



The Sizewell C Project

9.98 Response to the ExA's Second Commentary on the draft DCO

Revision: 1.0
Applicable Regulation: Regulation 5(2)(q)
PINS Reference Number: EN010012

September 2021

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





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1 INTRODUCTION

- 1.1.1 This document responds directly to the **further commentary on the draft DCO** issued by the Examining Authority on 9 September 2021 [[PD-042](#)].
- 1.1.2 Some of the content of this note was discussed at ISH14 and is also included in the **Written Summary of Oral Submissions for ISH14** (Doc Ref. 9.103).
- 1.1.3 The further commentary is divided into two principal sections, both relating to the use of the term “reasonable endeavours”. The first section deals with the use of the term in the **draft Deed of Obligation (DoO)** (Doc Ref. 8.17(G)), whilst the second refers to the use of the same term in the draft DCO.
- 1.1.4 The information submitted by the Applicant at Deadline 7 on 3 September includes material that is of relevance to the further commentary on 9 September 2021, and this response includes reference that material where it is relevant to the further commentary.
- 1.1.5 In particular, at Deadline 7 SZC. Co provided a legal note on the application of “reasonable endeavours” [[REP7-058](#)] at Appendix D. The legal note concluded that “*reasonable endeavours*” has a clear meaning, weight and value which enables it to be enforced against the Applicant where (in summary) the applicant is not acting as a “*reasonable and prudent person*” would have done. No greater form of enforcement would be appropriate.
- 1.1.6 It was this level of commitment which was found appropriate by the examining authority and Secretary of State at Hinkley Point C in respect of the timing of delivery of similar elements of associated development relative to the main development site works.
- 1.1.7 As this response explains, however, the commitment to reasonable endeavours (for example in relation to the Implementation Plan, secured by Schedule 9 of the **Deed of Obligation**) is also reinforced in this case by complementary measures which ensure not only the orderly development of the Sizewell C project but also protect against the risk of any harm arising from delayed or incomplete implementation – see further below.

2 REASONABLE ENDEAVOURS IN THE DRAFT DEED OF OBLIGATION

The ExA notes that the DoO submitted at D7 (Revision 7) has not changed so far as reasonable endeavours are concerned for Accommodation and Housing (Schedule 3, paras 3.1 and 3.2) nor for Key Environmental Mitigation (Schedule 9, para 2).

- 2.1.1 This response should be read together with SZC. Co's **Response to Examining Authority commentary on the draft DCO and other documents** [REP7-058] where a range of relevant matters were set out, particularly from paragraphs 2.2 to 2.17.
- 2.1.2 At Deadline 7, Schedule 3 of the DoO was amended to introduce the principle of a Housing Contingency Fund in the sum of £9,090,000 but SZC Co. had not at that stage developed the drafting to explain the application of the Contingency Fund. That explanation was provided by the Applicant in response to the second round of questions from the Examining Authority and particularly **ExQ Cl.2.1-2.3** [REP7-052] from electronic page 115 and elaborated in detail in Appendix 3B supporting those responses [REP7-057] from electronic page 432. These provisions are explained further below.
- 2.1.3 In short, however, they have been prepared in discussion with ESC to put in place measures to create further confidence that the workforce accommodation will be provided when it is required and to put in place contingency arrangements in the event of any default. The contingency measures are sized to address any impact that would arise from delayed provision.
- 2.1.4 It is correct that the DoO provisions for the Implementation Plan set out in Schedule 9 were not amended at Deadline 7. In its Response to the ExA's previous commentary [REP7-058], however, SZC. Co explained a number of matters which were intended to create greater confidence around its commitment to the Implementation Plan and to the enforcement powers of the planning authorities. Again, a number of these are addressed further below but in summary they included:
- an explanation that the terms of the DoO and of the Traffic Management Plans would be clarified and strengthened to make clear the powers available through the DoO to enforce HGV limits and mode share targets [REP7-062] at electronic pages 8 and 10.
 - SZC. Co has revised the terms of Requirement 8 to ensure that the construction works carried out as part of Work No. 1 must be carried

out in accordance with the **Construction Method Statement** (Doc Ref. 6.3 3D(D)) as explained in the Response to the ExA's commentary [REP7-058] at paragraph 2.3.

- Whilst it may not be necessary, SZC. Co could accept the principle of the approach suggested by SCC that it should commit to the provision of key infrastructure being available by the time it is required by milestones within the construction programme [REP7-058] at electronic page 22.

