WREXHAM POWER LIMITED

The Wrexham Gas Fired Generating Station Order

16.2. The Applicant's Responses to the Examining Authority's comments on the Draft Wrexham Gas Fired Generating Station Order 201[X]

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

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The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Application by Wrexham Power Ltd for the Wrexham Energy Centre (EN010055)

Examining Authority commentary on the draft DCO

The Examining Authority's (ExA's) commentary on the draft DCO (DCO) is set out below, with issues and questions arising from it. The issues and questions are principally addressed to the Applicant, to statutory authorities with prospective obligations arising under draft provisions and to persons affected by compulsory acquisition (affected persons) and other individual interested parties identified by name in the right hand column. However, comments from other interested parties and affected persons are welcome.

Questions (where asked) are requests for further information pursuant to the Infrastructure Planning (Examination Procedure Rules) 2010 (EPR) Rule 17.

Readers are requested to refer to the Applicant's most recent submitted DCO (Revision 5) [REP6-012] and to the comparison draft (Version 4 to Version 5) [REP6-013] in order to link the issues and questions raised to the draft provisions to which they relate.

Abbreviations used

PA2008	*The Planning Act 2008*
Art	*Article*
ALA 1981	*Acquisition of Land Act 1981*
BoR	*Book of Reference [REP4-014]*
CA	*Compulsory Acquisition*
dDCO	*Draft DCO [REP6-012](Rev 5) & [REP6-013]*
EM	*Explanatory Memorandum [APP-034](Rev 0)*
ES	*Environmental Statement*
LIR	*Local Impact Report*
LPA	*Local planning authority*
MP	*Model Provision (in the MP Order)*
MP Order	*The Infrastructure Planning (Model Provisions)(England & Wales) Order 2009*
NPS	*National Policy Statement*
NSIP	*Nationally Significant Infrastructure Project*
R	*Requirement*
SI	*Statutory Instrument*
SoS	*Secretary of State*
TP	*Temporary Possession*
7 Dec PPs	*Draft Protective Provisions annexed to a letter from the Applicant to the ExA dated 7 December 2016 [AS-006]*

Q No.	Part of DCO	Relevant extract from DCO (for ease of reference)	Commentary	Response sought from
1.	**Art 2(1)**	*"illustrative foul and surface water drainage strategy" means the draft foul and surface water drainage strategy (document reference number 6.4.9, revision 1) and submitted under regulation 5(2)(o) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009;*	**Definition of "illustrative foul and surface water drainage strategy"** Document 6.4.9 rev 1 was not submitted with the application and is just entitled 'Drainage Strategy. On that basis: • should this definition read *"…means the Drainage Strategy (document reference 6.4.9, revision 1) certified by the Secretary of State as the illustrative foul and surface water drainage strategy for the purposes of this Order;"* and • Does there need to be a corresponding addition to the list of documents for certification in A35?	Applicant
		Applicant comment: In respect of the ExA's comments regarding the definition of "illustrative foul and surface water drainage strategy", the Applicant has amended the definition in the dDCO submitted at Deadline 7 to read "*…means the document identified in Table 1 in Schedule 2 (documents and plans to be certified) to this Order and certified as the illustrative foul and surface water drainage strategy by the Secretary of State for the purposes of this Order*;" In respect of the ExA's comment as to whether there should be a corresponding reference to the illustrative foul and surface water drainage strategy in Article 35 of the dDCO, the Applicant is of the view that as the drainage strategy already forms part of the Environmental Statement, it does not consider that the draft strategy needs to be listed separately in Article 35 of the dDCO given the Environmental Statement is identified in Article 35.		
2.	**Art 2(1)**	*"Order land" means the land required for, or required to facilitate or is incidental to, or affected by, the authorised development shown on the land plans and described in the book of reference;*	**Definition of "Order land"** Should this read (so as to correct the grammar): • *"Order land" means the land which is required for, or is required to facilitate, or is incidental to, or is affected by, the authorised development shown on the land plans and described in the book of reference;* ?	Applicant

