

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

The Examining Authority's further commentary on the draft DCO

Issued on 9 September 2021

1. Introduction

- 1.1. This is the ExA's second commentary for issue on 9 September 2021. It is obviously of relevance to the Applicant and Councils. Other Interested Parties are not excluded in any way. Responses and comments should be titled "*Response to the ExA's Second commentary on the DCO, by [name of IP]*". Responses are due at Deadline 8, 24 September 2021. However the ExA may, if time permits and it is appropriate in all the circumstances, raise some of the points in it at ISH14 on 17 September. It asks the Applicant and Councils particularly to be prepared accordingly.
- 1.2. This commentary only addresses the issue of reasonable endeavours (RE). Other issues have been raised on the DCO, DoO and related documentation in preliminary points made by the ExA, in [PD-009] On 22 December 2020, the July commentary [PD-038] and ExQs. Issues are still live and it should not be assumed that the ExA is satisfied on all points merely because they are not addressed in this document.

2. Reasonable endeavours

A RE in the DoO

The ExA notes that the DoO submitted at D7 (revision 7) has not changed so far as RE are concerned for Accommodation and Housing (Sch 3, paras 3.1 and 3.2) nor for Key Environmental Mitigation (Sch 9 para 2). The ExA also notes the Applicant's responses on RE in its response to the [PD-038] (the ExA's commentary on the draft DCO). It will need to consider those carefully and expresses no view at this stage.

The ExA has given careful consideration to the position as it stood before the submission of Deadline 7 documentation on 3 September. The ExA would make the following points on that position and poses the following questions.

1. Dealing first with the DoO, Sch 9 para 2 states that "With effect from the Commencement Date, SZC Co shall use reasonable endeavours to carry out and complete the Key Environmental Mitigation in accordance with the Implementation Plan. The ExA notes that the Implementation Plan itself is only indicative.

2 The Questions of Control Appendix to [REP5-113] asserts there is “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” and “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”.

3 The ExA is having difficulty seeing where this is. In the table below the ExA lists the Key Environmental Mitigation and Accommodation Campus and whether it has identified controls apart from the RE obligation. This is based on a word search for the relevant items.

Table 1

Item of Key Environmental Mitigation	DCO	DoO
Project Accommodation	Nothing	Nothing
Permanent Beach Landing Facility	No compulsion	No compulsion
Temporary Beach Landing Facility	No compulsion	No compulsion
Fen Meadow Works	Reqt 14A - No vegetation clearance on the SSSI till the fen meadow plans (including an implementation timetable) have been approved, and a requirement to carry out the works in accordance with the approved plan. So +ve obligation to deliver	Provisions requiring payment of the Fen Meadow Compensation Fund if inadequate delivery of Fen Meadow
Marsh Harrier Habitat Improvement Works	Reqt 15 – No commencement of Wk No.1A till a marsh harrier implementation plan for establishment of marsh harrier compensation land (including an implementation timetable) have been approved, and a requirement to carry out the works in accordance with the approved plan. So +ve obligation to deliver ¹	Not obviously
Green Rail Route,	No compulsion	No compulsion
Freight Management Facility	No compulsion	No compulsion
Park and Rides	No compulsion	No compulsion
Sizewell Link Road	No compulsion	No compulsion
Yoxford Roundabout	No compulsion	No compulsion
Works Nos.15, 16 and 17	No compulsion	No compulsion
Accommodation Campus	Nothing	Nothing
LEEIE caravan park	Nothing	Nothing

Employment and skills (Sch 7, para 2.1.6(c))	Nothing	Nothing
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This review was carried out by a word search of the words in the first column, so there may be measures after all. It is also possible that for example an obligation to achieve a modal split will necessitate the construction of the Green Rail Route. But leaving that indirect enforcement aside, the only elements of Key Environmental Mitigation which are compelled are the Fen Meadow and the Marsh Harrier compensation. Also, modal splits are difficult to monitor and control and a more readily identifiable construction threshold would be more easily enforced.

In relation to the marsh harrier compensation land the ExA notes that there was no definition of the marsh harrier compensation land and this would need to be rectified not only to include the Westleton site if the SofS decides to include it, but also the on-site compensation. The ExA notes that the Applicant has modified the wording in Revision 8 of the DCO which may have dealt with this point.)

4 In relation to Employment and Skills the ExA notes that this has been redrafted in the D7 version of the DCO.

5 The ExA also notes from the D7 submissions that the question of RE and the Accommodation Campus and LEEIE caravan park has progressed with a financial scheme. A question on that is whether it will prevent the effects from arising before they arise.

6 The only elements of Key Environmental Mitigation which are compelled are the Fen Meadow and the Marsh Harrier compensation. Please will the Applicant set out how the others are compelled, or if not how the Applicant proposes to address the matter adequately.

