

**Wendy McKay**

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**Our Ref:** 20026727

**Your Ref:** EN010012

**Date:** 24 September 2021

**By email only**

Dear Ms McKay

**Planning Act 2008 – Section 88 and the Infrastructure Planning (Examination Procedure) Rules 2010 – Deadline 8: Comments on 3.1 Draft Development Consent Order - Revision 8.0 and 8.17 Draft Deed of Obligation - Revision 7.0**

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

For Deadline 8 (24th September) the Examining Authority (ExA) have requested comments on:

- [REP7-007] Draft Development Consent Order - Revision 8.0
- [REP7-040] 8.17 Draft Deed of Obligation - Revision 7.0

Our comments (Appendix A) highlight a number of minor amendments are required to the draft DCO requirements and draft Deemed Marine Licence (DML) conditions to ensure the Environment Agency is consulted in the discharge of additional information being submitted to the discharging authority. There is a substantial amount of information still to be submitted by the Applicant, and when we have considered this we may suggest to the Examining Authority that additional DCO Requirements or DML Conditions are required.

Our comment in relation to the proposed Deed of Obligation are set out below:

**Deed of Obligation**

At Deadline 7, the Applicant updated the Draft Deed of Obligation (Revision 7.0) to include Schedule 11, Section 9 'Eels and Migratory Fish Monitoring and Mitigation' to help offset the impact on the power station on eels and fish. These are matters specifically within the Environment Agency's statutory remit. We are concerned there is little time to resolve these issues prior to the close of examination and ensure that the obligations on the Applicant are legally secured.

**Section 9 Eels and Migratory Fish Monitoring and Mitigation**

We have substantial concerns in the legal drafting as submitted. Our main concern is that there is insufficient certainty that we will receive the compensation funds identified in this section. The Environment Agency are not a party to the Deed of Obligation and any rights we

have to receive the funds is limited to the existence of a deed of covenant. As the Deed of Obligation is currently drafted, entering into a deed of covenant is subject to the 'reasonable endeavours' of East Suffolk Council and/ or Suffolk County Council, which is in itself also subject to a caveat of "unless otherwise agreed by the relevant Council and SZC Co." (see Clause 15 of the draft Deed of Obligation).

"Reasonable endeavours" is not a strong obligation and does not provide the certainty that we require with regard to the delivery of the necessary compensation. Whilst there is considerable caselaw around what reasonable endeavours actually means, it can allow for a balancing act to be struck between complying with the obligation and the obliger's own interests. The only justification for a reasonable endeavours clause that we can see is if there is disagreement on the terms of the deed of covenant. This potential disagreement on the terms can be avoided by our instead agreeing terms - before the end of the examination period - that provide for direct payment, to the Environment Agency, of the funds necessary to deliver the necessary compensation.

We are also concerned by the further caveat "unless otherwise agreed by the relevant Council and SZC". We do not see any justification for such a caveat to be included, as this should be a simple case of transferring the funds to secure the compensation, to the Environment Agency, with relatively uncontentious terms attached to it.

We consider the Environment Agency should either be included as a party to the Deed of Obligation itself, with terms included within that to cover financial contribution to the Environment Agency, or that we should instead agree, and enter into a separate legal agreement with the applicant, prior to the end of the examination period.

### **Section 9 – Non-migratory fish contingency fund**

We note that currently there is no drafting provided for the 'non-migratory fish contingency fund'. We consider that this section should provide details of:

- proposed fish monitoring,
- how it will be determined that mitigation is required,
- the likely mitigation required,
- the sum of funds proposed,
- how funds will be administered, and
- justification as to why the amount of funds proposed is adequate.

### **Marine Technical Forum**

The Marine Technical Forum (MTF) terms of reference were included in the Deed of Obligation (Revision 6) [REP5-082] submitted at Deadline 5. These terms of reference were agreed between the MTF members in 2015 and were considered fit for purpose at the time.

The current Draft Deed of Obligation - Revision 7.0 [REP7-040] has now removed the MTF terms of reference. We consider a terms of reference needs to be included in the Deed of Obligation and that the 2015 MTF terms of reference is not currently fit for purpose.

There are a number of issues to resolve. In particular, we consider that the terms of reference clearly identify the members, what the quorum will be, and whether there are voting rights and/or casting votes.

There is currently no process to mediate or resolve disputes within the MTF. This is particularly important as currently:

- there is no agreement to the estimated numbers of fish and other biota predicted to be impinged at SZC, or
- the degree of mitigation offered by the proposed SZC intake design,
- or agreement on the significance of those losses

We have highlighted these concerns in our Deadline 8 response on the following report [REP7-077] Deadline 7 Submission - 9.89 Draft Fish Monitoring Plan - Revision 1.0.

We will endeavour to work with the applicant to try and resolve these issues before the close of examination. We would aim to update the Examining Authority on progress regarding the Deed of Obligation at Deadline 9 if that would be helpful.

