actions in the event that certain triggers are reached. These triggers are set out in either the **DCO**, **DoO** or the Level 1 control documents; or there are situations where it is most appropriate for the governance group to agree the triggers as part of their approval of Level 2 documents.

**Figure 2 Visual Representation of Governance Structure**



A.1. Table 1: Strategies and Plans Secured by the DCO

Level 1 Control Document	Level 2 Documents for Approval	Approval by	Securing Mechanism	Environmental topic
CoCP (Doc Ref. 8.11(C))	Subject Specific Management Plans: Dust Management Plan Soil Management Plan	ESC	Rqt. 2	Environment Review Group
Overarching Written Scheme of Investigation <a href="#">[REP3-022]</a>	Site-specific written schemes of investigation Site-specific post-excavation assessments Archaeological updated project design	SCC	Rqt. 3	Environment Review Group
Peat Strategy <a href="#">[APP-275]</a>	Peat archaeological written scheme of investigation	SCC	Rqt. 3	Environment Review Group
	Site-specific archaeological management plan	SCC	Rqt. 3	Environment Review Group
Terrestrial Ecology Monitoring and Mitigation Plan (Doc Ref. 9.4(A))	Ecological mitigation strategies, draft licences and licensable and non-licensable method statements	EWG	Rqt. 4	Ecology Working Group
Drainage Strategy <a href="#">[REP2-033]</a>		N/A	Rqt. 5, 13A, 22	Environment Review Group
	Construction emergency plan	N/A	Rqt. 5A	Planning Group
Rights of Way Strategy <a href="#">[REP2-035]</a>	Footpath implementation plans	SCC	Rqt. 6A	Rights of Way Working Group
Main Development Site Water Monitoring and Response Strategy <a href="#">[AS-236]</a>	Water monitoring plan	ESC	Rqt. 7	Environment Review Group



Level 1 Control Document	Level 2 Documents for Approval	Approval by	Securing Mechanism	Environmental topic
	Coastal Processes Monitoring and Management Plan (Draft (Doc Ref. 6.14(A)))	ESC/ MMO	Rqt. 7A, DML 17	Marine Technical Forum
Construction Method Statement <a href="#">[REP3-013]</a>		N/A	Rqt. 8	Planning Group
Section 1.3 Lighting Management Plan <a href="#">[APP-182]</a>		N/A	Rqt. 9	Environment Review Group
	SSSI flood risk monitoring and adaptive defence plan	ESC	Rqt. 12C	Environment Review Group
Outline Landscape and Ecology Management Plan <a href="#">[REP1-010]</a>	Landscape and ecology management plan	ESC	Rqt. 14	Environment Review Group
Fen Meadow Strategy <a href="#">[AS-208]</a>	Fen meadow plan	ESC	Rqt. 14A	Ecology Working Group
Wet Woodland Strategy <a href="#">[REP1-020]</a>	Wet woodland plan	ESC	Rqt. 14B	Ecology Working Group
Marsh Harrier Compensatory Habitat Report <a href="#">[REP3-053]</a>	Marsh harrier implementation plan	ESC	Rqt. 14C	Ecology Working Group
Section 1.4 Lighting Management Plan <a href="#">[APP-182]</a>		N/A	Rqt. 15	Environment Review Group
Two Village Bypass Landscape and Ecology Management Plan <a href="#">[AS-263]</a>		N/A	Rqt. 22A	Environment Review Group
Sizewell Link Road Landscape and Ecology Management Plan <a href="#">[AS-264]</a>		N/A	Rqt. 22A	Environment Review Group
	Rail noise mitigation strategy	ESC	Rqt. 25	Environment Review Group

**NOT PROTECTIVELY MARKED**

Level 1 Control Document	Level 2 Documents for Approval	Approval by	Securing Mechanism	Environmental topic
	Marine Environment Management Plans	MMO	DML 18	Marine Technical Forum
	Marine Archaeological Written Scheme of Investigation	MMO	DML 19	Marine Technical Forum
	Fisheries and Liaison Co-existence Plan	MMO	DML 20	Marine Technical Forum
	Maintenance Activities Plan	MMO	DML 34	Marine Technical Forum
	Sediment Sampling Plan	MMO	DML 36	Marine Technical Forum
	Aids to Navigation Management Plan	MMO	DML 38	Marine Technical Forum
	Marine Mammal Mitigation Protocol (Draft: <a href="#">[REP3-019]</a> )	MMO	DML 40	Marine Technical Forum
	Site Integrity Plan (Draft: <a href="#">[AS-178]</a> )	MMO	DML 40	Marine Technical Forum
	<i>Sabellaria</i> Monitoring Plan	MMO	DML 45	Marine Technical Forum
	Impingement management plan	MMO	DML 50	Marine Technical Forum
	Workforce Delivery Strategy	N/A	DoO Sch 7	Employment, Skills and Education Working Group
Supply Chain Strategy <a href="#">[APP-611]</a>	Supply Chain Work Plan	N/A	DoO Sch 7	Supply Chain Working Group
Implementation Plan <a href="#">[REP2-044]</a>		N/A	DoO Sch 9	Planning Group
Monitoring and Mitigation Plan for Sandlings (Central) and Alde-Ore Estuary (Doc Ref. 9.56)		N/A	DoO Sch 11	Environment Review Group

**NOT PROTECTIVELY MARKED**

**NOT PROTECTIVELY MARKED**

Level 1 Control Document	Level 2 Documents for Approval	Approval by	Securing Mechanism	Environmental topic
Monitoring and Mitigation Plan for Walberswick and Sandlings (North) (Doc Ref. 9.15(A))		N/A	DoO Sch 11	Environment Review Group
Noise Mitigation Scheme <a href="#">[REP2-034]</a>		N/A	DoO Sch 12	Environment Review Group
Construction Traffic Management Plan <a href="#">[REP2-054]</a>		N/A	DoO Sch 16	Transport Review Group
Construction Worker Travel Plan <a href="#">[REP2-055]</a>		N/A	DoO Sch 16	Transport Review Group
Traffic Incident Management Plan <a href="#">[REP2-053]</a>		N/A	DoO Sch 16	Transport Review Group
	Operational Travel plan	SCC	DoO Sch 16	Transport Review Group

**NOT PROTECTIVELY MARKED**

## APPENDIX B



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## 1 INTRODUCTION

- 1.1.1 This note is provided in response to issues raised during the Issue Specific Hearing (ISH1) on 6 July 2021 relating to the Implementation Plan. In particular, SZC Co. was invited to submit a note to explain its case that the provisions of the draft DCO would act as a framework of control to ensure the orderly and acceptable implementation of the Project and how this would be preferable to an alternative approach of strict control proposed by the planning authorities.
- 1.1.2 In doing so, this note also explains how a comparable framework within the Hinkley Point C DCO has operated to manage the acceptable implementation of that project, where the equivalent Implementation Plan is committed to through a “reasonable endeavours” obligation in the S.106 Agreement.

## 2 FURTHER CONSIDERATION

- 2.1.1 Notwithstanding that this note hopefully sets out SZC Co.’s clear intention, the note concludes by stating that SZC Co. is reflecting on the matters raised by the ExA at the Hearings and considering whether these intentions are sufficiently clearly expressed and committed to in the draft management plans and obligations currently proposed. This further consideration includes:
- working with ESC to consider whether greater confidence can be provided to the Council about the timely delivery of worker accommodation;
  - engaging with SCC to consider whether the controls over HGV movements can be expressed and managed in such a way as to meet its concerns;
  - reviewing whether more can be done to protect early years amenity;
  - reviewing the drafting of the Management Plans and the draft Deed of Obligation to consider whether the drafting can be enhanced to give the clearest effect to the intended framework of control.
- 2.1.2 SZC Co. intends to report back on these matters at Deadline 6.
- 2.1.3 The intention of the overall approach is explained below.

### 3 THE IMPLEMENTATION PLAN

3.1.1 Plate 1.1 of the **Implementation Plan** shows an “*Indicative Phasing Schedule*” for the commencement and completion of the following environmental mitigation measures:

- Accommodation Campus (Work No. 3).
- Caravan Park (Work No. 1A).
- Rail infrastructure (Work No.s 4A to 4D).
- Ecological Compensation Sites (Work No.s 6, 7 and 8).
- Highways Improvements and particularly:
  - Sizewell Link Road (Work No.s 12A to 12D).
  - Two Village Bypass (Work No.s 11A to 11C).
  - Yoxford Roundabout and other highway improvements (Work No.s 14 to 17).

3.1.2 It also shows the “*indicative phasing schedule*” for the construction stage of the Sizewell C project and the “*anticipated duration of works to construct and start bringing into use the mitigation measures*”. It also explains (para 1.2.4) that the issuing of any approvals and consents necessary to mobilise the works is not within SZC. Co’s control and will depend in part on the consenting bodies.

### 4 QUESTIONS OF CONTROL

4.1.1 The Councils recognise that no implementation plan for a project of this scale can be predicted with absolute certainty:

*“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 un-expected circumstances from un-predicted 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.” (LIR paragraph 31.1) [REP1-045]*

4.1.2 This much is common ground but there is disagreement about the consequences of the inherent uncertainty which can be summarised as follows:

- the Councils consider that the potential for the matters set out in the Implementation Plan to vary is reason for there to be strict controls on the implementation of the Project, to require any departure from the Implementation Plan to be approved and to impose caps on worker numbers, HGV numbers as well as Grampian requirements to ensure that the mitigations are provided in a particular sequence, “*unless the Councils agree otherwise*” (see for example, SCC’s Comments on the draft Deed of Obligation submitted at Deadline 3 [\[REP3-083\]](#). ESC’s comments on the draft DCO submitted at Deadline 3 [\[REP3-064\]](#) propose additional requirements, including a requirement (17) that the Implementation Plan should cover all of the works and should be regularly reviewed and revised subject to the agreement of the Councils.
- SZC. Co has already proposed a comprehensive framework of controls that would ensure that the Councils can have the confidence that the project’s delivery must stay within the limits that the ES has assessed and mitigated. The level of control already proposed is bespoke and provides a high degree of control for the Councils to provide oversight of the project throughout delivery. The controls also enable the Councils to enforce against SZC Co. where necessary (see further below).

