



The Planning Act 2008

Sizewell C (SZC)

Planning Inspectorate Reference EN010012

Deadline 8: *24 September 2021*

Written Summary of Oral Case

Issue Specific Hearing 14 DCO, Code of Construction Practice and similar regulatory documents, Deed of Obligation, reasonable endeavours.

20026200 East Suffolk Council

Issue Specific Hearing 14 (ISH) DCO, Code of Construction Practice and similar regulatory documents, Deed of Obligation, reasonable endeavours.	
Agenda Item	East Suffolk Council Submissions
1. Introductions	<p>Speakers on behalf of East Suffolk Council:</p> <p>Andrew Tait QC Angus Walker, Solicitor, BDB Pitmans</p>
2. Implications for the content and drafting of the DCO of points raised on the letter of 3 September 2021 from Walker Morris on behalf of Northumbrian Water	<ol style="list-style-type: none"> 1. REP7-271 identifies the works comprised in the temporary desalination plant (i.e. Works 2M, 2N, 2O, 2P) but there is no requirement or trigger for their provision. ESC would like to secure notification of the proposed location and subsequent relocations, either through a requirement or through the CoCP. 2. The long-term water supply solution for the Project will have to be subject to environmental assessment in so far as at variance from what has been assessed.
<p>3. Articles 9, 9A and 9B of the dDCO and in particular the points made by Suffolk County Council in their response to the Examining Authority's commentary on the DCO [PD-038]</p> <p>Without limiting the foregoing, the ExA would like to hear argument from Suffolk County Council and the Applicant on:</p> <p>a. Whether it is right not to require the Secretary of State's consent to</p>	<ol style="list-style-type: none"> a) ESC agrees with the position outlined by SCC and, for the reasons given by SCC, considers the answer to the first part of the question is 'no'. As to the second part of the question, for the avoidance of doubt, it would be sensible to explain that the site licence must be a licence to operate SZC. b) ESC does not consider it appropriate to limit enforceability of the DoO to any transferee or Works 1A(a) – (h). If the operator of the MDS has insufficient control over the other sites (such as the accommodation campus which is Work 3), then it is of concern that we could not enforce the obligations against them. For example, if the transferee of Works 1A(a) – (h) is subject to an obligation to make 'reasonable endeavours' to achieve some particular end, then it may be excused from achieving that end result on the basis that it could not, reasonably, carry out the works on land it does not control. Furthermore, the Applicant's