2.1.5 SZC. Co has explained in earlier submissions [REP5-113v] that the construction programme cannot practically be achieved without the provision of the proposed infrastructure and that it requires no incentive to provide that infrastructure.

2.1.6 Nevertheless, SZC. Co has now drafted proposals for *Grampian* style commitments to bring into operation key infrastructure components before defined milestone activities in the construction programme. In particular, those suggested at Deadline 7 related to:

- the Sizewell Link Road and two village bypass;
- rail infrastructure;
- the Marine Bulk Importation Facility (MBIF) (temporary BLF); and
- Accommodation.

2.1.7 SZC. Co's commitments to the Implementation Plan and the binding requirement to carry out work No. 1 in accordance with the **Construction Method Statement** (Doc Ref. 6.3 3D(D)) ensure the timely provision of these components, but the additional obligations referred to above are also now proposed and the overall package of measures is more than sufficient to secure that the development will be undertaken in a manner that is consistent with the environmental impact assessment.

The ExA notes that the Implementation Plan itself is only indicative

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.

2.1.8 There is no representation from interested parties which suggests that SZC. Co should commit to precise dates for the automatic roll out of its construction programme. That reflects the fact that "*pinning delivery to specific dates is unreasonable*" (as acknowledged by SCC at Deadline 6

[[REP6-049](#)] at electronic page 34). It is for that reason that the programme shown in the **Implementation Plan** [[REP2-044](#)] was “*indicative*”. It gives dates and shows a clear sequence of activity, but it is the sequence that matters, rather than the dates.

- 2.1.9 The sequencing that it proposes is important, but all parties appear to recognise that some flexibility in sequencing is necessary on any construction programme. Consequently, it is not usual for development consent to commit to a precise programme and it is common for the potential consequences of any variance to be protected by a full range of mitigation measures which work together to help to both ensure an orderly sequence of events (if that was necessary beyond the obvious necessity for the contractor to do the same) but limit and mitigate impacts in the event of default.
- 2.1.10 Nevertheless, SZC Co. recognises the concern expressed by the ExA about the potential uncertainty created by the fact that the construction sequence as shown on the Implementation Plan is labelled as indicative, and the commitment to deliver is based on reasonable endeavours. That concern has now been addressed. The Phasing Schedule included in the Implementation Plan (Annex I of the DoO (Doc Ref 8.17(G))) is the same as that included in the **Construction Method Statement** (Doc Ref. 6.3 3D(D)) and the Deadline 8 version has now been amended to remove the word ‘indicative’. Hence the reasonable endeavours obligation now relates to a construction sequence that is no longer labelled as indicative. This change, combined with additional *Grampian* triggers for the sequencing of specific elements of the project provides a comprehensive framework of controls.
- 2.1.11 The framework includes a combination of triggers, limits and *Grampian* restrictions that work together in limiting the project to the environmental envelope assessed within the environmental impact assessment, and which are also then consistent with the project’s deliverability requirements. These controls include:
- **Construction Method Statement** (Doc Ref. 6.3 3D(D)): secures the sequencing of the construction works within the main development site, including the offshore works. The Phasing Schedule (Plate 2.1) is no longer indicative. Other key points to note are:
 - **Construction sequencing:** The **CMS** identifies five phases of the main development site construction works:
 - Phase 1: sets out the initial works that would be undertaken, including the SSSI Crossing, realignment of the Leiston drain,

the cut off wall and cut-off wall platform and layout of construction roads;

- Phase 2: then secures the permanent and temporary beach landing facility.
- Phase 3: then relates to the construction of buildings, plant, facilities and other structures
- Phase 4: then relates to the installation and testing of mechanical and electrical plant and the permanent coastal defence feature
- Phase 5: then relates to the removal of the temporary facilities to allow completion of the groundworks, landscape and main platform works.

2.1.12 The **CMS** is therefore the primary document that describes the sequence of construction activities that are relevant to the ES. Requirement 8 of the **dDCO** secures the sequencing of the works on the main development site, meaning that the works must be completed in accordance with the details set out in the **CMS**, unless otherwise approved by ESC.