4.1.3 However, the additional level of control being sought by the Councils, particularly the request that the plan cover all items of the works and that SZC Co. should cede control of the construction programme, would make the project undeliverable. The risk that work on a multi-billion pound project would have to regularly stop pending agreement with the authorities would impose a risk that was unfinanceable and it would be perceived by funders and others that the approach would create a situation in which the progress of the project was regularly at risk of being ransomed in exchange for consent because of the massive financial implications of pausing the project. The controls proposed by SZC Co. seek to balance this risk, whilst providing for robust and enforceable controls that allow for legitimate and proportionate control over the project so far as necessary and justified in the public interest.

4.1.4 As an example, ESC’s additional suggested requirement (16) that no work can commence until the LEEIE caravan park is operational is practically unachievable (because it relies on other works such as the Lovers Lane access works). The ES has shown that this early stage does not lead to adverse impacts on the local housing market. The additional control of the

kind suggested by the Councils would by itself delay a nationally urgent infrastructure project by 15 months. SZC Co. could not accept the risk of fresh restrictions such as this being imposed on the project throughout the construction phase.

- 4.1.5 Equally, the suggestion that worker numbers should be capped seems inappropriate in a context where there are already controls on site parking, modal share commitments and transport mitigation measures that can secure appropriate control and mitigation over this stage. It would be extraordinary and entirely disproportionate to control the number of workers who can be recruited to deliver the Project when (a) this would give rise to delay in the delivery of nationally significant infrastructure which is urgently needed in the public interest, (b) the generation of employment is an important public interest benefit of the project, and (c) it is the workers that are obviously necessary to build the project in accordance with the Implementation Plan. Given the existing controls, and the lack of evidence to justify any further restriction, the proposed additional Requirement would also be unnecessary and contrary to policy for the reasons set out in the **Applicant's Response to the Local Impact Report** at Chapter 31 [REP3-045].
- 4.1.6 There is already a robust and enforceable framework of control proposed within the DCO which would ensure that there would be no significant environmental effects arising if it became necessary to adjust elements of the timings within the Implementation Plan in response to events. This framework of control is one that has learnt from HPC and provides both a deliverable project and one that limits its environmental impact to that which has been assessed.
- 4.1.7 SZC. Co is also fully incentivised to deliver the mitigations – otherwise it would be impossible to construct the Project.
- 4.1.8 Anyone who has visited the construction site at Hinkley Point C will be able to understand the complexity and sophistication of the construction programme and will recognise the need for the construction team to make decisions on a day to day basis to sequence the works, deal with events, ensure sufficient materials are available, that the project has the appropriate workforce and that all necessary services and infrastructure are in place to enable timely and efficient construction. Construction of this scale and complexity requires the highest level of experience and involves a degree of planning and co-ordination for which there are few precedents in the UK. The principle that the construction process would need to regularly pause and seek consent from two separate local authorities is neither reasonable nor something with SZC. Co could properly accept.



- 4.1.9 Instead, SZC. Co considers that the DCO creates a framework of control (parameters) within which the construction programme can proceed. Joint working with the authorities has helped to establish where those parameters should be set, and to promote measures, controls and limitations which need to be put in place in order to protect against any adverse environmental effects arising which are not anticipated and mitigated within the application. This is elaborated further below but limits on HGV vehicles before and after the opening of the Sizewell Link Road, for example, create binding controls within which SZC. Co would be obliged to operate and adjust its construction activities as necessary in order to live within those parameters.
- 4.1.10 There appeared to be some misunderstanding of this at ISH1. For example, the histogram of materials requirements at Plate 4.1 of the **Freight Management Strategy** [AS-280] together with the histogram of HGV movements shown at Plate 4.2 shows the potential for material demands to exceed the early years HGV limit. The **draft Deed of Obligation** [Rep 3-024], however, would mean that the exceedances could not happen without SZC Co. being in breach. The profile shows that the proposed limits are set at a level that would not allow SZC Co. to deliver the Project purely by HGV and stay within the terms of the Deed. SZC Co. must therefore deliver the SLR and rail improvements. The HGV caps are clear and unambiguous, meaning that SZC Co would be obliged to manage its activities to respect the caps and other limits in the Deed and DCO.
- 4.1.11 SZC. Co is also aware that the Implementation Plan reflects its own best expectation of the construction programme and identifies when necessary infrastructure needs to be in place not only to protect against environmental consequences but also to enable the project to be constructed.
- 4.1.12 The experience at Hinkley Point C helps to demonstrate how this approach works acceptably in practice.

## 5 HINKLEY POINT C

- 5.1.1 SCC's **Response to Additional Submissions from the Applicant** [REP3-079] provides a table (Table 1) which compares the delivery of some HPC infrastructure with that anticipated in the HPC Implementation Plan. There is no disagreement that some elements of the HPC Associated Development were delayed as a result of "*various external influences and causations*" (as expressed in SCC's **Comments on the draft Deed of Obligation** [REP3-083] at paragraph 13E). In fact, it is because events and external factors beyond the Undertaker's control sometimes cause impacts on the construction programme that SZC. Co is un-willing to commit to precise dates, caps or to have the construction programme controlled by the Local Authorities.

- 5.1.2 The very fact that the Suffolk authorities actively want to have control over these matters is also relevant to understanding why SZC Co is unwilling to cede control. SZC Co wishes to continue a collaborative, close working relationship with the authorities through the implementation of the project in which the respective roles of each party are fully respected. SZC Co. expects the Councils to enforce planning controls and ensure mitigation is put in place in accord with the DCO but it does not expect the councils to limit worker numbers or insist on construction sequences which are not necessary or deliverable.
- 5.1.3 Attached as **Annex B** is a fuller comparison of the delivery record at Hinkley Point C compared with the original Implementation Plan, which was provided at Appendix 14 of the HPC DCO Section 106 Agreement.
- 5.1.4 To some extent, the fact that events turned out slightly differently is not surprising given the fact that the HPC Implementation Plan assumed that construction would begin in June 2013. In practice, delays in agreeing financing arrangements with the UK government meant that agreement to proceed was not reached until September 2016. In addition, Hinkley Point C differs from Sizewell C in the fact that a Site Preparation planning permission was granted by the local authorities at Hinkley which enabled a number of site preparation works to proceed in advance of the main Project, which resulted in a delay to bringing forward some principal infrastructure, whilst site preparation works proceeded. For these and other reasons, direct comparisons may be unhelpful.
- 5.1.5 What **Annex B** does show is an impressive record of timely delivery for the majority of the infrastructure, once the Project fully commenced, with a number of elements being completed more quickly than anticipated in the Implementation Plan.
- 5.1.6 The important question, however, is not whether there were delays, but what the consequence (if any) was of those delays. It should not matter if the sequence changed, as long as no additional significant adverse effects arose. The practical consequences of delays can be considered under the following headings.

## 5.2 Park and Rides

- 5.2.1 Workforce build up happened relatively rapidly under the Site Preparation Consent but HPC was unable to commit to major infrastructure until funding arrangements for the main project were agreed with the Government. As a result, the park and ride facility at Junction 23 of the M5 was delayed but car parking controls in the planning permission and the DCO limited parking at the main site. Consequently, HPC needed to find a practical solution and it obtained a TCPA planning permission for a 600 temporary space park

and ride in Bridgwater from Sedgemoor Council. HPC's workforce requirements could, therefore, be met and the benefit of the early park and ride enabled a more efficient bussing system (rather than buses running through the catchment area picking up small numbers of workers at individual locations). In other words, the practical requirements of the project drove the necessary solution and the planning restrictions prevented adverse consequences. A further approval was necessary, but this was obtained from the planning authority.

5.2.2 Separately, it is understood that issues with fly parking arose and HPC responded by appointing a fly parking team to enforce the use of the park and ride car parks. That lesson has been learned for Sizewell C and the CWTP includes specific provision for fly parking control and enforcement [\[REP2-055\]](#).

5.2.3 It is understood that the mode share targets in the DCO at HPC have consistently been met.

5.2.4 In other words, events required different solutions, decisions were made by HPC but the principal controls within the DCO ensured that no additional adverse effects arose as a consequence. This framework of environmental controls and limits meant that there was no need to enforce against EDF Energy for delays to milestones identified in the Implementation Plan and it would have been impractical and counter productive to do so. There was no need to cap worker numbers or to pause the construction process. The harm that needed to be protected against was protected by the limitation on car parking and by the mode share targets.

### 5.3 Jetty

5.3.1 Probably the most significant slippages at HPC have related to the provision of the temporary jetty and to the fact that planned improvement works to Combs Wharf have not in fact been delivered. The phased start on the project through the site preparation consent reduced the early need for the jetty, whilst delays also arose when HPC was obliged to change the contractor delivering the jetty. A phased start and the lack of full financial agreement for FID also affected the ability to fund the jetty and the wharf works early in the project.

5.3.2 The design approved within the DCO for the Combs Wharf enhancement proved to be more complex than was required from an operational perspective. With limited changes, the existing wharf has been able to receive the largest AILs, whilst HPC has also been able to use the temporary jetty at the main site (which has a roadway as well as a conveyor) for the receipt of other AILs.