		Applicant comment: The Applicant agrees and has amended the definition in the dDCO submitted at Deadline 7.		
3.	**Art 30(1)**	*30.—(1) Where <u>any apparatus of a public utility undertaker or of a public communications provider is removed under article 28</u> (statutory undertakers) any person who is the owner or occupier of premises to which a supply was given from that apparatus is to be entitled to recover from the undertaker compensation in respect of expenditure reasonably incurred by that person, in consequence of the removal, for the purpose of effecting a connection between the premises and any other apparatus from which a supply is given.*	**Statutory undertakers that are not 'public utility undertakers'** As noted in the ExA's original DCO queries, statutory undertakers such as water and electricity providers are not covered by this Article as they are not 'public utility undertakers' as defined. Should there be some equivalent provision providing compensation for loss of such supplies?	Applicant
		Applicant comment: The current wording of Article 30 of the dDCO follows the Model Provisions. The Applicant agrees that Article 30(1) does not apply to water and electricity providers since they are not covered by the definition of 'public utility undertakers' in the Highways Act 1980. Both of these providers are, however, within the definition of "statutory undertaker" for the purposes of Article 28. Article 28 is subject to the provisions in Schedule 9 (protective provisions). Any loss of electricity or water supplies would be claimed against the relevant utility undertaker, which in turn would make a claim against the undertaker (subject to demonstrating that the undertaker caused that loss) pursuant to the provisions in Part 5 of Schedule 9.		
4.	**Art 39(1) & (2)**	*39.—(1) The undertaker must not exercise the powers conferred by the provisions referred to in paragraph (2) in relation to any land unless it has first put in place either— (a) <u>a guarantee in respect of the liabilities</u> <u>of the undertaker to pay compensation</u> under this Order in respect of the exercise of the relevant power in relation to that land; or (b) an alternative form of security for that purpose <u>approved by the Secretary of State.</u>*	**Guarantee of compensation liabilities** Earlier questions from the ExA on this provision have been responded to in the current drafting, providing a guarantee in respect of the liabilities. • The Applicant is asked whether a figure should be included for the estimated amount of the guarantee, or alternatively whether provision should be made for the amount of the guarantee to be determined by an independent body, thus providing an assurance of its adequacy?	Applicant, Mr Owen Earthworm

			• Art 39 (1) (b) makes clear that an 'alternative form of security is approved by the Secretary of State, but Art 39 (1) (a) is unclear about who approves the adequacy of the guarantee. Should that be expressed as the Secretary of State too, or some other body, independent of the undertaker? With reference to Question 13 below, the Applicant is requested to clarify whether its calculation of the sum required to give effect to this guarantee has taken effect of the passage of the gas connection alignment through a commenced / operational solar farm and the necessary costs associated with this? If so, does this make any difference to the Applicant's readiness and capacity to honour the guarantee? • With reference also to Question 13 below, Art 39(2) lists the provisions in respect of which the proposed guarantee or alternative security in Art 39(1) applies. Given that in its letter of 7 December 2016 [AS-006], the Applicant has annexed draft protective provisions that include proposals to repay expenses and costs to a solar farm operator (paragraph 5), should that provision be included in the list in Art 39(2)?	
		Applicant comment: The Applicant has amended Article 39(1)(a) in the dDCO submitted at Deadline 7 to make it clear that the guarantee referred to will be approved by the Secretary of State. The Applicant considers that it would not be appropriate for the amount of the guarantee to be included in the DCO. The amount of the guarantee, or alternative form of security, will be based on an estimate of the compensation due at the time the powers are to be exercised (which could be at any time within 5 years of the DCO being made—pursuant to Article 20(1)). The approval of the guarantee, or other form of security, by the Secretary of State will include approval of the amount. It will be for the Secretary of State to determine what evidence it requires in order to approve the amount (for example, an expert valuation provided by the Applicant). Whilst the Applicant considers that the existing wording is sufficient, the Applicant has no objection to the Article expressly referring to the form and amount of the guarantee, or alternative form of security, being approved by the Secretary of State and has made this amendment in the dDCO submitted at Deadline 7.			

		The estimated compensation figure provided in response to First Written Question 1.4.7 (Examination Library Reference REP1-032) does not include potential compensation associated with the solar farm. This is because the solar farm has not yet been constructed and the solar farm may not be operational when the Applicant commences construction of the Gas Connection. It should be noted that Earthworm Energy has not provided any information or evidence relating to its potential losses or the financial impact of the Gas Connection. Accordingly, no evidence has been supplied that provides the Applicant with details as to the tariff regime that the solar farm may be operating under. In any event, as set out in the Funding Statement (Examination Library Reference APP-036), St. Modwen, the owner of a 50% share in the Applicant, is a 100% wholly owned subsidiary of St. Modwen Properties Plc. St. Modwen Properties Plc is a FTSE 250 company with a total asset base valued at £1.7 billion (Half Year Report – May 2016). The Applicant will therefore have the necessary resources available be able to provide a guarantee, or other form of security, that includes any potential compensation relating to the solar farm. The guarantee, or other form of security, is to cover compensation due as a result of the exercise of the powers of compulsory acquisition or temporary use. The protective provisions re-confirm that position as well as go wider - the Applicant has offered to pay costs incurred by the solar farm operator (for example, inspection costs) as a result of the authorised works. It would not be appropriate for a guarantee, or other form of security, to be required even though the Applicant was not exercising its powers of compulsory acquisition or temporary use.		
5.	**Various Articles relating to compensation under Part 1 of the Land Compensation Act 1961**		**Tribunal jurisdiction and application of the 1961 Act** A number of Articles make provision for *"compensation to be determined, in case of dispute, under Part 1 of the 1961 Act"*. It is acknowledged that a provision in this form is in various MPs and is commonplace in DCOs and other similar Orders. However, the only situation in which Part 1 of the 1961 Act only refers questions of disputed compensation to the Tribunal, is where a statute authorises the compulsory acquisition of land. It does not appear to provide for reference to the Tribunal in any other case not involving compulsory acquisition (e.g. in relation to the felling of trees under A31), or to be a general procedure for disputes resolution. Could the Applicant explain clearly by whom and under what process compensation would be assessed in the event that it became due under the Articles containing such provision for compensation, and propose any such amendments to provisions as appear necessary to address this point?	Applicant