<p>transfer of the DCO to a person holding a licence under s.3 of the Nuclear Installations Act 1965 and if so whether it should be stated to be a licence to operate Sizewell C</p> <p>b. Whether it is right to limit the enforceability of the Deed of Obligation to any person to whom the power to construct or operate Work No. 1A(a) to (h) has been transferred or granted under article 9</p> <p>c. Should Art 9 state that the DoO is enforceable against the undertaker named in the DCO?</p> <p>d. Whether there should be deeds of covenant by transferees in addition to the provisions of Art 9 as drafted in [REP7-006] (which is revision 8)</p> <p>(The ExA notes in passing that Art 9(2) refers to Work No. 1(a) to (h). Should this be Work No. 1A(a) to (h)?)</p> <p>(B) the trust deed referred to during ISH12, item 2(iv)</p>	<p>suggestion that the Secretary of State would always have ultimate control over the transferee and would perform its supervisory role under article 9(1) competently, ignores the provision in Article 9(6) which allows a transfer without the approval of the Secretary of State.</p> <p>c) ESC does not consider it is necessary for Article 9 to state that the Deed is enforceable against the undertaker as this is implicit in 9A(1) and in any event it is explicitly enforceable under the terms of the Deed itself, because they are a signatory to it. Successors are addressed through 9(5A) and (5B). No further change is required.</p> <p>d) ESC considers that deeds of covenant are useful in the context of there being more than one potential transferee. We are content with the suggested wording from SCC – to add the words ‘and such transferee or lessee shall be treated for all purposes as the undertaker’</p> <p>e) ESC has sought to ensure that the ‘evolving approach’ in the Deed replicates s.106 as far as practicable, but is neutral about whether it should replicate the prohibition on appeals against refusals to amend the Deed within the first five years.</p> <p>B: Trust Deed</p> <p>EDF will set up a Trust and ESC will be on the board of the Trust. ESC welcomes the commitment to the Deed of Trust as an additional provision to be used for improving biodiversity in the local area / re-wilding projects. However, ESC has not relied on it to inform its position on the application and understands that SZC Co. does not rely on it as a benefit of the Project. It could be described as an aspect of corporate social responsibility, which ESC welcomes but does not rely upon or invite the ExA to rely upon.</p>
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<p>4. Parameter plans and Approved Plans – which take precedence? – Art 4 of the dDCO and Requirement 8</p>	<p>ESC understands and is satisfied with the relationship between Requirements which have Approved Plans and those which are subject to Parameter Plans and how that feeds into Articles 4(1) and (2). ESC will need to ensure that the correct drawings are enumerated and so we welcome the Applicant’s update to the drawing list and will look at the compatibility schedules to ensure that the drawings are correctly identified.</p>
<p>5. Structure of Control Documents and Subsequent Approvals – to consider Appendix C to the Applicant’s Response to the Examining Authority’s commentary on the DCO [PD-038]</p> <p>a. to consider Appendix C to the Applicant’s Response to the Examining Authority’s commentary on the DCO [PD-038].</p> <p>b. To include concerns flagged by East Suffolk Council at ISH11 re: the Code of Construction Practice.</p> <p>c. To address certain delivery questions including barriers on non-railway land.</p> <p>d. Other issues arising out of ISH12 and 13</p>	<p>a) ESC does not disagree with the overall structure of the control documents and subsequent approvals. There issue is whether there are any documents that are not yet properly secured.</p> <ol style="list-style-type: none"> 1. We have some drafting points in respect of Schedule 22 to the DCO (list of certified docs), which we will raise separately with the Applicant. <p>b) CoCP</p> <ol style="list-style-type: none"> 1. Requirement 2 should ensure that plans produced pursuant to the CoCP are themselves secured and enforceable. Alternatively, this could be made clear in the CoCP itself. 2. CoCP says a DMMP will be prepared and submitted for approval and implemented as agreed. However, the requirement in respect of the DMMP at 4.1.3 must ensure that the DMMP is approved prior to commencement of works (as per drafting for noise mitigation in CoCP 3.1.3). ESC understands that the Applicant proposes to make this change in the next iteration of the CoCP, to be submitted at Deadline 8. 3. The Conventional Waste Management Strategy and Materials Management Strategy are Level 1 documents (at paragraph 1.4.3 of Appendix C [REP7-058]). A Waste Management Plans and Materials Management Plan as Level 2 documents are referred to in the CoCP but are not subject to approval by ESC. The CoCP should be updated to include a requirement that those Level 2 plans must be approved by ESC prior to commencement of relevant works.