- 5.3.3 The delay in the delivery of the jetty caused HPC to be concerned that it may suffer programme constraints due to the limitation imposed by the HGV restrictions. Consequently, a supplemental Section 106 Agreement was negotiated with the local authorities to enable the temporary lifting of HGV restrictions. The authorities sought a mitigation package of £5m, which EDF agreed. Whilst that agreement was reached and signed, it turned out to be unnecessary and, in practice, the original limits set out in the Construction Traffic Management Plan (an average of 500 movements a day within a 3 month period and a maximum of 750 movements in a single day) have not been exceeded.
- 5.3.4 Again, events turned out differently from those anticipated in the Implementation Plan but with no greater environmental effects. A relaxation appeared to be necessary temporarily on HGV limits but the terms of the DCO required this to be approved, i.e. controls were in place where they were needed. EDF could not just increase the HGVs.
- 5.4 **Bio-diversity**
- 5.4.1 There have been no delays in the provision of habitat creation.
- 5.5 **Applying lessons to Sizewell C**
- 5.5.1 The DCO and the S.106 Agreement have been successful at Hinkley Point C in creating a framework for the orderly development of the HPC project. Given the time taken to agree funding arrangements with the Government, the complexity of over-laying the preliminary works consent and (more recently) the impact of the pandemic, the HPC DCO has been truly tested. Notably, however, the evidence to this examination from ESC and SCC, whilst identifying delays, does not identify any new or materially different significant adverse environmental effects that arose as a consequence of these events.
- 5.5.2 In practice, HPC has developed a close working relationship with the local authorities, who are closely involved in the implementation of HPC through regular joint working. At no stage has it been necessary for the authorities to threaten enforcement of the Implementation Plan. Attention has focussed instead on monitoring effects through the Transport Review Group and the Socio Economic Advisory Group and applying the provisions of the DCO and the Section 106 Agreement, which have shown themselves fully capable of controlling and mitigating effects. Key DCO limitations such as HGV limits, mode share targets and main site parking limits have proven completely effective and have been consistently observed. The DCO has been provided as a framework of control to the contractors, with its provisions passed on as contractual requirements and the contractors have been able to manage the programme accordingly.

5.5.3 Lessons have been learned for Sizewell C, for example:

- a commitment to fly parking control;
- the establishment of a dedicated Accommodation Working Group; and
- an approach to contingent housing payments based on monitored evidence of housing stress.

## 6 SIZEWELL C – A FRAMEWORK OF CONTROL

6.1.1 In relation to transport, the SZC **draft Deed of Obligation** [[Rep 3-024](#)] contains a series of measures which prescribe the ability for harm to rise. This can be explained under the principal headings of transport and accommodation but, of course, the **draft DCO** [RE2-015] and the draft Deed of Obligation contain mitigation commitments on all issues where the application assessments identify impacts which need to be mitigated.

6.1.2 Construction Traffic is managed through the **Construction Traffic Management Plan** [REP2-054] (the CTMP). The CTMP is committed to through Schedule 16 of the draft Deed of Obligation (although SZC Co. took away an action from the ISH to consider if the commitment could be made clearer).

6.1.3 The plan contains multiple measures, some of which are expressed conditionally but at its core are the commitments in Section 4 (Measures and controls for HGVs to / from the Main Development Site) where the language is deliberately imperative (SZC Co. 'will'). In particular, binding commitments are given to a key framework of controls, including:

- HGV routes
- Caps on HGV movements (daily and peak hour caps)
- HGV timings (for arrivals and departures).

6.1.4 Commitments are also given to a Delivery Management System, a freight management facility, a signage strategy and a number of other matters but it is the core controls listed above that will operate to protect against additional harm.

6.1.5 The significance of the HGV limits in particular should not be underestimated. SZC Co committed itself to tighter HGV limits in January 2021, partly at the request of SCC. The work undertaken on materials quantities and transport options in the Deadline 5 paper **Materials and Modal Split** (Doc ref. 9.49) demonstrates that the construction programme has been



carefully managed and sequenced in order to respect the HGV limits. Those limits not only shape the construction programme, they also drive the necessity to deliver the rail capacity and marine capacity on time – otherwise, the project cannot be constructed. SZC. Co needs no greater incentive to deliver the infrastructure. But, if it failed to do so, no greater harm would rise to local communities, because the HGV limits would be in place.

- 6.1.6 Similarly, the Construction Worker Travel Plan [REP2-055] (the CWTP) contains a detailed plan for the management of construction traffic. The core commitment, however, is that given at paragraph 3.4.9, which is an obligation that SZC Co. must achieve the mode share targets set out in Table 3.1, allied to the limitations set out at paragraph 4.7.2, which places a limit on car parking at the main development site.
- 6.1.7 Multiple other matters are set out – including walking and cycling improvement measures, bus provision, cycle parking, the operation of the park and rides etc. In theory, a Grampian style requirement could be drafted for every single component of the plan – resulting in a complicated mix of controls. In practice, however, the mode share targets and the parking controls provide clear and enforceable obligations, which will be effective in protecting against additional harm.
- 6.1.8 The parking limit is a simple but effective control. It is easily enforceable and effective in preventing more workers travelling to site unless investment is made in other forms of transport. That investment is planned in the form of the principal associated development listed in the Implementation Plan and the lesser measures listed in the CWTP. They have to be delivered otherwise the main site is starved of workers.
- 6.1.9 Harm is protected against because the only alternative would involve a breach of the Deed of Obligation.
- 6.1.10 The same applies in principle to the core commitments in the CTMP. They are intended to be clear and enforceable and completely effective in requiring investment in other freight capacity if the construction programme is to be met.
- 6.1.11 As at Hinkley, the Transport Review Group (TRG) has an important role to play. In respect of the CWTP for example, paragraphs 3.5.5, 5.3.5 and 6.4.3 make clear that the Transport Coordinator must report to the TRG meetings with an action plan to show how the mode share targets are being met or, if they are not, how they will be. The TRG has the power to require additional measures to be taken to meet the targets and those paragraphs of the CWTP are clear that any such action would be fully funded by SZC Co. That liability is uncapped. In practice, those measures could be



substantial – such as funding more busses, controlling worker travel to enforce car sharing, further investment in walking and cycling etc. The powers are real, enforceable and substantial.

6.1.12 Similarly, paragraph 9.46 of the CTMP provides for SZC Co. to be directed to take corrective actions to remedy and breach of the CTMP.

6.1.13 Comparable provisions are set out at section 3.5 of Schedule 16 the draft Deed of Obligation.

6.1.14 These provisions are entirely separate from the provisions in both plans and the draft Deed of Obligation for contingent funds to address additional significant effects that are identified through monitoring; although those funds and the provisions related to them provide further comfort that the consent will be effective in protecting against and mitigating harm, without the degree of direct control over the construction process sought by the councils.

6.1.15 Similarly, in relation to accommodation, SZC Co's **Comments on the Councils' Local Impact Report** (Doc Ref 9.29) [\[REP3-045\]](#) at Chapter 31 explain why imposing caps on worker numbers would be counter productive and contrary to policy. That response also explains why additional controls are not necessary. In particular:

- the Implementation Plan shows the construction of the LEEIE caravan park commencing shortly after FID and taking approximately a year. Site clearance, utilities diversions and access works prevent a significantly earlier opening. The consequence of the additional requirement requested by ESC that the caravan park must be complete before any other construction can commence would delay an urgent and nationally significant infrastructure project for over a year but is unnecessary for the reasons set out there. Those comments explain the precautionary nature of the assessment of accommodation impacts. For example, by the time the caravan park becomes available, it is anticipated that the workforce would be approximately 800. This is approximately the same number of workers regularly employed during Sizewell B outages and there are no reported housing stress effects from outages at Sizewell B.
- the Councils wish to see the campus constructed by 2028 or by the time 7,000 workers are engaged, whichever occurs first (which would be financially ruinous if the remainder of the project was delayed for any reason), although SCC's **Comments on additional information / submissions received at D2** [\[REP3- 083\]](#) asks whether the campus could be brought forward in phases, presumably so that an early phase can be made available.

- 6.1.16 It is relevant in this context that the mode share targets to which SZC Co is committing in the CWTP could not be met without the construction of the LEEIE caravan park and the campus.
- 6.1.17 No party has a greater incentive to provide the campus than SZC. Co.
- 6.1.18 Schedule 3 of the **draft Deed of Obligation** [\[Rep 3-024\]](#) provides (at 3.1.1) for the campus to be delivered using reasonable endeavours in accordance with the Implementation Plan, unless otherwise agreed with the Accommodation Working Group. The potential to phase the campus, therefore, is a matter to be discussed through the Accommodation Working Group in the light of experience of monitoring workforce build up and indicators of housing stress. That is plainly a more sensible approach than trying to pre-determine the precise timing now.
- 6.1.19 The draft Deed of Obligation [\[Rep 3-024\]](#) commits to the establishment of an accommodation management system but also to regular monitoring both by ESC and by SZC. Co. A Housing Fund is proposed, to be spent in accordance with a Private Housing Supply Plan devised by ESC. Similar provisions are proposed for a Tourist Accommodation Plan. Provisions are made for the expenditure to be front loaded, i.e. undertaken early in the construction period. Experience at HPC suggests that these measures will be highly effective. At the same time, there is general agreement that the forecast number of home based workers (2,400) is conservative and a number of measures are proposed to enhance local recruitment (and reduce any housing pressure).
- 6.1.20 Amongst the measures to be monitored are a number of indicators of “*housing stress*” and funding is provided for in the draft Deed of Obligation contingent on the outcome of that monitoring - to be spent on Housing and Homeless Services Resilience Measures to respond to any indicators of stress.
- 6.1.21 Again, these provisions ensure that the risk of harm is protected against and that there is no need for any greater level of control. Indeed, it is difficult to discern how greater control would be necessary, sensible or effective. Slowing the construction of Sizewell C would not be in the national interest or in the interest of the local community. Limiting the number of workers would have the effect of slowing the project but would also limit its local economic benefits.
- 6.1.22 In respect of all of these issues, working groups and review Groups are to be established to enable joint working, based on real time motoring information. Schedule 17 of the **draft Deed of Obligation** [\[Rep 3-024\]](#) also sets out measures to ensure that the Councils are regularly kept informed of progress against the Implementation Plans and consulted on the

appropriate course of action which SZC. Co will take in the event of any delay in implementation. The Schedule sets out that these matters would be reviewed and discussed through regular meetings of the Planning Group, with escalation provisions to the Delivery Steering Group.

