



The Sizewell C Project

8.22 Final Deed of Obligation - Confirmation and Compliance Document

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

October 2021

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





The Secretary of State for the Department for Business, Energy and Industrial Strategy, 1 Victoria Street, London, SW1H 0ET

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Our ref
5567/18150/31017009
Your ref
END10012
Date
12 October 2021

By email

Dear Sir or Madam

NNB Generation Company (SZC) Limited - Deed of Obligation and Environment Agency Deed

1. INTRODUCTION

- 1.1 We have acted as English legal advisers to NNB Generation Company (SZC) Limited (the "**Applicant**") in connection with:
- 1.1.1 the agreement made pursuant to section 1 of the Localism Act 2011 and section 111 of the Local Government Act 1972 dated 8 October 2021 and made between (1) NNB Generation Company (SZC) Limited as applicant, (2) East Suffolk Council and (3) Suffolk County Council, (referred to as the "**Deed of Obligation**"); and
 - 1.1.2 the agreement made pursuant to section 37 of the Environment Act 1995 and section 30 of the Anglian Water Authority Act 1977 dated 8 October 2021 and made between (1) NNB Generation Company (SZC) Limited and (2) the Environment Agency, (referred to as the "**Environment Agency Deed**"),
- (together referred to as the "**Deeds**").
- 1.2 This document has been submitted to confirm that, in our opinion and subject to the qualifications and assumptions set out in this letter, the Deeds contains legal, valid, binding and enforceable obligations in respect of the Applicant and further opines on the provisions of the Deeds and the associated development consent order for which the Applicant has applied under the Planning Act 2008 which relate to its enforceability.
- 1.3 We are solicitors qualified in England and Wales. We express no confirmation or opinion as to any law other than English law as applied by English courts and reported and in effect on the date of this document and assume that to the extent that the laws or regulations of

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any jurisdiction other than England may be relevant, such laws and regulations do not prohibit, and are not inconsistent with, the entering into and performance of the Deeds. No opinion is expressed as to matters of fact.

2. CONFIRMATIONS

2.1 Capacity of the Applicant and validity of the Deeds

Based on the Deeds and other documents referred to in paragraph 3.1 and subject to the assumptions and the qualifications contained in paragraph 3.2 and to matters not disclosed to us, it is our opinion that:

- 2.1.1 **Status:** The Applicant is a company duly incorporated with limited liability under English law.
- 2.1.2 **Capacity:** The Applicant has the power and legal capacity to enter into and perform its obligations under the Deeds.
- 2.1.3 **Authority:** The Applicant has taken all necessary corporate actions to authorise the execution, performance and delivery of the Deeds and the Deeds have been duly executed by the Applicant.
- 2.1.4 **Validity:** The obligations of the Applicant under the Deeds constitute legal, valid, binding and enforceable obligations of the Applicant.

2.2 Restrictions on the Project

Based on the Deeds and other documents referred to in paragraph 3.1 and subject to the assumptions and the qualifications contained in paragraph 3.2 and to matters not disclosed to us, it is our opinion that the Deeds contain obligations on the part of the Applicant:

- 2.2.1 with which the Applicant is required to comply during its construction, occupation and use of the proposed development authorised by the Development Consent Order (if granted);
- 2.2.2 which, in accordance with Clause 5 of the Deed of Obligation, are binding on and enforceable against the Applicant until it transfers the entirety of its benefit of the Development Consent Order;
- 2.2.3 which would be enforceable against any person to whom the power to construct or operate Work No. 1A(a) to (h) (main platform works) of the Development Consent Order has been transferred or granted under article 9 of the Development Consent Order (provided that any such transfer or grant is entered into by an authorised transferee or grantee with sufficient capacity and is in all other respects executed in a way which is legal, valid and binding), for so long as they benefit from the power to construct or operate any of those works. By virtue of article 9, such transferee or lessee will be treated for all purposes as the undertaker who entered into the Deeds with the other parties to them, so that the obligations shall be binding and enforceable against the transferee or lessee throughout the construction, occupation and use of the proposed development of Sizewell C Project, or until such time as they seek to transfer or grant the powers to construct or operate Work No. 1A(a) to (h) (main platform works) to another party under article 9;
- 2.2.4 a breach of which would be subject to enhanced statutory enforcement powers granted to East Suffolk Council and Suffolk County Council, including by injunction, entry to the land and as a land charge; and



2.2.5 which may not be modified or discharged except by agreement or further to a determination by the Secretary of State.