	<p>4. In respect of Table 4.1 of the CoCP:</p> <ul style="list-style-type: none">i) It is mentioned that an action level of 0.5g/m²/day dust deposition will be used to trigger dust event reporting to the Environment Review Group. ESC requests that the dust deposition alert level is changed to 0.2g/m²/day to align with the 0.2g/m²/day alert level threshold identified in section 4.41 of the Institute of Air Quality Management’s Guidance on Monitoring in the Vicinity of Demolition and Construction sites. SZC have agreed this but failed to make the change.ii) States ‘The use of stationary generators will be minimised through the provision of site electrical power and use of alternative supply sources where possible.’ It is positive to see a commitment to the introduction of mains electrical power <i>where possible</i>, but ESC would like to see a commitment to provide and use electrical site power at the <i>earliest opportunity</i>. <p>5. The NMMP is secured through CoCP. Points were made on this by ESC at ISH12 and there have been further discussions as to the substance of the NMMP which will be reflected in the SoCG. We suggest the following additional wording be included in the NMMP (we understand the Applicant is minded to include these):</p> <ul style="list-style-type: none">i) At para 2.2.1 add the following obligation for SZC Co.’s Site Environmental Lead (5th bullet – new proposed words underlined): <i><u>Undertaking investigations in relation to noise level exceedances and to investigate any complaints received by the project in relation to noise and vibration issues, including assessment of contractors’ compliance with approved Bespoke Mitigation Plans, and taking appropriate enforcement action against contractors found to be operating in breach of any requirement of a Bespoke Mitigation Plan</u></i>ii) At Para 4.4.4 –the following wording should be added at the end: <i>“Section 60 authorises ESC to serve a notice imposing requirements as to the way in which works are to be carried out in order to control noise on construction sites, which is subject to a right of appeal by the recipient. A person who contravenes any requirement of a section 60 notice without reasonable excuse shall be guilty of an offence. Where the requirements of a section 60 notice reflect the measures set out</i>
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	<p><i>in a Bespoke Mitigation Plan, those requirements would therefore be enforceable under section 60 of the Control of Pollution Act 1974 as well as under the DCO.”</i></p> <p>iii) Provision should be made at 4.4.5 to preclude commencement until approval of the Bespoke Mitigation Plan (or following the outcome of dispute resolution).</p> <p>c)</p> <ol style="list-style-type: none"> 1. In respect of Requirement 25, ESC is in discussion with the Applicant in respect of draft RMNS, which is to be amended to include the process of further exploration of mitigation options including fencing and relaying track, John Rhodes on behalf of the Applicant, at ISH 12 committed to this. 2. We have been in discussion with the Applicant in respect of an amendment to the wording of Requirement 25 and we understand there is likely to be agreement in respect of that requirement . Our view is that the limitation between the hours of 11 and 6 should be removed. ESC is not concerned about the Requirement being limited to Work 4 as that is going to be the operating stretch of track. <p>d)</p> <ol style="list-style-type: none"> 1. ESC has asked the Applicant to consider an amendment to the LEMP for the 2VBP to include a commitment to additional landscaping between the road and St Marys Church to mitigate the heritage impacts. 2. AD Principles – lighting – additional wording is required to reflect the importance of minimising light spill; 3. Southern P&R additional wording in relation to legacy landscaping.
<p>6. Other issues arising from responses to the Examining</p>	<p>ESC has been in discussion with the Applicant on the drafting of the DCO.</p>

Authority's commentary on the DCO [PD-038]

Requirements:

1. ESC welcomes the amendment to paragraph 1(4) of Schedule 2.
2. Requirement 1(5): remove the words 'and these are not triggered by commencement' and replace with the words "and these requirements apply to all material operations including those excluded from the definition of commence" to ensure that they cover works which do not fall within the definition of "commencement".
3. Requirement 7A should include details concerning proposed review of the CPMMP – the Applicant should be required to review on a regular basis and this should be submitted to ESC for approval.
4. 12C should be amended to say construction works within SSSI must not be carried out (rather than "must not commence") and also to relate only to works associated with the SSSI Crossing.
5. Additional requirement 12D to be included to provide for Method Statement for works in SSSI – to be approved before works in SSSI are carried out, and to cover pre-commencement.
6. Requirement 14C to be amended to ensure that construction of Work 1A must not be carried out until a marsh harrier plan has been approved, i.e to encompass pre-commencement activities.
7. Requirement 22A wording agreed as discussed at ISH13, agreed between SCC, ESC and the Applicant.
8. Requirement 24 should include a trigger as to when it should be approved.
9. Requirement 25: ESC are in discussion about revisions to this Requirement (as mentioned above) .
10. ESC no longer seek a requirement for a Maintenance Activities Plan.

	<ol style="list-style-type: none"> 11. ESC seeks an additional requirement in respect of operational noise limits, following the precedent of Hinkley Point C. ESC are in discussion with the Applicant about what the control should be. 12. At Deadline 7 the Applicant submitted the Estate Wide Management Plan which is addressed in Requirement 5C. ESC has some reservations about the content of the Plan, in particular with respect to bat mitigation, which we have raised with the Applicant. 13. ESC has recently agreed a number of revisions to the requirements, at our request, that are to be incorporated at Deadline 8 and look forward to reviewing those.
<p>7. Issues arising from responses to ExQs2 on the DCO, DoO and related matters</p>	<p>DoO:</p> <ol style="list-style-type: none"> 1. ESC has raised a number of detailed drafting comments with the Applicant and is hopeful that those will be reflected in the next version. 2. The Deed should ensure that the MTF is consulted and engaged on updates and reviews to the CPMMP (currently the Deed only empowers the MTF to make recommendations in respect of Smelt mitigation – Schedule 11, section 9.4) and the Terms of Reference do not empower the MTF to make recommendations etc. It should be made clear, through the ToR or the Deed, that the MTF will be expected to review and make recommendations in respect of any updates to the CPMMP. 3. Schedule 17 role of Suffolk Design Review Panel – ESC is seeking clarification from the Applicant on costs and the role of the Panel. 4. Schedule 12, Noise Mitigation Scheme – ESC seeks certain amendments to the NMS which are subject to ongoing discussion with the Applicant. 5. At ISH8 the Applicant committed to fund AQ monitoring carried out by ESC. ESC understands that Schedule 2 to the Deed (Council Resourcing) is to be further updated to provide additional funding to cover ESC’s AQ and noise monitoring
<p>8. Reasonable endeavours</p>	