6.1.23 Altogether, a comprehensive framework of control is proposed.

## 7 FURTHER CONSIDERATION

7.1.1 Notwithstanding the above, which describes SZC Co.'s clear intentions, SZC Co. is reflecting on the matters raised by the ExA at the Hearings and considering whether these intentions are sufficiently clearly expressed and committed to in the draft management plans and obligations currently proposed. This further consideration includes:

- working with ESC to consider whether greater confidence can be provided to the Council about the timely delivery of worker accommodation;
- engaging with SCC to consider whether the controls over HGV movements can be expressed and managed in such a way as to meet its concerns;
- reviewing whether more can be done to protect early years amenity;
- reviewing the drafting of the Management Plans and the draft Deed of Obligation to consider whether the drafting can be enhanced to give the clearest effect to the intended framework of control.

7.1.2 SZC Co. intends to report back on these matters at Deadline 6.

## ANNEX A: IMPLEMENTATION PLAN: RELATED SECURING MECHANISMS & FLEXIBILITY

Key milestone dates	Start	End	Linked Requirement or Deed of Obligation	Justified Flexibility
Assumed Final Investment Decision (FID)		Q3/4-22	N/A	The FID date will be used to confirm the overall programme. The assumptions set out below are based on FID, therefore changes to FID could lead to proportional changes to all other dates
<b>Main Development Site - Construction Phases **</b>	-	-		
Sizewell B relocated facilities works ***	Q1-21	Q4-24	Requirement 8 (Temporary Construction related Development) secures the sequence of construction works as set out in the Construction Method Statement	The sequence of these phases (i.e. measures in Phase 1 need to be in place before certain works in Phase 2 should be commenced) are secured by Requirement 8. The dates set out here are therefore purely illustrative. SZC CCo. would be justified to change these dates in order to meet the Government deadline for the power station to begin operation.
Pre-commencement and enabling works	Q2-22	Q2-23		
Phase 1: Site Establishment and preparation for earthworks	Q1-23	Q1-25		
Phase 2: Bulk earthworks	Q1-25	Q3-27		
Phase 3: Main civils	Q3-25	Q2-32		
Phase 4: Mechanical and electrical installation	Q1-26	Q4-33		
Phase 5: Commissioning and land restoration	Q1-30	Q4-34		
<b>Main Development Site: Mitigation</b>	-	-		
Permanent Beach Landing Facility	Q3-23	Q2-25		

Key milestone dates	Start	End	Linked Requirement or Deed of Obligation	Justified Flexibility
Temporary Beach Landing Facility	Q3-23	Q2-25	HGV limits in the early years and once SLR is available, provides a substantial incentive for SZC Co. to deliver the BLF as soon as practically possible. Given these HGV controls, any delay to the BLR would unlikely have any significant impact. Given the urgency of the project, it is clear that these controls would provide adequate certainty for item.	
Accommodation Campus	Q3-23	Q3-25	SZC Co has committed to delivery of the Accommodation Campus and Caravan site through a commitment to the Implementation Plan – with the accommodation campus open at the end of Year 3 of construction and the LEEIE Caravan Site open at the end of Year 1 of construction.	
Caravan Park	Q4-22	Q4-23	<p><b>Figure 5.1</b> of the <b>Accommodation Strategy</b> [APP-614], shows the interaction between the build-up of the NHB workers requiring accommodation in the local area, and the indicative opening dates of the campus and caravan park.</p> <p>This shows that on this basis, the gap between the availability of project accommodation and the total amount of accommodation required is never greater than the number of bedspaces which SZC Co. assesses to be the minimum amount of spare capacity available in the 60-minute area.</p> <p>This is considered to be a conservative assumption due to the likely underestimate of the HB workforce as a percentage of the total workforce as set out in the next section. No further controls are therefore considered necessary.</p>	
Lover's Lane works	Q3-22	Q4-23	N/A	The Implementation Plan provides sufficient control for this work.

Key milestone dates	Start	End	Linked Requirement or Deed of Obligation	Justified Flexibility
Green Rail Route	Q4-22	Q1-24	HGV limits in the early years and once SLR is available, provides a substantial incentive for SZC Co. to deliver the rail works as soon as practically possible. Given these HGV controls, any delay to the rail works would unlikely have any significant impact. Given the urgency of the project, it is clear that adequate certainty on this item has been provided.	
Branch Line/Other Rail Improvements	Q2-23	Q4-23		
Fen meadow compensation areas (Initial Habitat Establishment)	Q2-22	Q2-23	Requirement 14A (Fen Meadow) restricts vegetation clearance on the SSSI until the Fen Meadow Plan has been approved by ESC. This then secures the timing of the works and the triggers for monitoring and, if necessary, adaptive migration.	The combination of a Grampian requirements and the implementation plan means that there is no possibility that the works could be commenced before the Fen Meadow Plan has been approved. The Fen Meadow Strategy then provide clear triggers for the monitoring arrangements. This approach is considered to be consistent with the ES and HRA assumptions.
Marsh harrier habitat improvement area	Q2-22	Q2-23	A new requirement will be included at the next Deadline that follows the approach of Requirement 14A and 14B (Wet Woodland).	As above.
<b>Offsite Associated Development</b>	-	-		
Pre-commencement and enabling works	Q2-22	Q2-23	Requirement 2 (CoCP) secures the necessary measures needed to be undertaken during relevant	N/A



Key milestone dates	Start	End	Linked Requirement or Deed of Obligation	Justified Flexibility
			site set up and enabling works.	
Friday Street Roundabout	Q1-23	Q2-23	N/A	The Implementation Plan provides sufficient control for this work.
Two Village Bypass	Q1-23	Q4-24	HGV limits in the early years and once SLR is available, provides a substantial incentive for SZC Co. to deliver the SLR and 2VBP as soon as practically possible.	
Sizewell Link Road	Q1-23	Q4-24		
Yoxford A12 Junction	Q2-23	Q2-24	N/A	The Implementation Plan provides sufficient control for this work.
Freight Management Facility	Q2-23	Q2-24	The Deed of Obligation secures the targets set out in the CWTP. The Draft Deed of Obligations states <i>3.5.1 In the event that a Monitoring Report identifies that any of the targets or limits set out in the Construction Worker Travel Plan or the Construction Traffic Management Plan have not been achieved or have been exceeded, or are not reasonably likely to be achieved or are likely to be exceeded, SZC Co shall at the next available meeting of the Transport Review Group</i>	The CWTP, including the monitoring and review arrangements, provides a substantial incentive for SZC Co. to deliver the FMF as soon as it is needed to support the construction process.
Northern Park and Ride	Q2-23	Q3-24		
Southern Park and Ride	Q2-23	Q3-24		

NOT PROTECTIVELY MARKED

Key milestone dates	Start	End	Linked Requirement or Deed of Obligation	Justified Flexibility
			<i>propose revisions to the Construction Worker Travel Plan or the Construction Traffic Management Plan (as relevant), sufficient to mitigate the impacts identified, for approval by the Transport Review Group.</i>	
A12/A144 Junction	Q1-23	Q4-23	N/A	The Implementation Plan provides sufficient control for this work.
Other Highway Improvements	Q4-22	Q4-23	N/A	The Implementation Plan provides sufficient control for this work.