Yours sincerely



Simon Barlow  
Project Manager  
Sizewell C Nuclear New Build  
Environment Agency



## Appendix A: Environment Agency comments on Draft Development Consent Order

Section	Wording	Comments
<b>Schedule 2, Article 3 - Requirements</b>		
<p>Requirement 12C,</p> <p>Main development site: SSSI Crossing</p>	<p><b>Main development site: SSSI Crossing</b></p> <p>(1) Construction works within the SSSI must not commence until details of working methods within the SSSI land have been submitted to and approved by East Suffolk Council, following consultation with the Environment Agency and Natural England. The temporary SSSI Crossing must be built in general accordance with the following details:</p> <p>(a) Main Development Site SSSI Crossing (SZC Construction) (July 2021) (Drawing Ref: SZC-SZ0100-XX-000-DRW-100207);</p> <p>(b) Main Development Site SSSI Crossing (Bailey Bridge Stage) (July 2021) (Drawing Ref: SZC-SZ0100-XX-000-DRW-100209).</p> <p>(2) Construction of the permanent element of Work No. 1A(l) (SSSI Crossing) must not commence until details of the layout, scale and external appearance have been submitted to and approved by East Suffolk Council, following consultation with the Environment Agency and Natural England. The details must:</p> <p>(a) be in general accordance with the Main Development Site SSSI Crossing (SZC Operational) (July 2021) (Drawing Ref: SZC-SZ0100-XX-000-DRW-100205);</p> <p>(b) include layout and scale which has:</p> <p>(i) a crest no lower than 8.6m (AOD);</p>	<p>The potential environmental impacts, including Water Framework Directive concerns, relate to both the construction and permanent elements of the SSSI Crossing.</p> <p>We welcome that the Environment Agency is now proposed as a consultee in discharging (1) Construction works, as well as for (2) permanent elements.</p>

	<p>(ii) a soffit no lower than 6.8m (AOD) at its intersection with the Leiston Drain; and</p> <p>(iii) a span no wider than 15m.</p> <p>(c) include a flood risk monitoring and adaptive defence plan that sets out the periodic monitoring proposals for the SSSI Crossing and the trigger point for when the crest height of the SSSI Crossing would need to be increased to 10.5m (AOD).</p> <p>(d) a timetable for the works, including a timetable for the return of temporary SSSI land.</p> <p>(3) Work No. 1A(I) (SSSI Crossing) must be carried out in accordance with the approved details.</p>	
<p>Requirement 22A,</p> <p>Associated developments: Landscape works</p>	<p><b>Associated developments: Highway landscape works</b></p> <p>(1) Work No. 11 and Work No. 12 must not be commenced until details of the landscape works for that work have been submitted to and approved by East Suffolk Council in consultation with the Environment Agency.</p> <p>(2) The details referred to in paragraph (1) must be in accordance with the Approved Plans (Schedule 7), unless otherwise agreed by East Suffolk Council.</p> <p>(3) Landscape works must be carried out in accordance with the approved details.</p> <p>(4) Landscape works in relation to Work No. 11 must be managed in accordance with the Two Village Bypass Landscape and Ecology Management Plan, unless otherwise agreed with East Suffolk Council.</p>	<p>This requirement secures key environmental mitigation and monitoring measures.</p> <p>We welcome that the Environment Agency is now proposed as a consultee for any future revision of Sizewell Link Road or Two Village Bypass Landscape and Ecology management plans.</p>

	(5) Landscape works in relation to Work No. 12 must be managed in accordance with the Sizewell Link Road Landscape and Ecology Management Plan unless otherwise agreed with East Suffolk Council.	
<b>Schedule 20 — Deemed Marine Licence under Part 4 (Marine Licensing) of the Marine and Coastal Access Act 2009</b>		
Condition 40: Beach Landing Facilities	<p><b>Beach Landing Facilities</b></p> <p>40.—(1) Work No. 1A(m) and Work No. 1A(bb) shall not commence until the following activity details have, after consultation by the undertaker with ESC, been approved by the MMO. The details must include—</p> <ul style="list-style-type: none"> <li>(a) start and end dates for the installation</li> <li>(b) installation methodology and detailed method statement,</li> <li>(c) any proposed mitigation,</li> <li>(d) navigational lighting to be used on plant,</li> <li>(e) vessels to be used; and</li> <li>(f) links to the coastal processes monitoring and mitigation plan.</li> </ul> <p>(2) Should impact piling be required, the impact piling must not commence until:</p> <ul style="list-style-type: none"> <li>(a) the expected location, start and end dates of impact pile driving have been submitted to the Marine Noise Registry and the MMO has been notified;</li> <li>(b) a Marine Mammal Mitigation Protocol in general accordance with the Draft Marine Mammal Mitigation Protocol has been submitted to and approved by the MMO; and</li> <li>(c) a Site Integrity Plan in general accordance with the Draft Site Integrity Plan has been submitted to and approved by the MMO.</li> </ul> <p>(3) The undertaker must submit the exact locations and start and end dates of impact pile driving to the Marine Noise Registry on every 6 month anniversary of the start of that impact pile driving as necessary and in any event within 12 weeks of completion of the impact pile driving. The undertaker must notify the MMO of these submissions.</p> <p>(4) The construction of Work No. 1A(m) and Work No. 1A(bb) shall be carried out in accordance with the details approved by the MMO.</p> <p>(5) Unless a shorter period is agreed with the MMO in writing, the undertaker must use reasonable endeavours to submit the activity details to the MMO at least 6 months prior to the proposed commencement of the relevant Work No.</p>	The proposed condition links to the Coastal Change Management Plan. On this basis, we request the condition is amended to include the Environment Agency as consultee of the detailed information.