3. ASSUMPTIONS AND QUALIFICATIONS

3.1 For the purposes of providing the confirmations in this document, we not examined any documents or made any enquiries save for:

- 3.1.1 an original of the Deed of Obligation, signed (by a director of the Applicant) and completed in the presence of a solicitor of Herbert Smith Freehills LLP;
- 3.1.2 an original of the Environment Agency Deed, signed (by a director of the Applicant) and completed in the presence of a solicitor of Herbert Smith Freehills LLP;
- 3.1.3 a draft Development Consent Order submitted at Deadline 10 of the examination (Doc Ref. 3.1(l));
- 3.1.4 certified copies of the Certificate of Incorporation and the Memorandum and Articles of Association of the Applicant (together the "**constitutional documents**");
- 3.1.5 draft copies of the minutes of (and resolution from) a meeting of the board of Applicant's shareholder which we assume was validly passed at a properly convened and conducted meeting of the board and remains in full force and effect and which direct the directors of the Applicant to enter into the Deed of Obligation;
- 3.1.6 the results of a search of the Companies House Service operated by the Registrar of Companies in England and Wales in respect of the Applicant carried out on 8 October 2021, at 10 am; and
- 3.1.7 the results of a search of the Insolvency and Companies List, at the Royal Courts of Justice, was carried out (by us or by GlobalX (a trading name of LegalinX Limited) on our behalf) in relation to the Applicant on 8 October 2021.

3.2 The confirmations are based upon the following assumptions and qualifications (which may or may not be the case):

- 3.2.1 **Development Consent Order:** it is assumed that the Development Consent Order which comes into force contains articles 9, 10 and 11 of the Deadline 10 draft Development Consent Order submitted by the Applicant;
- 3.2.2 **Documents:** it is assumed that all documents (including scanned, electronic and copy documents and the constitutional documents) examined by us (i) are authentic, complete and accurate and all signatures and seals (if any) thereon are genuine and (ii) are and remain up-to-date, and have not been terminated or rescinded;
- 3.2.3 **Due Execution:** it is assumed that the persons who executed the Deeds on behalf of the Applicant (i) are persons authorised by the resolution passed at the board meeting referred to in paragraph 3.1.5, (ii) have full legal capacity to execute the Deeds and (iii) intended the Applicant to be bound by the Deeds; and that the witness to such execution is independent (i.e. he or she has no personal or other conflict of interest issues), has full legal capacity, acted in good faith and was physically present when the Deeds were executed by the relevant signatory.



- 3.2.4 **Filings and Records:** it is assumed that the public files, documentation and information available from the Registrar of Companies and the Insolvency and Companies List at the Royal Courts of Justice are complete, accurate and up-to-date and contain details of all relevant moratoria applications filed, administration applications filed, or appointments recorded in or orders made.
- 3.2.5 **Directors:** it is assumed that the directors of the Applicant have acted in good faith and have complied with their duties under all applicable laws in relation to the approval of and entry into the Deeds.
- 3.2.6 **Other parties:** it is assumed that each party to the Deeds other than the Applicant has the power and legal capacity to enter into, perform and exercise its rights under the Deeds and the Deeds have been duly authorised, executed and, where applicable, delivered by all of the parties thereto other than the Applicant in accordance with all applicable laws.
- 3.2.7 **Solvency:** it is assumed based on the searches carried out prior to completion and set out in paragraph 3.1 above and which revealed no evidence of any resolutions for the winding up or dissolution of the Applicant and no evidence of the appointment of any liquidator, administrator or other person, insolvency or event:
- (A) that the Applicant was solvent at the time of the execution and delivery of the Deeds; and
 - (B) that the Applicant has not entered into any composition or arrangement with its creditors (or any class of them) and that no step has been taken to obtain a moratorium in relation to the Applicant or to wind up the Applicant or to place the Applicant into administration and that no receiver has been appointed over or in respect of the assets of the Applicant, nor has any analogous procedure or step been taken in any jurisdiction which has not been revealed by the searches carried out in paragraph 3.1 above; and
 - (C) that no recognised main insolvency proceeding has been recognised in Great Britain (as it is not possible to conduct a central search in Great Britain in relation to any such proceedings); and
 - (D) that the Applicant did not become insolvent as a result of entering into the Deeds; This opinion is subject to all insolvency and other laws affecting the rights of creditors (whether secured or unsecured) generally;
- 3.2.8 **Misconduct or breach etc:** it is assumed that no party to the Deeds (and no individual employed by or acting on behalf of any such party) is, or will be, engaging in criminal, misleading, deceptive or unconscionable conduct or seeking to conduct any relevant activity in a manner or for a purpose not evident on the face of the Deeds which might render the Deeds (or any part thereof) or any matter contemplated thereby or any associated activity illegal, unlawful, void or unenforceable and no party will, by reason of the matters contemplated by the Deeds, be in breach of any of their respective obligations under any agreement, licence, authorisation, consent or similar document. It should be noted that this document is not designed to and is not likely to reveal fraud, misrepresentation, bribery or corruption by any person.