NOT PROTECTIVELY MARKED

Scheme	DCO S106 Implementation Plan			Actual Dates			Months from ... to Completion				Commentary
	Indicative Schedule Duration	Implementation Plan Duration (inclusive of Contingency)	Expected Completion with June 2013 Start Date	Start Date	Completed	Actual Duration	June 2013	Commenc't November 2014	Transition June 2016	Gov Agreement September 2016	
<b>Cannington Bypass</b>	21 Months	22 Months	April 2015	November 2014	July 2016	<b>21 Months</b>	37 Months	21 Months	Completed	Completed	The Cannington Bypass Triggered the Commencement of the DCO and construction was completed 1 month earlier than envisaged in the DCO Implementation Plan
<b>Bridgwater A</b>	19 Months (partial) / 29 Months (full)	24 Months (partial) / 35 Months (full)	June 2015 / May 2016	July 2017	November 2018 / February 2019	<b>16 Months / 19 Months</b>	66 Months / 69 Months	49 Months / 52 Months	21 Months / 24 Months	25 Months / 28 Months	Bri A Campus was started just before the SoS approved the consolidated campus proposal via NMC 2 which increased the footprint of the Bri A campus and construction was completed 16 months earlier than envisaged in the Implementation Plan
<b>Bridgwater C</b>	13 Months	16 Months	Oct 2014	N/A	N/A	<b>N/A</b>	N/A	N/A	N/A	N/A	Bridgwater C Campus has not been constructed. NMC 2 Application approved by Sec. of State on 17 August 2017 proposed consolidating accommodation onto Bridgwater A site
<b>HPC Accommodation Campus</b>	16 Months	19 Months	January 2015	March 2017	May 2018	<b>14 Months</b>	60 Months	43 Months	24 Months	21 Months	The HPC Campus was started 7 months after the Government Agreement was reached and construction was completed 5 months earlier than envisaged in the Implementation Plan
<b>J23</b>	17 Months	21 Months	March 2015	September 2016	February 2018	<b>18 Months</b>	57 Months	40 Months	21 Months	18 Months	J23 was started once the Government Agreement was reached and construction was completed 3 months earlier than envisaged
<b>J24</b>	7 Months	8 Months	February 2014	August 2016	November 2016	<b>5 Months</b>	42 Months	25 Months	6 Months	3 Months	J24 was started 2 months after Transition and construction was completed 3 months earlier than envisaged in the Implementation Plan
<b>Cannington Park &amp; Ride</b>	10 Months	13 Months	July 2014	June 2017	May 2018	<b>11 Months</b>	60 Months	43 Months	24 Months	21 Months	Cannington P&R was started 9 months after the Government Agreement was reached and construction was completed 2 months earlier than envisaged in the Implementation Plan. A temporary P&R approved by a TCPA application was in operation which limited the operational need for this P&R until 2017
<b>Williton Park &amp; Ride</b>	10 Months	12 Months	June 2014	May 2018	July 2018	<b>3 Months</b>	62 Months	45 Months	26 Months	23 Months	Williton P&R was started 20 months after the Government Agreement was reached and construction was completed 2 months earlier than envisaged in the Implementation Plan. Limited numbers of workers were located close to the P&R which limited the operational need for this P&R until 2018
<b>Combwich Wharf</b>	13 Months	15 Months	September 2014	May 2020	Estimated September 2021	<b>16 Months</b>	100 Months	83 Months	64 Months	61 Months	The design approved within the DCO proved to be more complex than was required from an operational perspective. Revised design proposals were presented and agreed with the Relevant LPA. Early AILs were delivered via the existing wharf and a small number have been delivered by the temporary jetty meaning no programme implications from delayed start to the construction.
<b>Combwich Freight Laydown Facility</b>	16 Months	18 Months	December 2014	N/A	N/A	<b>N/A</b>	N/A	N/A	N/A	N/A	Combwich Freight Laydown Facility has not been implemented following review of Project requirements. Sedgemoor District Council approved 'slot in' TCPA application to replace Laydown with a layby for AIL deliveries to await transport to HPC site
<b>Temporary Jetty</b>	15 Months	21 Months	March 2015	December 2017	September 2019	<b>22 Months</b>	76 Months	59 Months	40 Months	37 Months	Engineering and contractual issues resulted in the construction of the temporary jetty not beginning until December 2017, 16 months after the Government Agreement was reached. To mitigate the impact of this delay, a supplemental agreement setting out a range of measures was proposed and agreed by the Transport Review Group. Once commenced the construction of the temporary jetty was completed 1 month later than envisaged in the Implementation Plan. Measures agreed in the supplemental agreement were kept in place until the temporary jetty was operational
<b>Highway Improvements</b>											
<b>M5 Junction 23</b>	4.5 Months	6 Months	December 2013	October 2017	January 2018	<b>4 Months</b>	56 Months	39 Months	20 Months	17 Months	Design for junction improvement scheme was subject to discussions with both Highways England and LHA after the

											Government Agreement was reached. Once scheme was approved, construction was completed 2 months earlier than envisaged within the DCO Implementation Plan.
<b>A38 Bristol Road / The Drove Junction</b>	1.5 Months	2.5 Months	Mid-August 2013	January 2017	June 2017	<b>6 Months</b>	49 Months	32 Months	13 Months	10 Months	Relevant parties agreed to limit the impact of road works that HPC should undertake a joint scheme to upgrade Bristol Road / The Drove at the same time as Wylds Road / The Drove. The joint scheme took 6 months rather than the 2.5 month and 5 month schemes envisaged in the DCO Implementation Plan.
<b>A38 Bristol Road / Wylds Road Junction</b>	3 Months	4 Months	October 2013								The Bristol Road / Wylds Road junction improvement has not be commenced. Detailed design revealed the existence of a BT Chamber which would have to be moved to accommodate the design agreed in the DCO and as such would have taken significantly longer and caused significantly more disruption than the DCO Implementation Plan envisaged. EDF and the LHA/LPA have been unable to agree a revised design and EDF have invited the LHA and LPA to submit their relevant representations on a proposal to delay the implementation of the scheme until after the peak of construction. EDF await a response from the LHA and LPA to this proposal.
<b>Wylds Road / The Drove Junction</b>	4 Months	5 Months	November 2013	January 2017	June 2017	<b>6 Months</b>	49 Months	32 Months	13 Months	10 Months	Relevant parties agreed to limit the impact of road works that HPC should undertake a joint scheme to upgrade Bristol Road / The Drove at the same time as Wylds Road / The Drove. The joint scheme took 6 months rather than the 2.5 month and 5 month schemes envisaged in the DCO Implementation Plan.
<b>Huntworth Roundabout</b>	1.5 Months	2.5 Months	Mid-August 2013	N/A	N/A	<b>N/A</b>	N/A	N/A	N/A	N/A	As allowed for by para 10 of schedule 11 of the DCO s106 agreement and agreed at the Transport Review Group, the Huntworth Roundabout was upgraded by Somerset County Council as part of an alternative set of highway improvements

## APPENDIX C

**POST-HEARING NOTE: ISH1**  
**RESPONSE TO ENFORCEMENT ISSUES ARISING FROM ISH1**

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**1. INTRODUCTION**

- 1.1 This post-hearing note summarises the points made by the Applicant at Issue Specific Hearing 1 ('ISH1') on 6 July 2021 in relation to a number of issues raised by the ExA, Suffolk County Council and East Suffolk Council relating to the enforcement of obligations in the Deed of Obligation under the Evolving Approach.
- 1.2 It also sets out more detail in relation to some specific matters which the Applicant undertook to comment upon in writing.

**2. INJUNCTIONS, INTERIM INJUNCTIONS AND CROSS-UNDERTAKINGS IN DAMAGES**

**Availability of injunction**

- 2.1 At Deadline 3, the Applicant put forward Appendix 26A 'Obligations Enforcement Note' [\[REP3-047\]](#) in which a new DCO article was proposed which sought to mirror the means of enforcement of a s106 agreement under the Town and Country Planning Act 1990. For ease of reference, that proposed article is reproduced in the Appendix to this Post-Hearing Note in the form in which it has now been incorporated in the dDCO Rev 5 submitted at Deadline 5. Article 9A(1) provides that: "*(1) Restrictions or requirements imposed under the Deed of Obligation and deeds of adherence are enforceable by injunction.*" Injunctions are available as a remedy to enforce contracts where the court considers such a remedy to be equitable. In deciding whether to grant an injunction in respect of the breach of a s106 agreement, the court would in any event have to consider whether such a remedy was equitable. Nevertheless, as explained in the 'Obligations Enforcement Note' and at ISH1 if the Councils consider that the existence of a specific statutory provision for enforcement by injunction (as in s106(5) TCPA 1990) provides a more robust basis upon which an application to the court for injunction can be made, this is provided for by art 9A(1).

**Availability of Interim Injunctions**

- 2.2 At ISH1 the ExA referred to the fact that 'interim injunctions' are sometimes sought by local planning authorities in order to address a breach of a s106 agreement, pending determination of the merits of the parties' cases which will later be considered at trial. On receiving an application for an interim injunction, the court will be concerned that it may ultimately be shown that the injunction should not have been granted when the full facts emerge. Due to the risk of this injustice, courts sometimes require the applicant for the injunction to undertake to compensate the other party for any loss caused if it is later shown that the injunction was wrongly granted. This is sometimes referred to as a 'cross-undertaking in damages'. At ISH1, the ExA raised the issue of whether the need to provide a cross-undertaking in damages might prevent the local planning authority from seeking or obtaining an injunction given the huge damages which might be payable to SZC Co. if ultimately the court determined at a later date that the interim injunction should not have been granted.
- 2.3 In response to this, the Applicant explained at ISH1 that to the extent this is a legitimate concern, it would arise regardless of whether the obligation being breached were contained in an agreement made under s106 TCPA or under the Deed of Obligation.





- 2.4 Furthermore, in practice the court will exercise its discretion as to the need or otherwise for such an undertaking in any particular case, having regard to the surrounding factual circumstances. Were the evidence to show a clear breach of the Deed of Obligation, it seems likely that the court would be content to grant an interim injunction without a concern that this would be determined to be unjust at a later date, and might therefore conclude that any risk of injustice is not such as to necessitate requiring a cross-undertaking in damages.
- 2.5 Even in a case where there is less certainty over the merits of the case against a developer brought by the local planning authority for breach of an obligation, the court may well consider it appropriate in the public interest to grant an interim injunction without a cross-undertaking in damages. Case law suggests that the requirement for a cross-undertaking in damages as a condition for obtaining an interim injunction should not be applied to public authorities acting in the public interest as a matter of course, but should instead be considered on the particular facts of the case (*Hoffmann-La Roche & Co Ag V Secretary Of State For Trade And Industry* [1975] AC 295; *Financial Services Authority v Sinaloa Gold Plc and others* [2013] UKSC 11). Whilst the court is bound to bear in mind that the absence of a cross-undertaking will mean that the defendant may suffer loss which will be uncompensated, it will not necessarily require a cross-undertaking in damages unless there are special circumstances on the facts of the case which demonstrate a need to do so. In summary, therefore, we do not believe the ExA should be concerned about the enforceability of obligations in the Deed of Obligation by means of injunction, and the position would be the same whether the obligation being breached were contained in an agreement made under s106 TCPA or under the Deed of Obligation.