		Applicant comment: The assessment of compensation under various Articles referencing Part 1 of the Land Compensation Act 1961 would be made by the undertaker and the parties involved in the first instance. As there is no statutory framework to deal with disputed compensation in the situations covered by these Articles (e.g. in the case of temporary possession or the temporary stopping up of streets), reference is made to the 1961 Act. The wording recognises that there needs to be an arbiter in such circumstances and therefore applies the procedure which applies in the case of compulsory acquisition under the 1961 Act. In addition to being found in Model Provisions, Transport and Works Act Orders and made DCOs, the reference to Part 1 of the 1961 Act can also be found in the Crossrail Act 2008 (for example see paragraph 7(2) of Schedule 2 (support of buildings). The Applicant does not consider that any amendments are necessary.		
6.	**Schedule 1**	*and <u>such other buildings, structures, works or operations as may be integral to and part</u> of the construction, operation and maintenance of the works in this Schedule 1 but only within the Order limits and insofar as they are unlikely to give rise to any materially new or materially different environmental effects from those assessed in the environmental statement.*	**Integral and associated development** The ExA notes the Applicant's view (paragraph 3.21 of its oral summary at the last DCO ISH – REP6-011)) that it is not necessary to exclude 'associated development' from A3, in part because of the inclusion of the wording 'integral and part of'. The ExA remains concerned about the potential ambit of this part of Schedule 1. • Should this read e.g. "such other ancillary buildings, structures, works or operations as are integral to and part of ….the Works in this Schedule…."?	Applicant
		Applicant comment: The Applicant has made this amendment in the dDCO submitted at Deadline 7.		
7.	**R2(4)**	*(4) Numbered work 1 may not commence until written details of the following have been submitted to and approved by the relevant planning authority—*	**Pre-commencement submission of details of works** At present there are no other requirements requiring pre-commencement submission of details of numbered works 2-5. Should there be?	Applicant, WCBC

		Applicant comment: The purpose of Requirement 2(4) is for full details of the permanent buildings and structures. 1. Numbered work 2A is for temporary works only. 2. The Applicant has amended R2(4) to include the submission of details for numbered words 2B(a)(vi) and 2B(a)(vii). Numbered works 2B(a)(i), 2B(a)(iii), 2B(b)(ii) and 2B(b)(iii) (fencing and lighting) are covered by Requirements 7 and 13 respectively. Requirement 2(4) is not applicable to the remainder of numbered work 2B. 3. Numbered work 3 is covered by Requirement 3 (landscaping) and Requirement 12 (foul and surface water drainage). 4. Numbered work 4 is covered by Requirement 3 (landscaping) 5. Requirement 2(4) is not applicable to numbered work 5.		
8.	**R4(1)**	*4.—(1) No authorised development may commence until a construction and environment management plan has been submitted to and approved by the relevant planning authority. The construction and environment management plan must be substantially in accordance with the draft construction environment management plan in so far as it relates to the relevant numbered work set out in the document with reference appendix 19.1 revision 2 of the environmental statement and must include the following—*	**Construction and Environment Management Plan** R4(1) requires the submission of a Construction and Environment Management Plan before commencement. • Should this read: *"…substantially in accordance with the draft construction and environment management plan (document reference 6.4.11, revision 2) forming part of the environmental statement insofar as it relates to the relevant numbered work and must…")*? • Would it be preferable for the draft CEMP to be a separate certified document listed in A35 in view of its importance?	Applicant
		Applicant comment: In respect of the ExA's question regarding the wording of Requirement 4(1), the Applicant has re-ordered the words so that the reference to "insofar as it relates to the relevant numbered work..." is at the end. Given the changes to Schedule 2 (documents and plans to be certified), the Applicant has deleted "reference 6.4.11, revision 2 as this is now covered in Schedule 2). These amendments have been made t in the dDCO submitted at Deadline 7. In respect of the ExA's question regarding whether the draft Construction and Environment Management Plan (CEMP) should be listed as a separate certified document in Article 35 of the DCO, the Applicant is of the view that the draft CEMP is already subject to certification by the Secretary of State by virtue of it forming part of the Environmental Statement, and as such does not consider that the draft CEMP needs to be listed separately in Article 35 of the DCO.		