2.1.13 The **CMS** is then supplemented by a series of additional and bespoke controls that will help provide further confidence that the mitigation relied on by the ES will be secured. This includes:

- **HGVs:** have clearly defined limits for the period before and after the Sizewell link road and two village bypass are available for use set out in the **Construction Traffic Management Plan** (Annex K, DoO (Doc Ref. 8.17(G))). These limits ensure that the impacts during construction are no worse than that assessed. The Implementation Plan, secured by Schedule 9 of the **Deed of Obligation**, then provides additional comfort that SZC Co. will take reasonable endeavours to deliver the highway mitigation to the timescales set out. The combination of these controls gives the Local Authorities a high degree of comfort and control over the impacts of the project, but without risking the funding or delivery of the project.
- **Construction worker travel:** the **Construction Worker Travel Plan** (Annex L, DoO (Doc Ref. 8.17(G))). sets out mode share targets for the period before and after the park and ride sites have become available for use. Requirement 8 also then proposes absolute car parking limits that apply to the periods before and after. Again, the Implementation Plan's purpose is to provide additional comfort that the park and ride sites will be delivered in a timely fashion, but allows for some limited degree of flexibility in terms of timing that reflect the projects' practical deliverability requirements. Again, the combination

of parking limits, modal share targets and then the timescales secured by the Implementation Plan give the Local Authorities a high degree of comfort over the anticipated impacts and control over the project.

- **Noise:** the **CoCP** (Doc Ref. 8.11(E)) sets noise thresholds that apply across all construction at either the main development site (CoCP Part B), or for the associated development sites. Specific controls are then identified in the **Draft Main Development Site Noise Management and Mitigation Plan** (Appendix B, Part B, CoCP (Doc Ref. 8.11(E))) for noisy activities. These triggers and thresholds require SZC Co. to agree a bespoke mitigation plan for works above a set threshold in advance of those works commencing. The controls in the **CoCP** then work together with any measures found necessary in the bespoke plans in ensuring that the impacts identified in the ES are not exceeded.
- **Rail Noise:** Requirement 25 secures the Rail Noise Mitigation Strategy (now to be called **Draft Rail Noise Mitigation Plan** (Doc Ref. 6.14 9.3E(A))) in advance of rail movements. The approved strategy will then be implemented, monitored and enforced for the duration of overnight rail movements.
- **Ecology:** Requirements 12C, 14A, 14B and 14C are Grampian styled requirements that prevent defined works commencing until certain criteria or events have taken place.
- **Marine:** Requirements 7A and 12B then provide Grampian style controls in relation to the marine works and prevent works taking place until the relevant details have first been approved.

2.1.14 It should also be recognised that there are other provisions within Schedule 9 of the **DoO** which are relevant. Paragraphs 2.2-2.6 provide obligations on SZC. Co to closely monitor and report on the implementation of the project against the terms of the Implementation Plan. The obligations include the requirement to promptly notify the Planning Group of any material delay in the completion of any Key Environmental Measure, to propose and implement remedial measures as soon as reasonably practicable. As set out above, these provisions are fully enforceable.

2.1.15 They are complemented by the commitment in Requirement 8 to undertake the main development site construction (work no. 1A) in accordance with the terms of the **Construction Method Statement** (Doc Ref. 6.3 3D(D)). In order to assist with enforceability, the **CMS** has been provided as a stand-alone document (Doc Ref. 6.3 3D(D)). The **CMS** sets

out a detailed explanation of the sequence of each of the 5 phases of construction and it contains the same construction programme as the Implementation Plan at Plate 2.1, which is titled 'Assumed Construction Programme'.

- 2.1.16 In relation to each principal component of the main development site construction, a sequence of activity is set out. It is that sequence of activity which has been used as the basis for the assessment in the Environmental Statement and the effect of requirement 8 is that the sequence of activity must be observed and can be enforced.
- 2.1.17 In combination, this is a very substantial suite of commitments going far beyond what was considered acceptable by the Secretary of State when granting development consent for the development of Hinkley Point C.
- 2.1.18 The **Construction Method Statement** has been updated at Deadline 8 to include *Grampian* triggers for the Sizewell link road, two village bypass, temporary beach landing facility and rail works. As secured by the **DoO** (Doc Ref. 8.17(G)), SZC Co. must use reasonable endeavours to deliver works indicated on Plate 2.1 by the milestone dates. Where, despite using reasonable endeavours, the timescales indicated in the Plate 2.1 cannot be met, SZC Co. must nevertheless deliver the following key components of the project in accordance with the following *Grampian* triggers, unless otherwise approved in writing by ESC (following the procedure set out in Schedule 23 of the dDCO):
- Main Platform Phase 2 backfilling with imported material must not be commenced until the Branch line / LEEIE rail spur (Work No. 4D) and the green rail route (Work No. 4B) are available for use.
 - Phase 3 Installation of the Reactor Building Liner must not be commenced until the Sizewell link road (Work No. 11), the two village bypass (Work No. 12) and the temporary beach landing facility are available for use.
- 2.1.19 The Accommodation Campus and caravan park is then secured separately by Schedule 3 of the **Deed of Obligation**.
- 2.1.20 Schedule 9 of the **DoO** requires that a detailed construction plan must be submitted to ESC before construction works commence. This plan will detail the anticipated milestones for main Platform Phase 2 backfilling with imported material and Phase 3 Installation of the Reactor Building Liner. Progress and reporting against these milestones will be made to the Planning Review Group, established pursuant to Schedule 17 of the **DoO**.