3. **WOULD CRIMINAL ENFORCEABILITY VIA DCO BE PREFERABLE TO OTHER MEANS?**

- 3.1 Another theme discussed in ISH1 was whether it would be preferable for some of the obligations in the Deed of Obligation to be removed and translated into requirements or Schedules within the DCO, on the basis that breach of a DCO is a criminal offence (s161 PA 2008). Section 161 PA 2008 provides as follows:

***"161 Breach of terms of order granting development consent***

*(1) A person commits an offence if without reasonable excuse the person—*

*(a) carries out, or causes to be carried out, development in breach of the terms of an order granting development consent, or*

*(b) otherwise fails to comply with of enforcement the terms of an order granting development consent.*

*(2) Subsection (1) is subject to section 149A(4).*

*(3) It is a defence for a person charged with an offence under this section to prove that—*

*(a) the breach or failure to comply occurred only because of an error or omission in the order, and*

*(b) a correction notice specifying the correction of the error or omission has been issued under paragraph 2 of Schedule 4.*

*(4) A person guilty of an offence under this section is liable on summary conviction, or on conviction on indictment, to a fine.*"



Whilst it might be thought that the threat of being convicted of an offence under s161 PA 2008 would act as a greater deterrent to the undertaker, and a simple remedy for the local planning authorities, the position is in fact more complex for the reasons summarised below. When those issues are taken into account, reliance on prosecution for a criminal offence is clearly a less satisfactory means of enforcement than enforcement of the Deed of Obligation through debt recovery action or means of injunction (including 'specific performance') or court action for breach and damages.

**No policy or legal requirement to provide mitigation by way of DCO rather than contract.**

- 3.2 As a preliminary point it is important to emphasise that there is no legal requirement under the Planning Act 2008 for all matters capable of being regulated via a DCO to be provided for within the DCO rather than through a s106 agreement or equivalent contractual means such as our proposed Deed of Obligation.
- 3.3 In terms of policy, paragraph 4.1.7 of NPS EN-1 states that: "*The IPC should only impose requirements in relation to a development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. The IPC should take into account the guidance in Circular 11/95, as revised, on "The Use of Conditions in Planning Permissions" or any successor to it*" (emphasis added). Paragraph 54 of the National Planning Policy Framework is such a successor policy and provides that: "*Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition*". Even in the context of the Town and Country Planning Act 1990, that policy approach needs to be applied having regard to the particular circumstances of the case and the measure that needs to be secured. In the context of a DCO the obligation is to take that policy approach into account, and there is no specific policy that positively requires all duties and restrictions on the Applicant to be crafted as DCO provisions where possible.
- 3.4 Under the Town and Country Planning Act 1990, criminal proceedings cannot of course be taken by a local planning authority against persons who fail to comply with a condition or the terms of a planning permission, or otherwise breach development control by undertaking development without planning permission. An intermediate step or steps must be taken, for example service of an enforcement notice. It is only where the recipient of such a notice has failed to comply with the terms of the enforcement notice that a criminal offence is committed. Hence the offence is failure to comply with the terms of the enforcement notice, and not failure to comply with the terms of the planning permission (for example). The potential for criminal liability is reflected in the requirements that apply to the drafting of enforcement notices in section 173(3), which must "specify" the steps to be taken (or the activity which must cease) to achieve the purposes identified in section 173(4) and thus comply with the notice. That is then reflected in the fact that criminal proceedings for breach of an enforcement notice rarely involve difficult matters of law, interpretation, and evidence. Dealing with such matters through the magistrates' court is therefore a relatively straightforward matter.



- 3.5 The same approach is reflected in the provisions contained within section 187A of the Town and Country Planning Act 1990 for the enforcement of conditions. Breach of a condition is not in itself a criminal offence. Where a local planning authority considers that a condition imposed on a grant of planning permission is being breached, it may serve a breach of condition notice ("BCN"), requiring the relevant person to secure compliance with such conditions as are specified in the BCN (ss. (2)). Importantly, the BCN must "specify" the steps to be taken, or the activities which the authority consider ought to cease, to secure compliance with the condition(s) specified in the notice (ss. (5)). If, after the period for compliance with the BCN, any of the conditions specified within it is not complied with and the steps specified in the notice have not been taken or, as the case may be, the activities specified in the notice have not ceased, the person responsible is in breach of the BCN (ss. (8)). Breach of the BCN is an offence (ss. (9)). As the commentary to section 187A in the Planning Encyclopedia points out, it is not a breach of condition *per se* that constitutes the offence, or even a failure *per se* to comply with any of the specified conditions during the period allowed for compliance. Rather, there must be a failure to comply with the conditions specified in the BCN during the period allowed for compliance and a failure to take the steps specified (or, as the case may be, a failure to cease the specified activities) (P187A.04.7). Hence the courts have made clear that the requirement under ss.(5) for the BCN to "specify" those matters connotes a greater degree of particularity than if the word "state" had been used, particularly given the prospect of criminal liability after the end of the period for compliance. It is not enough simply to require the recipient of the BCN to ensure the result required by the relevant condition, rather than specifying the actual practical steps that are to be taken as the means of achieving that outcome (see *R v. East Lothian Council, ex parte Scottish Coal Company Ltd.* [2001] 1 PLR 1 at paragraph 12).
- 3.6 That can be contrasted with appeals against enforcement notices, which can be much more complex and often involve difficult matters of law, interpretation of the planning position, and evidence. Unlike the criminal courts, however, the local planning authority does not have to satisfy the criminal burden of proof when dealing with these issues through a public inquiry into an appeal against an enforcement notice.
- 3.7 For simple breaches of DCO requirements, prosecution through the magistrates' court may be a practicable and relatively straightforward means of enforcement (even without the benefit of the preliminary enforcement notice stage provided for under the Town and Country Planning Act regime). However for anything more complicated requiring the interpretation of lengthy and nuanced DCO provisions, bespoke to this project, and matters of judgement requiring the bringing of evidence on both sides relating to a major construction project, the option of seeking to resolve these issues via a prosecution in the magistrates' court may prove unattractive in many instances.
- 3.8 Given the absence of any general imperative on the Secretary of State to provide for commitments to be secured in the DCO rather than by means of obligation, it is instead necessary to consider in the case of each mitigation measure where it is most appropriately provided for. So far as enforcement is concerned, this requires consideration of whether it is helpful or unhelpful for particular measures to be enforceable by way of criminal proceedings rather than civil remedies for breach of contract or those remedies proposed by the Applicant in respect of the Deed of Obligation under article 9A.<sup>1</sup> In addition, of course, it is necessary

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<sup>1</sup> The Planning Act 2008 of course also provides some other means of enforcement of DCO provisions – most notably the ability for local authorities to access land to ascertain if there has been a breach of a DCO (s163 and s164 Planning Act 2008); and the ability of the local authority to seek injunctions in cases of an actual or anticipated breach of a DCO (s171). However, these remedies would also be available to enforce the Deed of Obligation under our art 9A and the common law, therefore the distinctive enforcement feature of a DCO as opposed to the Deed of Obligation will be the ability to enforce DCO provisions through criminal law.



to consider other wider issues such as the advantages that obligations offer in terms of the ability to combine commitments to funding and governance in one place as a coherent whole. That in turn brings with it advantages in terms of ease of enforcement, as opposed to connected provisions being scattered between requirements, schedules to the DCO and the Deed of Obligation.

### **Private Prosecution Would be Necessary**

- 3.9 Most criminal proceedings are prosecuted by the Crown Prosecution Service, but private prosecutions are also capable of being brought. In some cases the CPS may choose to then 'take over' such proceedings. Based on the CPS's legal guidance on private prosecutions (<https://www.cps.gov.uk/legal-guidance/private-prosecutions>), it seems very unlikely that the CPS would institute action against a developer for breach of a term of a DCO, or take over any such proceedings begun by the local planning authority or another party.
- 3.10 In particular, we note that the CPS guidance states that the CPS will generally only take over a private prosecution where: *"the papers clearly show that:*
- *the evidential sufficiency stage of the Full Code Test<sup>2</sup> is met; and*
  - *the public interest stage of the Full Code Test is met; and*
  - *there is a particular need for the CPS to take over the prosecution.*
- 3.11 *All three elements outlined above must be satisfied before the CPS takes over and continues with the prosecution."* The guidance also notes that: *"It is also necessary to consider whether or not the case is of a type that the CPS normally conducts following a police investigation. If it is not such a case, it is less likely that there would be a particular need for the CPS to take it over."*
- 3.12 It is most likely that the local planning authority would therefore need to bring private prosecution proceedings itself and at its own cost if it wished to enforce a term which was being breached. This would involve laying a charge sheet referred to as an 'information' in a Magistrates' Court. Once the information has been laid in court the Clerk or Magistrate will issue a warrant or summons in order to secure the attendance of the defendant at court on a future date to start proceedings in front of a jury or judge. Once a warrant or summons is issued, this will set a date for the first hearing of information. The time taken to dispose of the proceedings will vary depending on the nature of the case and the capacity of the court in question. As has been widely reported, the COVID-19 pandemic has added to the growing backlog of cases in the criminal justice system.

### **Efficacy of a Private Prosecution**

- 3.13 A key question is therefore whether private prosecution proceedings brought by the local planning authority would be a more effective means of enforcing some or all of the sorts of obligations currently contained in the Deed of Obligation. The obligations in the Deed of Obligation fall into the following broad categories:

#### **3.13.1 Obligations to make payments;**

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<sup>2</sup> This test is contained in The Code for Crown Prosecutors and sets out the principles to be applied when deciding whether a case should be prosecuted. This involves considering: (i) If there is sufficient evidence to provide a realistic prospect of conviction? If the answer is yes, then the next question is: (ii) Is the prosecution required in the public interest?