9.	**R12(1)**	*12.—(1) Numbered works 1 and 2 must not commence until written details of the surface and foul water drainage system for the operation of the authorised development has been submitted to and approved by the relevant planning authority. <u>The surface and foul water drainage system must be substantially in accordance with</u> the illustrative foul and surface water drainage strategy.*	**Surface and foul water drainage system and Work No. 3** R12(1) requires the submission of written details of the surface and foul water drainage system before the commencement of Works Nos. 1 and 2. • In relation to drafting, the Applicant is asked to consider whether the underlined text in column 3 should be redrafted as follows? - "…*The submitted details of the surface and foul water drainage system must be substantially in accordance with*…."? • The ExA notes the Applicant's view (paragraph 3.29 of its oral summary at the last DCO ISH [REP6-011]) that Work No. 3 need not be referred to in this requirement. Having considered this further the ExA agrees that as Work No. 3 relates to surface water drainage and related landscaping and ecological mitigation and is largely self-contained, there is no apparent scope for interface with the foul drainage system. However, the potential for cross-over between the landscape and ecological performance of the surface water drainage system provided in Work No. 3 and the discharge of R12(1) remains a possible source of confusion whilst the requirement refers jointly to a "…<u>surface</u> and foul water drainage system…". Should R12(1) (or another provision such as a definition) be amended to make express that the details sought do not relate at all to Work No. 3, or to clarify that surface water discharged from a system serving Works Nos. 1 and 2 is discharged into Work No. 3. Views are sought from the Applicant, NRW and (in relation to foul drainage) Welsh Water about how best to provide drafting clarity on this point.	Applicant, NRW, Welsh Water

		Applicant comment: In respect of the ExA's question regarding the wording of Requirement 12(1) in Schedule 3 to the dDCO, the Applicant agrees and has made the amendment in the dDCO submitted at Deadline 7. In respect of the ExA's question regarding the interaction between Requirement 12(1) and numbered work 3, Requirement 12 covers the integrated system that is required for numbered works 1 and 2. The surface water part of that system is described in numbered work 3. The Applicant has amended Requirement 12(1) to refer to numbered work 3 as well as numbered works 1 and 2 to assist the ExA.		
10.	**R13(3)**	*(3) The artificial lighting for the authorised development must be implemented in accordance with the approved details.*	**Artificial lighting** R13(3) relates to artificial lighting. • Is it necessary for a timescale for implementation of the approved lighting to be provided? • If so, should that be done on the face of the Order or could a timescale form part of the 'approved details' by adding the words "… and the timescale for its implementation…" after 'development' and before 'must'?	Applicant, WCBC
		Applicant comment: The Applicant agrees but considers that the amendment should be made to Requirement 13(1) as follows: *"No generation of electricity on a commercial basis is to take place until written details of the control of artificial lighting during maintenance and operation of the authorised development have been submitted to and approved by the relevant planning authority, such details to include the timetable for implementation of the artificial lighting and measures to keep external lighting to the minimum necessary for operational safety and security reasons, incorporating cut-offs to reduce light pollution."* It therefore follows that Requirement 13(3) will require the Applicant to implement the lighting in accordance with the timetable as approved under Requirement 13(1). This amendment has been made in the dDCO submitted at Deadline 7.		
11.	**Protective provisions** **Sch 9 Part 1**		**Protective Provisions: National Grid** Have the changes to Part 1 of Schedule 9 been considered and agreed by National Grid? Is there any	Applicant, National Grid

			outstanding disagreement? Please provide evidence.	
		Applicant comment: The Applicant confirms that the changes to Part 1 of Schedule 9 have been considered and agreed by National Grid. As such, the Protective Provisions contained in Revision 5 of the dDCO are agreed. Email evidence of this agreement is attached, and National Grid's legal advisers have also agreed to provide written confirmation of this direct to the Examining Authority.		
12.	**Protective provisions** **Sch 9 Part 6**		**Protective Provisions: Wales and West Utilities** Have the changes to insert Part 6 of Schedule 9 been considered and agreed by Wales and West Utilities? Is there any outstanding disagreement? Please provide evidence.	Applicant, Wales and West Utilities
		Applicant comment: The Applicant sent the draft protective provisions to Wales and West Utilities on 15 November 2016. To date the Applicant has not received any comments or proposed amendments from Wales and West Utilities on the draft protective provisions.		
13.	**Protective Provisions not yet incorporated into the DCO, annexed to the Applicant's letter to the ExA of 7 December 2016 (7 Dec** **PPs): all provisions**	**Protective Provisions (and their relationship with Compulsory Acquisition): Solar Farm Undertaker** At the Compulsory Acquisition Hearing and the Issue Specific Hearing on the draft Development Consent Order held on 24 November 2016, The ExA raised questions with the Applicant relating to the ongoing need for the exercise of compulsory acquisition powers over land owned by Mr Gerard Michael Ormrod Owen of Pickhill Bridge Farm, Cross Lanes, Marchwiel, Wrexham LL13 0UH (Mr Owen) and subject to an unspecified option agreement (the solar farm option) in favour of Earthworm Energy Limited, Browns Road, Daventry, Northamptonshire, NN11 4NS (Earthworm) providing for the construction of a solar farm, for which planning permission has been granted. The land in question is traversed by the Applicant's proposed gas connection alignment and remains the most direct and preferred route for the construction of this alignment by the Applicant. The preferred route benefits from an extant planning permission. It having become clear that an effect of the proposed compulsory acquisition in this location would be to bisect the consented solar farm with consequential effects on its deliverability or operation, the Applicant has engaged with Mr Owen to negotiate a private agreement for a diversionary route by which the proposed gas connection alignment would pass around the proposed solar farm. This diversionary route		Applicant, Mr Owen, Earthworm.