	(6) The determination date is 6 months from submission of the activity details to the MMO.	
Condition 41: Soft Coastal Defence Feature (sCDF)	<p><b>Soft Coastal Defence Feature (sCDF)</b></p> <p>41.—(1) Work No. 1A(n) shall not commence until the following activity details have, after consultation by the undertaker with ESC, been approved by the MMO. The details must include—</p> <p>(a) start and end dates for the installation;</p> <p>(b) installation methodology and detailed method statement;</p> <p>(c) any proposed mitigation;</p> <p>(d) vehicles and plant to be used;</p> <p>(e) links to the coastal processes monitoring and mitigation plan.</p> <p>(2) The construction of Work No. 1A(n) shall be carried out in accordance with the details approved by the MMO</p> <p>(3) Unless a shorter period is agreed with the MMO in writing, the undertaker must use reasonable endeavours to submit the activity details to the MMO at least 6 months prior to the proposed commencement of Work No. 1(A)(n).</p> <p>(4) The determination date is 6 months from submission of the activity details to the MMO.</p>	The proposed condition links to the Coastal Change Management Plan. On this basis, we request the condition is amended to include the Environment Agency as consultee of the detailed information.
Condition 50 – Fish Monitoring	<p>S50.—(1) No water abstraction shall commence until a fish entrapment and impingement monitoring plan has been submitted to and approved by the MMO in consultation with Natural England and the Environment Agency. The plan must be in general accordance with the Draft Fish Entrapment and Impingement Monitoring Plan and must set out—</p> <p>(a) the monitoring arrangements for assessing the efficacy of the intake head and the fish recovery and return system during the commissioning of Unit 1 and Unit 2;</p> <p>(b) the undertaker’s duty to consider future additional adaptive measures arising from (a) that may be required during operation of Unit 1 and Unit 2;</p>	<p>We consider that Condition 50 should be amended to ensure the fish entrapment and impingement monitoring plan be implemented.</p> <p>In addition, we consider that for clarity, in Condition 50(2) and (3) reference should be made to the plan in full, i.e. the ‘fish entrapment and impingement monitoring plan’.</p> <p>We have highlighted in our comments for the Deed of Obligation that we consider there is insufficient certainty that we are</p>

	<p>(c) the monitoring methodology, frequency of monitoring and format of monitoring reports; and</p> <p>(d) examples of mitigation measures which would be effective to mitigate particular results of the monitoring and how the appropriateness of each measure will be considered.</p> <p>(2) Unless a shorter period is agreed with the MMO in writing, the undertaker must use reasonable endeavours to submit the monitoring plan at least 6 months prior to the proposed commencement of water abstraction.</p> <p>(3) The determination date is 6 months from submission of the monitoring plan to the MMO.</p>	<p>will receive the compensation funds identified to meet this condition.</p> <p>In addition, we have provided separate comments at comments report [REP7-077] Deadline 7 Submission - 9.89 Draft Fish Monitoring Plan - Revision 1.0 detailing the likely measure needed in monitoring.</p>
<p>Condition 51 – Smelt Monitoring Plan</p>	<p>51. No water abstraction shall commence until a Smelt Monitoring Plan has been submitted to and approved by the MMO in consultation with the Environment Agency. The Smelt monitoring plan must include—</p> <p>(a) The monitoring methodology</p> <p>(b) Frequency of monitoring; and</p> <p>(c) Format of monitoring reports.</p> <p>(2) The Smelt Monitoring Plan must be implemented as approved.</p>	<p>We consider that Condition 51 should be amended to provide additional references should to start date, frequency and duration.</p> <p>We have highlighted in our comments for the Deed of Obligation that we consider there is insufficient certainty that we are will receive the compensation funds identified to meet this condition.</p> <p>In addition, we have provided separate comments at comments report [REP7-077] Deadline 7 Submission - 9.89 Draft Fish Monitoring Plan - Revision 1.0 detailing the likely measure needed in monitoring.</p>