- 3.13.2 Obligations to set up and attend governance groups in order to manage impacts on a dynamic basis;
  - 3.13.3 Obligations to act in accordance with management plans (such as the transport management plans); and
  - 3.13.4 A reasonable endeavours obligation to deliver the Key Environmental Mitigation in accordance with the Implementation Plan<sup>3</sup>.
- 3.14 In our view, none of these are most appropriately enforced through criminal proceedings, the outcome of which on conviction would be a fine. We take each category in turn to make this point.
- 3.15 In the event that SZC Co. failed to make a payment, it would be easier and more appropriate for the local planning authority to pursue SZC Co. for payment through civil proceedings for breach of contract than to take criminal proceedings with a view to SZC Co. being fined on conviction. Proceedings for breach of contract could be twinned with an action for an injunction – requiring payment, or preventing carrying out of works which are ‘grampianed’ by reference to such payments. These would be the sorts of remedies pursued where s106 obligations are breached, and would be equally appropriate in the case of the SZC project.
- 3.16 In the event that for some reason the various governance groups are not being run properly by SZC Co., or SZC Co is not attending, seeking a conviction of SZC Co. and the imposition of a fine by the courts does not appear to be an appropriate, proportionate and effective remedy. The better means of enforcement by reference to those factors would be through dispute resolution procedures contained within the Deed of Obligation, injunction proceedings requiring specific performance, or action for breach of contract which if successful would result in payment becoming due in the form of damages. Furthermore, as the ExA will be aware, criminal offences (biting upon parties other than the undertaker) cannot be created by a DCO. Therefore, it is not possible via a DCO to oblige the Councils (or other parties) to attend the governance groups – because this would give rise to an offence if they then did not attend. In contrast, the councils as well as SZC Co. can be held to a contractual obligation to which they have committed through signing a contract - be that a s106 agreement or the proposed Deed of Obligation.
- 3.17 In principle ‘management plans’ (in particular the transport management plans) could be secured by means of a contractual commitment or a DCO requirement. For planning permissions granted under the Town and Country Planning Act 1990, such plans are sometimes secured by means of a condition imposed on the permission and sometimes by the s106 agreement. In the case of the SZC project, we have put forward an approach of dynamic management of impacts via governance groups which will be capable of reacting and varying the relevant management plans within limits where necessary over time, allied in some cases with the release of further payments. Given that the transport management plans are intended to be capable of being reviewed and varied via the Transport Review Group, we consider it most appropriate that these plans themselves, as well as the way they are enforced and managed over time by the TRG is contained together, in drafting within the Deed of Obligation. For the reasons set out in section 3 above we do not consider it is necessary or desirable in the public interest for such a regime to be drafted into the DCO itself and enforced through the magistrates’ courts.
- 3.18 A ‘reasonable endeavours’ obligation to carry out Key Environmental Mitigation in accordance with the Implementation Plan is proposed in the Deed of Obligation. There is precedent for the term ‘reasonable endeavours’ being used in DCO drafting, including at

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<sup>3</sup> This is the only obligation to carry out specific works

least in one case for a requirement (the Northampton Gateway DCO, as mentioned in ISH1). However, for the reasons set out in section 3 above, and having regard to the judgments required as to whether a party has used reasonable endeavours in all the circumstances or not (see below), we do not consider it would be appropriate or preferable for this commitment to be moved from the Deed of Obligation into the DCO. The reasons why this particular obligation is couched in terms of the use of reasonable endeavours was explained in oral submissions in ISH (see the separate summary of oral submissions for ISH1).

- 3.19 If for some reason SZC Co. does not carry out the Key Mitigation Measures exactly in accordance with the Implementation Plan, there are likely to be complex reasons for this failure. If the local planning authority were minded to question whether the standard of 'reasonable endeavours' had been met by SZC Co. in seeking to adhere to the Implementation Plan, then this would be a legal matter much better suited to determination through the High Court using the civil standard of proof (balance of probabilities) rather than the magistrates court using the criminal standard of proof (beyond reasonable doubt). It would be likely to involve adducing detailed factual evidence on construction contractual matters and project funding, weighed up against the most recent case law on the meaning of 'reasonable endeavours'. These are not matters which we expect magistrates would consider themselves well placed to determine, nor would the remedy of a fine upon conviction be likely to be most appropriate in the event that prosecution was successful.

#### 4. **MAKING COMPLIANCE WITH THE DEED OF OBLIGATION A DUTY UNDER THE DCO**

- 4.1 At ISH1, the ExA asked that SZC Co. consider whether it would be appropriate to draft a provision into the DCO obliging the undertaker to comply with the Deed of Obligation. This would make compliance with the whole of the Deed of Obligation capable of being enforced via the criminal law under s161 PA 2008, in addition to all of the civil remedies available, and the enforcement provisions we propose in art 9A. In light of the analysis set out in this note, we do not consider that this is necessary or appropriate. For the reasons set out above, the types of obligation in the Deed of Obligation are in our view best enforced via mandatory or prohibitory injunctions or proceedings for breach of contract – both because the High Court will be better able to deal with the complex issues and evidence likely to be involved, and because a fine is unlikely to be an appropriate remedy.
- 4.2 In addition, as the ExA will be aware, s106 agreement are not enforceable by the criminal law. It would be excessive to apply the criminal law to compliance with the Deed of Obligation, which in all essential respects is akin to a s106 agreement. We are not aware of any precedent in which the Secretary of State has considered it necessary to take this step, and do not consider that there is anything in the circumstances of this case that would justify such an approach in order adequately to secure the relevant obligations.

#### 5. **FRAGMENTATION OF LIABILITY FOR COMMITMENTS IN THE DEED OF OBLIGATION**

- 5.1 A concern was raised at ISH1 that the 'Evolving Approach' could lead to the 'fragmentation of liability'. The concern arises, we believe, due to the proposed drafting of art 9 as put forward in the "Obligations Enforcement Note".
- 5.2 The proposed drafting states that: *"save to the extent agreed by the Secretary of State, a deed of adherence shall be entered into by a transferee or lessee with East Suffolk Council and Suffolk County Council prior to any transfer or grant being made in accordance with this Order"*. The 'deed of adherence' is proposed to be defined as: *"means a deed binding the transferee or grantee (as defined in article 9), from the date of transfer or grant, to the Deed of Obligation and any variations to it at that date"*.



- 5.3 By virtue of clause 5 of the Deed of Obligation, SZC Co. will remain bound by the obligations in the deed until such time as it has transferred the 'entire benefit' of its powers under the Development Consent Order pursuant to article 9. This would apply similarly to any future undertaker bound to clause 5 of the Deed of Obligation by virtue of a deed of adherence. In this way, the person constructing or operating the power station will always be bound by the Deed of Obligation, because:
- 5.3.1 for nuclear safety reasons, set by the Office of Nuclear Regulation, there can only ever be one entity authorised to construct or operate the power station at any one time;
  - 5.3.2 it is inconceivable that the Secretary of State would authorise transfer of the power to construct and operate the power station under article 9 without requiring entry into a deed of adherence binding the new owner to the Deed of Obligation; and
  - 5.3.3 SZC Co. will remain bound by the Deed of Obligation until such time as all of its powers under the DCO have been transferred (clause 5 of the Deed of Obligation).
- 5.4 We therefore see no risk that liability for the Deed of Obligation commitments could become fragmented. It will always stay with the primary undertaker of the project – the nuclear operator.
- 5.5 For reasons that SZC Co has explained in its previous submissions on the 'Evolving Approach', it is not appropriate for either land owners or the statutory bodies empowered by the DCO to deliver mitigation (ENGL, National Grid and Network Rail), to be bound by the Deed of Obligation now or in future. For the same reason, if any of these named bodies chose to transfer their DCO powers to another party in future to carry out the relevant works, we would not expect those successors to have liability under the Deed of Obligation. There is therefore no issue with regard to 'fragmentation' of liability for the Deed of Obligation in respect of these parties.
- 5.6 To the extent that parties are contracted by SZC Co. to carry out the works, those contracted bodies will be obliged by SZC Co. to carry out the works in accordance with the DCO and the Deed of Obligation, just as would be normal for any project where the contractors are obliged to comply with relevant consents to ensure that the promoter of the project is not found to have breached the relevant authorisations.
6. **ISSUES RAISED BY EAST SUFFOLK COUNCIL**
- 6.1 We welcome the statement made by East Suffolk Council at ISH1 that they are open to the Evolving Approach as long as it can be made no less effective than a s106 agreement. The specific issues the Council raised for consideration in this regard are addressed below:
- Discretion of the Secretary of State under art 9(5)**
- 6.2 The Council noted that the Secretary of State would have a discretion under art 9(5) dDCO not to require an incoming transferee of the DCO powers to complete a 'deed of adherence' binding it to the Deed of Obligation. As set out above, article 9(5) states that: *"save to the extent agreed by the Secretary of State, a deed of adherence shall be entered into by a transferee or lessee with East Suffolk Council and Suffolk County Council prior to any transfer or grant being made in accordance with this Order"*.
- 6.3 For the reasons set out in section 5 above, we do not consider it credible that the Secretary of State would authorise transfer of the power to construct or operate the nuclear power station to a party without requiring them to commit to a deed of adherence. For transfers of the power to carry out subsidiary works (such as the rail and grid works) however, it is unlikely

to be appropriate that transferees are directly bound, any more than other sub-contractors. It is neither possible nor necessary to seek to cater in the drafting of the DCO for all of these potential circumstances, not least because in the usual way it is to be assumed that where the Secretary of State is given a discretion it will be exercised lawfully. If it is not, the decision would be susceptible to judicial review.

- 6.4 It is also important to note that while article 9 provides that the Secretary of State's consent is not required to transfer the DCO powers in certain specific circumstances (see art 9(6)), there is no exception to the need for a transferee to sign a deed of adherence unless the Secretary of State agrees otherwise in a particular case. Therefore, the Secretary of State's consent would always be required if it was proposed that a particular transferee should not bind itself to the Deed of Obligation by means of a deed of adherence. In that way the public interest is protected by the supervisory role of the Secretary of State.