		would remain within land owned by Mr Owen. In the Applicant's submission, the diversionary route is not the preferred route and its delivery would have to be conditional (in summary terms) upon: • proof of need for the diversion, in terms of the proposed solar farm undertaker demonstrating an obligation on their part to construct and operate the solar farm; and • obtaining planning permission for the diversion. The Applicant has made clear its view that, even if the necessary conditions were to be met indicating that the solar farm would become operational, the plots subject to the solar farm option would remain subject to CA provisions in the dDCO. Its reasoning is set out in full in its letter to the ExA of 7 December 2016 [AS- 006][1].	
		Recognising the remaining potential for the CA provisions to impact adversely on the solar farm undertaking, the Applicant has proposed draft protective provisions in favour of the solar farm operator. Whilst these are not incorporated in the Version 5 dDCO, a draft is annexed to the Applicant's letter of 7 December 2016 [AS-006][2]. The purpose of the protective provisions is to provide assurances to a solar farm operator about the process for the removal and reinstatement of solar farm equipment and the payment of associated expenses and costs, cooperation and the availability of arbitration. They address a range of foreseeable adverse operational effects. Having taken account of the Applicant's reasoning in its letter of 7 December 2016 [AS-006] and of the annexed draft protective provisions, the ExA retains a concern that, should the necessary conditions for the pursuit of the diversionary route be met, the retention of CA provisions over the solar farm option land could have additional adverse effects over and above those addressed in the draft protective provision annexed to the Applicant's letter of 7 December 2016 [AS-006]. It appears possible that the ongoing presence of CA provisions in such circumstances could: • harm the prospects for a solar farm operator obtaining construction finance and/or a contract to sell power (adverse commercial effects); • be contrary to the provisions of the PA2008 s 122, as it would not be clear that the land is required for the development to which the consent relates (as an implementable diversion would be available) and there would no longer be a compelling case in the public interest for the compulsory	

[1] Letter to the ExA from Pinsent Masons, Solicitors for the Applicant of 7 December 2016 [AS-006]
https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010055/EN010055-001504-Letter%20to%20PINS%207th%20December%202016.pdf

[2] In [AS-006] from pg 6

		acquisition; and • be contrary more broadly to DCLG guidance on compulsory acquisition[3]. Turning to the detail of the DCLG guidance: • An ongoing interference in the rights of those interested in the land burdened by the original gas connection alignment may no longer be necessary and proportionate in circumstances where a deliverable alternative exists (paragraph 8). • The solar farm option land would arguably no longer be required for the development to which the development consent relates (paragraph 11(i)) and nor would it serve any of the remaining purposed in paragraph 11 of the DCLG guidance. • In terms of the balance of the public interest against private loss, the adverse commercial effects on a solar farm operation and the potential for the loss of renewable energy generation capacity from a solar farm broadly supported by NPS EN-1 might weigh against the imposition of CA in circumstances where it is not clear that the CA of the solar farm option land is necessary (paragraphs 14 – 16).	
		In reaching this position, the ExA has noted the Applicant's submission set out in its letter of 7 December 2016 [AS-006] that there ought be no need to place any provision on the face of the dDCO to remove the compulsory acquisition provisions on the original gas connection alignment in circumstances where the conditions enabling the construction of the diversionary alignment are met. Whilst such submissions have held good in many circumstances where an applicant and a person with an interest in land reach a voluntary private agreement to facilitate the objective for which compulsory acquisition was sought and where the agreement and the compulsory acquisition proposal relate to the same land, the ExA remains concerned that the distinguishing fact in this case is that the voluntary agreement provides for the use of a diversionary route which is different land. In such circumstances, should the necessary conditions providing for the delivery of the diversionary route be met, different land can be used to achieve the original objectives of the compulsory acquisition. Whilst this point is arguable and the ExA has no concluded position, to proceed with a tandem compulsory acquisition of the original route in such circumstances does not appear to meet the elements of the DCLG guidance highlighted above. In such circumstances, and without prejudice to the position set out in its letter of 7 December 2016 [AS-006], the Applicant is requested to take one of the following courses of action:	