	<p>ESC has raised a number of concerns in relation to the Applicant's proposal to use reasonable endeavours to comply with the indicative timetable in the Implementation Plan [REP2-044]. At ISH14 the Applicant proposed an amendment to the Construction Method Statement, compliance with which is secured through Requirement 8. ESC understands that the intention is for the Construction Method Statement to include longstop triggers which must be achieved, in addition to a continued requirement on the undertaker to use reasonable endeavours to deliver the relevant works/mitigation prior to those longstops.</p> <p>The Applicant committed to providing the updated Construction Method Statement at Deadline 8. ESC will comment on the mechanism, wording and proposed longstop triggers in the Construction Method Statement at Deadline 9.</p> <p>ESC confirmed that it is content for reasonable endeavours to remain as a strand of the Applicant's strategy but considers that it is insufficient on its own, or even together with the agreed Contingency Fund. ESC welcomes the proposed removal of the word 'indicative' in respect of the implementation plan but remains of the view that a clear commitment to delivery of the accommodation campus and caravan site is essential. ESC reiterated its reference to para 1.5.18 of REP7-057, which committed the Applicant to a requirement to deliver the caravan park by a certain trigger. An equivalent provision must also be made in respect of the accommodation campus.</p> <p>ESC therefore remains of the view that the Applicant must commit to a longstop by which time the caravan site and accommodation campus must be delivered. At REP7-057, the Applicant indicated that the longstop would be included in the Deed of Obligation. However, ESC is open to the Applicant's current suggestion that the longstop be secured through Requirement 8.</p> <p>ESC noted that the accommodation campus and caravan park comprise embedded mitigation in the Applicant's Environmental Statement. The Housing Fund sits alongside that embedded mitigation and is not a replacement for it. The Housing Contingency Fund is a separate fund, which is only intended to deal with a temporary expedient arising from and delay in compliance with the longstop requirement. How the Contingency Fund would be applied in the extreme circumstances of non-compliance with the longstop is not something we can identify at present. The whole purpose of the campus and caravan park is to address issues relating to the quantum of supply. The Contingency Fund simply provides a means of addressing the delay other than stopping the Project. It is designed to address a remote prospect which ESC hopes will not arise. That is why the commitment to a long-stop is</p>
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	<p>considered to be so important and ESC looks forward to seeing the Applicant’s proposals to secure that long-stop at Deadline 8.</p> <p>As to the invitation from the ExA to comment on Table 2 of PD-042, ESC notes that the table relates entirely to the Deemed Marine Licence and in those circumstances, it does not have any comments to make.</p>
<p>9. Practical arrangements for submission and form of the Applicant’s preferred draft DCO, executed DoO and allied documentation</p>	<p>ESC has recently advised the Applicant, that we will need around 1 week’s notice as we need to have two of ESC’s solicitors in the office to sign / seal an agreement. The aim is for this to be achieved by Deadline 10 which has just been pushed back by a week until 12 October. SCC signing day is a Wednesday so this could be done on 6 October.</p>
<p>10. The Examining Authority reminds the Applicant and the Councils of point 27 of Annex B “Observations on the draft section 106 agreement” to [PD-009] of 22 December 2020 – the need for the Confirmation and Compliance Document and the confirmations from the councils that the right parties and land interests are bound and that the s.106 agreement (now DoO) has been properly executed.</p>	<p>Noted.</p>
<p>11. Any other matters relevant to the subject matter of this ISH</p>	
<p>12. Close of the hearing</p>	