7 For clarity, the ExA does not at present see any issues with Sch 14 paras 2.4.9 and 2.4.10 of the DoO where the Suffolk Community Trust are to use reasonable endeavours in relation to grants and the Sizewell C Community Fund as the fallback position is that, if SZC following the use by them of RE "is unable to enter into a Deed of Transfer and an Administration Agreement with the Suffolk Community Foundation pursuant to paragraph 2.2, SZC Co shall establish a new trust established to administer and apply the Sizewell C Community Fund for the purposes of mitigating the intangible and residual impacts of the Project by enhancing the quality of life of communities within the Area of Benefit and all references to the Suffolk Community Foundation in this Schedule 14 shall be deemed to be references to such new trust". Nor does it have any issue with the obligation on ESC at Sch 3 Accommodation and Housing to use RE to identify initiatives for the use of Housing Fund payments which are required, practically deliverable and would deliver 1,000 bedspaces or more, all prior to the 6th anniversary of the Commencement

Date. If the ESC, SCC or Applicant take a different view on either of these, please will they say so.

8 The ExA also reiterates that the Implementation Plan is indicative. An obligation to use reasonable endeavours to deliver an indicative plan seems to amount to a loose obligation squared, which is very loose.

B The ExA turns now to the dDCO.

10 There are RE provisions in the Protective Provisions. The ExA assumes that the persons protected are content with that. If that is not the case, please will the Applicant explain. There are 15 occasions of RE in the DML. The formula goes like this: "(3) Unless a shorter period is agreed with the MMO in writing, the undertaker must use reasonable endeavours to submit the detailed method statement to the MMO at least 6 months prior to the proposed commencement of the licensed activity, or each phase of a licensed activity". In some cases there is then a ban on the related works until the approval has been issued. The use of RE therefore appears acceptable. But there is not always a ban. In the following table the ExA lists the conditions, and whether they have a corresponding ban. The conditions in italics do not have a ban and therefore the RE obligation seems to the ExA to be inadequate.

Table 2

Condi on	Subject	Corresponding ban? Y/N	Adequate / Inadequate
11(3)	Detailed method statement for works	Yes, 11(2)	Adequate
17(3)	<i>Coastal Processes Monitoring and Mitigation Plan</i>	No	<i>Inadequate</i>
18(3)	Marine Environmental Management Plan	Y, 19(2)	Adequate
19(3)	<i>Marine Archaeological Written Scheme of Investigation</i>	N	<i>Inadequate</i>
20(3)	<i>Fisheries and Liaison and Coexistence Plan</i>	N	<i>Inadequate</i>
34(5)	<i>Submission and refreshment of a Maintenance Activities Plan</i>	N	<i>Inadequate but 34(3) covers the position on additional activities and could be amended to cover the first and subsequent plans</i>
35(3)	Dredging activities plan	Y	Adequate
36(3)	sample plan and sediment sample analysis	Y	Adequate
40(5),	Work No. 1A(m) and Work No. 1A(bb) activity details	Y	Adequate
41(3),	Work No. 1A(n) (SCDF) activity details	Y	Adequate
44(3),	Work Nos. 2K and 2L (CDO) activity details	Y	Adequate
45(3),	<i>Sabellaria monitoring plan</i>	<i>Y – provided Wk 2B is the southern intake</i>	<i>Inadequate unless it is clarified that</i>

			<i>Wk 2B is the southern intake</i>
47(3),	Work Nos. 2A to 2J activity details	Y 47(1)	Adequate
48(3),	Work Nos. 2B, 2D, 2G and 2H and 2I and 2J details	Y 48(3)	Adequate
50(2)	impingement monitoring plan	Y 50(1)	Adequate

11 The ExA would press the Applicant to include clear enforceable obligations to deliver all the elements of the Key Environmental Mitigation unless it can convince the ExA that other aspects of the DCO and DoO deal with it effectively. On the delivery of the Accommodation Campus and Caravan Park (i.e. the Project Accommodation) the ExA does not understand the Applicant's explanations of why RE is enough. The ExA is not content to rely on RE in the instances in the two tables.

12 The Applicant has in [REP5-113] pointed to its experience at HPC to seek to show that the RE approach has worked. Without working through the examples given with the HPC DCO in one hand and its s.106 in the other the ExA does not understand. If the Applicant wants to persist with that it needs to walk the ExA through it with chapter and verse and evidence. But Sizewell C is of course a different project in different circumstances.

13 The ExA thanks the Applicant for its note on the law on "reasonable endeavours" (Appendix D to 9.72 Response to ExA's Commentary on the draft DCO and other Documents) submitted at D7 which it has been able to consider. It is not reassured however. For example, the note draws out common principles of interpretation of the standard as follows:

"2.4 In the context of this case-law, some common principles around the interpretation of a reasonable endeavours obligation can be seen:

2.4.1 In discharging such an obligation, the company will be required to:

(A) balance its contractual obligation with all relevant commercial considerations;

(B) take into account the chances of achieving the desired result via the proposed action,

2.4.2 The obligation will be interpreted against the position of a reasonable and prudent person in light of the obligor's particular circumstances and interests."

14 The ExA would observe that commercial interests could prejudice the delivery, or timely delivery of "Key Environmental Mitigation".

The Examining Authority