[3] 'Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land', DCLG 2013
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236454/Planning_Act_2008_-_Guidance_related_to_procedures_for_the_compulsory_acquisition_of_land.pdf

		• **provide a Statement of Common Ground** with Mr Owen and Earthworm, clarifying that the protective provisions as annexed to the letter of 7 December 2016 [AS-006] are (subject to any necessary minor drafting revisions to be provided) agreed between these parties and that, for stated reasons, there is no breach of PA2008 or the DCLG guidance and no further changes are sought; or • **prepare an amendment to the annexed protective provisions,** addressing the adverse commercial effects and prospective breaches of PA2008 or the DCLG guidance identified above by ensuring that in circumstances where the necessary conditions for the implementation of the diversionary alignment are met, provisions in the DCO that would otherwise bring about the compulsory acquisition of the solar farm option land would cease to have effect. • If it is the view of one or more of the Applicant, Mr Owen and or Earthworm that amendments to the DCO are required to address any element of the adverse commercial effects and prospective breaches of PA 2008 or the DCLG guidance identified above, but that these should not be placed into a Protective Provision benefitting the solar farm operator, responses to this question should identify where in the DCO the appropriate drafting should be placed and should provide a fully drafted set of amendments. If the second or third of these options is pursued by the Applicant, Mr Owen and Earthworm are invited to respond to it at Deadline 8. It should be noted that the following questions 14 – 22 address the content of the proposed Protective Provision [AS-006] as currently drafted. Responses to this Question (13) and ongoing negotiations between the Applicant and Mr Owen and / or Earthworm may lead to the need for structural and textual changes to the proposed Protective Provision which replace aspects of drafting addressed in the following questions. If that becomes the case, the Applicant is asked to make that clear in its response to this question and to respond to further questions below as appropriate, making clear that the relevant drafting has been replaced.	
		Applicant Comment: The Applicant reiterates its position that whilst a potential diversion is being negotiated with Mr Owen, there is currently no agreement in place. As far as the Applicant is aware, Earthworm Energy has not exercised its option to lease land required for the solar farm. It should also be noted that Mr Owen has not objected to the DCO Application for compulsory acquisition and temporary use powers over his land nor did Mr Owen object to the planning application for the Gas Connection which was submitted to Wrexham County Borough Council (WCBC) and was granted planning permission on 5 September 2016. The Applicant strongly disagrees with any suggestion that the inclusion of compulsory acquisition powers over the original route would be "in breach" of the Planning Act 2008 or the DCLG Guidance. As set out in the Applicant's letter of 7 December 2016 (AS-006), even if a 'voluntary' agreement is obtained for the diversion of	

		the Gas Connection Route over Mr Owen's land, compulsory acquisition powers are still necessary over the original Gas Connection Route to ensure the delivery of the Gas Connection in the event that the landowner fails to comply with the terms of the 'voluntary' agreement. It is for this reason that the Applicant considers that the grant of planning permission will not automatically result in an "implementable diversion" or "deliverable alternative". Until the deed of easement has been granted for the diversion, there is a risk that the landowner will not comply with the terms of any 'voluntary' agreement. Compulsory acquisition powers over the original Gas Connection Route are therefore necessary to deal with this potential scenario. A compelling case in the public interest for the compulsory acquisition of rights over land therefore absolutely remains to ensure that the NSIP can be delivered. The Wrexham Gas Fired Generating Station Order would authorise a generating station that would contribute up to 299MWe of electricity to the energy mix compared with a maximum of 4MWp from the solar farm. The amount of electricity generation from the Wrexham Energy Centre means it qualifies as a NSIP, unlike the solar farm, which means the Secretary of State must determine the Applicant's DCO Application in accordance with National Policy Statements EN-1 and EN-2 (section 104(3) of the Planning Act 2008). EN-1 and EN-2 recognise the need for fossil fuel generation (see paragraph 3.3.11 of EN-1 for example), whilst National Policy Statements EN-1 and EN-3 (for renewable energy) do not cover, or apply to, solar generation (see paragraph 1.8.1 of EN-3). Therefore, the Examining Authority and the Secretary of State must weigh the benefits of the Wrexham Energy Centre NSIP in delivering the policies set out in EN-1 and EN-3 unhindered against the solar farm development (and the fact that the two can co-exist).
		The ExA refers to the potential for the compulsory acquisition powers to "*harm the prospects for a solar farm operator obtaining construction finance and/or a contract to sell power*". Earthworm Energy has not submitted any evidence into the Examination to support the ExA's concern that there will be any such adverse commercial effects. In fact, since the Application was submitted, Earthworm Energy has spent time and money discharging pre- commencement conditions and making non-material amendments to its planning permission in full knowledge of the Applicant's proposal. This suggests that Earthworm Energy is not particularly concerned about the impact of the Gas Connection. The Examination process has afforded Earthworm Energy the opportunity to make full submissions on any concerns it may have and to be heard orally. An advisor to Earthworm Energy has attended only one hearing, where he **did not** indicate, present evidence or advance any argument whatsoever that the Gas Connection would "*harm the prospects for a solar farm operator*". **Accordingly, there is no evidence for the Applicant to comment on (despite being in the last few weeks of the Examination) and there is no evidence for the ExA's statement as to harm. That is pure assumption on the ExA's part without foundation.** The works to construct the Gas Connection will be temporary in nature (up to approximately 28 weeks in total) and therefore any impact on the operation of the solar farm will be for a limited duration. Compensation is payable for any losses suffered as a result of such interference pursuant to the dDCO.
		In considering the balance of public interest against private loss, the Applicant has already committed to reimbursing any losses incurred by the solar farm operator as a result of the construction of the Gas Connection. The Applicant does not consider that there will be any significant public loss as a result of the potential reduction of renewable energy generation during construction of the Gas Connection. Whilst small scale renewable generation is part of the overall need for an increase in renewable energy