- 2.1.21 Wording within the **Construction Method Statement** has also been updated to provide greater certainty on the commitments it makes regarding the construction methodology.
- 2.1.22 The ExA's further commentary provides a helpful summary table (**Table 1**) which summarises its view on whether or not Key Environmental Mitigation Measures are committed to within the **dDCO** or the **DoO**. That table is replicated below with the Applicant's explanation of where the commitments are made.

Table 1 Key Environmental Mitigation Measures

Item of Key Environmental Mitigation	DCO	DoO
Project accommodation	Requirement 8 provides for works on the Main Development Site to be carried out in accordance with the Construction Method Statement (Doc Ref. 6.3 3D(D)). The CMS provides for the provision of the caravan park at the LEEIE as part of construction Phase 1 (paragraph 3.5.4-14 at electronic page 61) and for the campus accommodation to be provided as part of Phase 2 at paragraph 3.4.55-59 at electronic page 56).	Schedule 2 will contain provisions for the LEEIE and campus accommodation to be provided by defined numbers of non-home based workers or for contingent mitigation sums to be paid in consequence. Schedule 9 obliges SZC. Co to use reasonable endeavours to deliver the accommodation in accordance with Plate 2.1 of the CMS .
Temporary beach landing facility	Requirement 8 obliges the main development site construction to take place in accordance with the Construction Method Statement . The CMS provides for the development of the temporary BLF as part of Phase 2 of construction	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the construction of the temporary BLF in accordance with Plate 2.1 of the CMS . Schedule 16 puts in place HGV limits which prevent the construction of he

NOT PROTECTIVELY MARKED

Item of Key Environmental Mitigation	DCO	DoO
	(from paragraph 3.1.74 at electronic page 31). The CMS now states that Phase 3 Installation of the Reactor Building Liner must not be commenced until the the temporary beach landing facility is available for use.	project without the implementation of the temporary BLF.
Permenant beach landing facility	Requirement 8 obliges the main development site construction to take place in accordance with the Construction Method Statement . The CMS provides for the development of the permentant BLF as part of Phase 2 of construction (from paragraph 3.1.89).	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the construction of the permanent BLF in accordance with Plate 2.1 of the CMS .
Fen Meadow works	Requirement 14A prevents vegetation clearance in the SSSI until the Fen Meadow Plan is in place, including an agreed tiometable of works.	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .
Marsh Harrier Habitat Improvement Works	Requirement 14C prevents any of the authorised development from being carried out until the Marsh Harrier Implementation Plan is in place, including an agreed tiometable of works.	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .
Green rail route	The CMS also now includes a Grampian	Schedule 9 requires SZC. Co to use reasonable

Item of Key Environmental Mitigation	DCO	DoO
	condition that prevents Main Platform Phase 2 backfilling with imported material until the rail works are in place.	endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .
Freight management facility	N/A	Schedule 16 puts in place HGV limits which prevent the construction of the project without the implementation of the freight management facility. Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .
Park and rides	Requirement 8 includes parking caps for the MDS until the park and ride sites are available for use. These controls ensure that the modal share targets in the CWTP (Annex K of the DoO (Doc Ref. 8.17(G))) can be relied on.	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .
Sizewell link road	The CMS now states that Phase 3 Installation of the Reactor Building Liner must not be commenced until the Sizewell link road (Work No. 11) and the two village bypass (Work No. 12) are available for use.	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .

Item of Key Environmental Mitigation	DCO	DoO
Yoxford roundabout	N/A	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .
Works 15, 16 and 17	N/A	Schedule 9 requires SZC. Co to use reasonable endeavours to carry out and complete the works in accordance with Plate 2.1 of the CMS .
Accommodation campus	N/A	Schedule 3 of the Deed of Obligation (Doc Ref 8.17(G)) contains: <ul style="list-style-type: none"> • Firm commitments to deliver the accommodation by defined workforce number milestones; and • Contingent financial provisions to mitigate the effect of any default
LEEIE caravan park	N/A	As above.
Employment and skills (Schedule 7 para 2.1.6C)	N/A	These matters are fully committed in Schedule 7 which requires, for example, a Workforce Delivery Strategy to be produced before commencement and adhered to. That strategy must include, for instance, the Sizewell C Skills Prospectus, the

Item of Key Environmental Mitigation	DCO	DoO
		<p>Apprentership Strategy etc.</p> <p>Specific obligations are provided in relation to matters such as Annual Skills Implementation Plan, Regional Skills Coordination, Employment Outreach Fund, Sizewell C Bursary Scheme, Asset Skills Enhancement and Capability Fund, Sizewell C jobs service etc either obliging SZC. Co to pay the public authorities for the cost of these or to enable the authorities to establish initiatives and draw the cost from SZC. Co.</p> <p>All of these measures are considered to be fully enforceable.</p>

Modal splits are difficult to monitor and control and a more readily identifiable construction threshold would be more easily enforced.

2.1.23 The response in the table above explains how key infrastructure is committed within the **dDCO** and the **DoO**. The modal splits required through the **CWTP** (Annex L, **DoO** (Doc Ref. 8.17(G))) or the HGV daily and peak hour caps set out in the **CTMP** (Annex K, **DoO** (Doc Ref. 8.17(G))) serve the dual function of protecting against adverse impacts at the same time as compelling the construction of the infrastructure which is necessary to enable those mode splits or HGV limits to be met. The MDS parking controls secured by Requirement 8 then provide greater assurance that the modal targets would not be exceeded. There is no possibility of the project being constructed without the necessary infrastructure in place.

The ExA notes that there was no definition of the Marsh Harrier compensation land.

- 2.1.24 This point is addressed in response to the ExA's first commentary on the DCO; please see [[REP7-058](#)] at paragraph 3.11, electronic page 31]. The terms of Requirement 14C are for the Marsh Harrier compensation to be carried out in accordance with the **On-Site Marsh Harrier Compensatory Habitat Strategy** (Doc Ref. 9.16(A)), which defines the necessary land and measures.

The ExA also notes from the D7 submissions that the question of reasonable endeavours 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.

- 2.1.25 This issue has also moved on substantially. Schedule 3 of the draft **Deed of Obligation** (Doc Ref 8.17(G)) contains:
- Firm commitments to deliver the accommodation by defined workforce number milestones; and
 - Contingent financial provisions to mitigate the effect of any default.

These matters are explained in response to **EXQ 3.CI.0** (Doc Ref. 9.97) and also in SZC Co.'s **Response to Requests for Further Information** submitted at Deadline 8 (Doc Ref. 9.109) and in particular in **Appendix B** of that document.

- 2.1.26 The milestones for the provision of accommodation agreed with ESC take direct account of both the timing of the need for provision and the ability to rapidly deploy mitigation if necessary. The timing commitments given by SZC. Co exceed those requested by ESC which were for the campus to be constructed by the time 7,000 workers are engaged. The use of Non Home Based (NHB) workers as the metric for the milestones is explained in those documents. It is the recruitment of NHB workers which generates the need for the accommodation and the potential impact if the accommodation is not provided. The choice of this approach is considered to be much more appropriate than any suggestion that workforce numbers should be capped (which would be inappropriate, counter intuitive and contrary to the achievement of important public interest objectives for many reasons rehearsed at ISH1) or that construction should be halted or slowed.

The ExA also notes 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.

- 2.1.27 The bespoke protective provisions within the **dDCO** have been agreed by those protected except for Cadent and National Grid. The outstanding issues are not related to the use of “reasonable endeavours” and the Applicant is confident that the outstanding issues to be resolved by Deadline 10.

The ExA also notes 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.

- 2.1.28 The DML (Schedule 20 of the **dDCO** (Doc Ref 3.1(E))) has been updated for this Deadline 8 to include a ban on particular works being carried out before it is approved where that is considered appropriate and to provide more precise controls over these elements The Applicant is seeking agreement with the MMO on these measures and a final draft DML will be submitted at Deadline 10 with a final SoCG with the MMO setting out their agreement, or otherwise, with the DML.