3.2.9 **Validity/enforceable obligations:** although we consider that obligations of the Applicant under the Deeds constitute legal, valid, binding and enforceable obligations and are not aware of any reason at the date of this opinion why the breach of such obligations should not be enforceable, it is not certain that those obligations will necessarily be legal, valid or binding or will be enforced in all circumstances in accordance with their terms at all times, since the existence, effect and enforcement of legal obligations is subject to principles of law, equity, court's discretion, issues of public policy and procedure of general application. In particular:

- (A) equitable remedies, such as specific performance and injunctions, are within the discretion of the court and an English court may make an award of damages if it considers this an adequate remedy for breach of legal obligations and not grant an equitable remedy in such circumstances;
- (B) claims may become time-barred;
- (C) enforcement of rights and obligations may become frustrated;
- (D) claims may be subject to defences of set-off or counterclaim;
- (E) a failure or delay to exercise a right may constitute a waiver of that right;
- (F) any indemnity obligations imposed under the Deeds may not be effective insofar as they relate to fines and penalties arising out of matters of civil or criminal liability and an indemnity for costs of litigation may not be effective;
- (G) any terms excluding or limiting the duties owed by or the liability of any person may be void if and to the extent they do not satisfy the relevant tests of reasonableness or fairness imposed by law and will be construed strictly;
- (H) an obligation to negotiate or enter into further agreements may not be enforceable;
- (I) an English court may choose not to treat any certificate or determination as being conclusive;
- (J) the severance of any invalid or illegal provision and the continued effect of any other obligations will be determined by an English court, at its discretion;
- (K) any discretion or determination may be required to be exercised or made in a timely manner, reasonably or in good faith, and not arbitrarily, capriciously, perversely or irrationally, whether or not there is any express obligation to do so;
- (L) any provision in a contract which requires payment of additional amounts by any party as a result of breach of its contractual obligations (whether expressed by way of fee, additional interest (whether described as penalty or default interest or implemented by margin ratchet), or specified or liquidated damages or otherwise), or which results in the loss of a right to a future payment or a requirement to transfer assets at an undervalue, may be determined by a court to be unenforceable as a penalty;



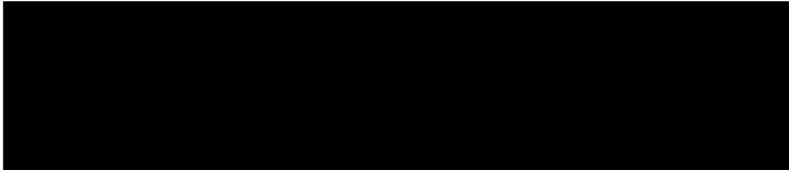
- (M) notwithstanding any contractual provision that requires a variation to be made in writing or to comply with some other formality, a party may in some circumstances be prevented from enforcing the original terms where a variation was agreed orally or by conduct of the parties;
- (N) if a court determines that a provision lacks certainty it may not be contractually binding;
- (O) an English court may choose not to enforce or recognise as binding obligations which are incompatible with English public policy or which purport to override mandatory rules of English law;
- (P) a contract may be void if the parties are mistaken as to some matter that is essential to the contract; and
- (Q) by virtue of section 233B of the Insolvency Act 1986, a provision of a contract for the supply of goods or services to a company ceases to have effect when the company becomes subject to a relevant insolvency procedure if and to the extent that, under the provision (a) the contract or the supply would terminate, or any other thing would take place, because the company becomes subject to the relevant insolvency procedure, or (b) the supplier would be entitled to terminate the contract or the supply, or to do any other thing, because the company becomes subject to the relevant insolvency procedure.

4. ADDRESSEES AND RESPONSIBILITY

- 4.1 This document is addressed to you personally and is provided solely in connection with the Deeds. It may not be relied upon by any other entity or person without our prior written consent.
- 4.2 It is acknowledged that this document shall be disclosed to the Planning Inspectorate in their role as Examining Authority in respect of the Applicant's application for the Development Consent Order and to other third parties and their legal advisers whether they are interested and participating in the examination of the Applicant's application or accessing the public records of the Applicant's application for the Development Consent Order provided that in each case:
 - 4.2.1 such disclosure is made for information purposes only and not for the purposes of reliance; and
 - 4.2.2 we do not assume any duty or liability to any person to whom such disclosure is made and no such person to whom this document is disclosed may rely on it without our prior written consent.
- 4.3 This document is given by Herbert Smith Freehills LLP which assumes liability for and is solely responsible for it.
- 4.4 Notwithstanding the provision of this document, we expressly reserve the right to represent the Applicant (if it so requests) in relation to any matters affecting the Deeds at any time in the future (whether or not you retain separate advisers on any such matter), and the fact that we have provided this document to you shall not be deemed to have caused us to have any conflict of interest in relation to the giving of any such advice. The provision of this document to you does not create or give rise to any client relationship between this firm and you.



- 4.5 This document and any non-contractual obligations arising out of or in connection with it are governed by and shall be construed in accordance with English law. This document is given on condition that the courts of England have exclusive jurisdiction to settle any dispute or claim arising out of or in connection herewith (including any non-contractual disputes or claims).



HERBERT SMITH FREEHILLS LLP