		referred to in NPS EN-1, such generation has to be supported by large scale gas fired generation which provides "*vital flexibility to support an increasing amount of low-carbon generation*" and maintains "*security of supply*" (paragraph 3.6.2 of EN-1). There is significant public interest in ensuring the delivery of the Scheme. In any event, the Applicant maintains its position that the solar farm and the Gas Connection can coexist on the same land and therefore any "private loss" is limited to the duration of the construction works only. Earthworm Energy has not provided any evidence to counter this position. Paragraph 5 of the draft protective provisions includes a wide obligation on the Applicant to reimburse any losses suffered by the solar farm operator as a result of any specified works. The Applicant has not sought to exclude economic or consequential losses or cap its liability. The Applicant does not consider it appropriate or necessary for the protective provisions to include an obligation to pay compensation for potential adverse economic effects prior to the commencement of the authorised development or prior to the exercise of compulsory acquisition or temporary use powers, which would be wholly unreasonable in the absence of evidence and without precedent. The Applicant made Mr Owen aware of its proposals, including the prospect of the Gas Connection passing under his land, in 2012. The Applicant notified Mr Owen in accordance with s42 of the Planning Act 2008 in July 2014 which included a redline showing the land through which the Applicant proposed to constructed the Gas Connection. The Applicant does not consider that the public interest will be met if compulsory powers are not granted as a result of a solar farm proposal that was promoted after statutory consultation was carried out for the Scheme, particularly as the two developments can co-exist. This is due to the very fact that, as advanced above, the Wrexham Energy Centre accords with policies EN-1 and EN-2 (and the Secretary of State must determine the application in accordance with those policies), will generate considerable more electricity than the solar farm and, as a NSIP, its delivery should not be hindered when the solar farm and the Wrexham Energy Centre can co-exist. In addition, the Applicant has included a number of safeguards in its dDCO to ensure that the solar farm operator is safeguarded to make sure disruption will be minimised and will be fully compensated. The Applicant acknowledges that it would be reasonable to notify the solar farm operator in the event that it does not intend to exercise compulsory acquisition powers or temporary use powers over the solar farm land. Once this notice had been served, the Applicant would not be able to exercise the compulsory acquisition powers or temporary use powers. This would prevent compulsory acquisition powers continuing to bind the land for longer than is needed. The Applicant will include a notification obligation in the next draft of the DCO.	
14.	**7 Dec PPs: Paragraph 2**	*"apparatus" means any solar photovoltaic panels, cables or other apparatus belonging to or maintained by the Solar Operator <u>for the purposes of electricity</u> generation pursuant to the planning permission*	**Protective Provision for the Solar Operator: Interpretation: "apparatus"** Should a reference to '… and for the export of electricity …' be added after the underlined text to protect grid or distribution network connection assets associated with the solar farm? Alternatively could the underlined text be deleted for the same effect?	Applicant, Earthworm