**Duty not to obstruct the local planning authority**

- 6.5 The Council also welcomed the Applicant's suggestion that it would add to the enforcement provisions a duty not to obstruct or hinder entry onto land by the local authorities in circumstances where they are accessing land to carry out an obligation in the Deed of Obligation which SZC Co. has failed to carry out. Reference was made to the need for a power similar to s106(8) Town and Country Planning Act 1990. We have therefore proposed the following drafting in art 9 of Rev 5 dDCO (see the underlined text in art 9 as replicated in Appendix to this note for context):

9A(5) Following receipt of the notice given in accordance with subsection (4) in relation to land in its possession, the undertaker shall not refuse or hinder entry to such land by East Suffolk Council or Suffolk County Council provided that such entry is in accordance with any reasonable requirements of the undertaker.

- 6.6 The new provision relates specifically to land 'in the possession' of the undertaker, as SZC Co. will not be in a position to hinder (or facilitate) access to land which is not in its control. Breach of this duty by the undertaker would constitute an offence under s161 Planning Act 2008.

**7. ISSUES RAISED BY SUFFOLK COUNTY COUNCIL**

We welcome the County Council's confirmation that in principle it too is open to the Evolving Approach, subject to resolution of the enforcement issues raised by East Suffolk Council.

**Enforcement against Network Rail, ENGL and National Grid**

- 7.1 A further specific issue raised by the County Council was how the Deed of Obligation would be enforced against Network Rail, ENGL and National Grid (who are all proposed to be granted the benefit of the DCO alongside SZC Co. for elements of the project for which they will be responsible). Our response in section 5 above, addresses these concerns.

**Bonds**

- 7.2 An additional point raised by the County Council was that bonds should be put in place to guarantee performance of the obligations in the Deed of Obligation. Save in respect of some highway works, it is not usual for a bond to be sought to cover all of the obligations in a s106 agreement, and we do not consider it appropriate that a bond should therefore be required to cover all of the obligations in the Deed of Obligation<sup>4</sup>.

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<sup>4</sup> Where bonds are considered necessary in respect of highway works required by a s106 agreement in connection with a TCPA planning permission, these are ordinarily committed to via s278/38 agreements. In the case of the Sizewell project agreements made under art 21 agreements of the DCO will be used

- 7.3 If SZC Co. is solvent and simply refusing to pay a particular contribution, or to carry out Key Environmental Mitigation in accordance with the Implementation Plan, then the appropriate remedy would be civil legal proceedings to enforce performance. If instead the County Council's concern is obtaining payment in circumstances where SZC Co. is insolvent then we need to consider the circumstances that would pertain in that unlikely situation. In such circumstances, the project would either have been paused (pending transfer to a new undertaker under art 9 DCO), or abandoned. In the former case, the new incoming undertaker would be required by the Secretary of State to commit to the Deed of Obligation via a deed of adherence. In the latter case, the project would no longer be ongoing, and (i) the triggers for further payments would not arise, and (ii) the Council would not have the powers, expertise, funds or desire to take over the project and deliver the power station and related infrastructure itself and therefore would not in practice need monies to cover the related payments due under the Deed of Obligation. In circumstances where there were outstanding payments due at the time SZC Co. became insolvent and no party was transferred the undertaking under article 9, the outstanding payments would be capable of being enforced as local land charges against land owned by the undertaker (see art 9A(7) drafting in the Appendix to this note).

## 8. **NOVEL APPROACH**

- 8.1 The ExA commented at ISH1 that this is a large and complex project, and that the applicant was introducing a novel approach to contractual commitments to mitigation during the examination. We recognise the approach is novel, but it is conceptually simple, legally robust and provides a clear and effective practical solution to the concerns raised by the ExA as to the more conventional approach that had originally been adopted. The Applicant has recognised and responded to those concerns, and the timing of the evolution of the approach reflects that. The fact that the Evolving Approach is novel is not an obstacle to its being adopted. The need for and appropriateness of that approach is also a reflection of the nature, size and complexity of the Sizewell C project and the need for a flexible, responsive and multi-party approach to monitoring and adaptive mitigation. It is perhaps unsurprising therefore that it is during the examination of such a project that the need for the Evolving Approach has been identified.
- 8.2 The duration of the project and the complex and dynamic nature of the measures necessary to mitigate its impacts over time require bespoke and collaborative governance arrangements. The scale of the project means that land must be acquired from multiple land owners, from whom only options have currently been taken. Indemnity arrangements for financial obligations of the scale under negotiation are unlikely to induce statutory bodies like ENGL, Network Rail or National Grid, never mind ordinary land owners, to sign up to liability for the very substantial financial obligations contained in the draft Deed of Obligation, or take a lease at a later date of land bound by such an agreement. More fundamentally, since the DCO benefits only the named undertakers, and is financially for the benefit only of the primary undertaker (SZC Co. currently), it is both appropriate and equitable that only SZC Co. should be bound by the contractual commitments to mitigation. Having considered all of these issues in light of the ExA's questions and the points raised by the Councils, we remain firmly of the view that the Evolving Approach is the right approach, and may in fact provide a model which will be useful for other DCO applications – particularly the largest and most complex.
- 8.3 As a practical point, aside from the legal reasons set out in this note why we do not consider it appropriate to move much of the contractual drafting into the DCO, it would also be an extremely time-consuming and difficult exercise for both SZC Co. and the Councils at this

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instead of s278/38 agreements (as at Hinkley), so any negotiation of bonds would be undertaken as part of the negotiation of those agreements.



stage of the process. All parties to the current draft Deed of Obligation have invested considerable time and effort in negotiating its structure, scope and terms. As explained at ISH1, if the current draft had to be dismembered and its contents redistributed amongst requirements, schedules to the DCO and a much reduced s.106 Obligation the overall end result would inevitably be different in its detailed drafting and thus effect, having regard to the different drafting approach required in each case.

#### 9. **MODIFICATION OR DISCHARGE OF OBLIGATIONS IN THE DEED OF OBLIGATION**

While not a matter discussed at ISH1, we suggested in section 7 of the 'Obligations Enforcement Note' that we would like to provide a mechanism for varying the Deed of Obligation which would be similar to s106(A) TCPA. Drafting to this effect has now been provided for in Rev 5 of the dDCO, as follows:

##### **9B— Modification and discharge of Deed of Obligation**

- (1) An obligation in the Deed of Obligation may not be modified or discharged except:
    - (a) by agreement between the undertaker against whom the obligation is enforceable and the beneficiary of the obligation, executed as a deed; or
    - (b) further to a determination by the Secretary of State under this article.
  - (2) The undertaker against whom an obligation in the Deed of Obligation is enforceable may apply to the Secretary of State for the obligation—
    - (a) to have effect subject to such modifications as may be specified in the application; or
    - (b) to be discharged.
  - (3) An application under subsection (2) for the modification of an obligation in the Deed of Obligation may not specify a modification imposing an obligation on any other person against whom the Deed of Obligation is enforceable.
  - (4) Where an application is made to the Secretary of State under subsection (2), the Secretary of State may determine—
    - (a) that the obligation shall continue to have effect without modification;
    - (b) if the obligation no longer serves a useful purpose, that it shall be discharged; or
    - (c) if the obligation continues to serve a useful purpose, but would serve that purpose equally well if it had effect subject to the modifications specified in the application, that it shall have effect subject to those modifications.
- and shall give notice of his or her determination to the applicant within three months of the application.
- (5) Where the Secretary of State determines under this article that an obligation shall have effect subject to modifications specified in the application, the obligation as modified shall be enforceable as if it had been entered into on the date on which notice of the determination was given to the applicant.
  - (6) Section 84 of the Law of Property Act 1925 (power to discharge or modify restrictive covenants affecting land) does not apply to an obligation in the Deed of Obligation.



## APPENDIX 1

### Article 9A – Rev 5 dDCO

#### Showing changes proposed to the version put forward in the 'Obligations Enforcement Note'

##### 9A. Enforcement of the Deed of Obligation

(1) Restrictions or requirements imposed under the Deed of Obligation and deeds of adherence are enforceable by injunction.

(2) Without prejudice to paragraph (1), if there is a breach of a requirement in the Deed of Obligation to carry out any operations in, on, under or over the land to which the requirement relates, East Suffolk Council or Suffolk County Council may:

- (a) enter the land and carry out the operations; and
- (b) recover from the undertaker any expenses reasonably incurred by them in so doing.

(3) For the purpose of exercising the power to carry out operations under subsection 2(a), East Suffolk Council and Suffolk County Council will be deemed to have the benefit of the Order under article 8 (Benefit of Order) to carry out those operations.

(4) Before exercising their power under subsection (2)(a) East Suffolk Council or Suffolk County Council shall give not less than twenty-one days' notice of their intention to do so to any owner or occupier of the land.

(4A) Following receipt of the notice given in accordance with subsection (4) in relation to land in its possession, the undertaker shall not refuse or hinder entry to such land by East Suffolk Council or Suffolk County Council provided that such entry is in accordance with any reasonable requirements of the undertaker.

(5) If entry to the land by East Suffolk Council or Suffolk County Council is refused or hindered by the undertaker, the owner or occupier, they may issue a warrant to-

- (a) the sheriff, or
- (b) the enforcement officer,

to allow entry to it by the person appointed in the warrant to receive it.

(5) On receipt of the warrant the person to whom it is issued shall allow entry to the land accordingly.

(6) If, by virtue of paragraph 3A of Schedule 7 to the Courts Act 2003, the warrant is issued to two or more persons collectively, the duty in subsection (5) of this section shall apply to the person to whom the warrant is allocated in accordance with the approved arrangements mentioned in that Schedule.

(7) The Deed of Obligation shall be a local land charge in respect of all land owned by the undertaker within the Order limits and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.

(8) In this section-

"the enforcement officer", in relation to a warrant to under this article, means the officer or officers identified for that purpose in paragraph 3A of Schedule 7 to the Courts Act 2003, and

"sheriff" includes an under sheriff or other legally competent deputy, and means the sheriff for the area where the land is situated, or if land in one ownership is not situated wholly in one such area the sheriff for the area where any part of the land is situated.