		Applicant comment: The Applicant has included a reference to "*and for the export of electricity*" within the definition of apparatus in the dDCO submitted at Deadline 7. It should be noted that this only relates to apparatus belonging to or maintained by the Solar Operator. Any apparatus owned or operated by the DNO would be covered by the protective provisions set out in Part 5 of Schedule 9 of the draft DCO.		
15.	**7 Dec PPs: Paragraph 2**	*"specified work" means so much of any of the works comprised in the authorised development or works required to facilitate or are incidental to the authorised development (including, but without limitation, the gas pipeline) whlch are in, on or under any land purchased, leased, held, appropriated or used under this Order that are near to, or will or may affect, any apparatus*	**Protective Provision for the Solar Operator: Interpretation: "specified work"** Should the underlined text be amended to read 'or which are incidental to'?	Applicant
		Applicant comment: The Applicant has added the suggested wording in the dDCO submitted at Deadline 7		
16.	**7 Dec PPs: Paragraphs 2 and 3(3)**	*(3) Regardless of anything in sub- paragraph (2), the undertaker may, in the notice issued under sub-paragraph (1), give notice to the Solar Operator that it desires itself to execute any work, or part of any work, in connection with the removal of apparatus in any of plots GC12, GC12A and GC12B as identified on the land plans, and where such notice is given that work, instead of being executed by the Solar Operator, must be executed by the undertaker within 28 days of the Solar Operator receiving such notice.*	**Protective Provision for the Solar Operator: Interpretation: "work"** Does the term 'work' (in the first underlining) here take the same meaning as in the body of the DCO / as defined in Art 2(1)? If not, the Applicant is requested to define 'work' for the purposes of these protective provisions in Paragraph 2.	Applicant
		Applicant comment: There is no definition of "work" in Article 2(1). In any event, in paragraph 3(3), the term "work" refers to the works required to remove apparatus which are necessary as a result of any "specified work" referred to in paragraph 3(1). "Specified work" is defined in the protective provisions.		

		The Applicant therefore considers that there is no need to define the term "work" in the context of paragraph 3(3). It should be noted that any works relating to the Gas Connection are not part of the authorised development defined in Article 2(1).		
17.	**7 Dec PPs:** **Paragraph 3(3)**	*As Q16 above*	**Protective Provision for the Solar Operator: Removal of apparatus** The provision seeks the removal of certain solar farm assets where notice is served by the undertaker on the solar farm operator. • Is 28 days' notice reasonable and sufficient for a solar farm operator to decommission and remove assets? (For example: the ExA has not reviewed the extant planning permission for the solar farm. However, it is possible that the number and siting of certain assets may be conditioned and hence removal may require an application to vary a condition. It may take longer than 28 days to contract for the removal of assets at a reasonable price, using an appropriately qualified contractor.) • Is it reasonable for the undertaker to take a power to execute removal itself? Is the wording 'within 28 days of the Solar Operator receiving such notice' (in the second underlining) appropriate, or does it empower the undertaker to execute the removal of assets in 28 days or less and so effectively negate the purpose of a notice period.	Applicant, Earthworm
		Applicant comment: The Applicant considers 28 days to be a reasonable time period to remove the relevant solar panels. It should be noted that the Applicant has the power to take temporary possession of the land and remove any structures or erections on 14 days notice pursuant to Article 26. The protective provisions therefore give the Solar Operator twice as much notice as other landowners and occupiers. The Applicant has reviewed the extant planning permission for the solar farm and does not consider that the temporary removal and reinstatement of any of the solar panels would require an application to vary a condition.		

		It is common for protective provisions to enable the Applicant to undertake works to remove assets itself (see paragraph 50(6) of Part 5 of Schedule 9). However, the Applicant is not authorised to carry out any connection or disconnection works. The removal of the apparatus must be completed within 28 days of the notice referred to in paragraph 3(1). Removal works will therefore need to commence prior to the expiration of the 28 days, whether undertaken by the Solar Operator or the Applicant.		
18.	**7 Dec PPs:** **Paragraph 3(4)**	*(4) Where notice is given in sub- paragraph (3), the undertaker must provide the Solar Operator with the opportunity to supervise any work, or part of any work, in connection with the removal of apparatus but if the Solar Operator does not provide any superintendence within the required 28 days, then the undertaker must proceed to execute the works.*	**Protective Provision for the Solar Operator: Removal of apparatus** Is the intention of this paragraph that the solar farm operator must nominate a supervisor within 28 days, after which the undertaker can proceed to carry out the work with or without supervision provided by the solar farm operator? If so, the drafting does not appear to achieve that intention, the adequacy and reasonableness of which is also questioned. The Applicant is also requested to review the drafting of this paragraph to address matters also raised in respect of Paragraph 3(3) in questions 16 and 17 above, namely: • the need for definition of 'work' (second underlining); and • the adequacy and reasonableness of the 28 day provision (third underlining), including the means by which the undertaker would notify the solar farm operator that it would execute the works itself. • The drafting of the first underlining should be amended to read "in the circumstances described in sub-paragraph (3)"	Applicant, Earthworm
		Applicant comment: The Applicant refers to its responses to questions 16 and 17 in respect of the need for a definition of "work" and the reasonableness of a 28 day notice period. The Applicant has made the suggested amendment to the drafting of the first underlining so as to read "*in the circumstances described in sub-paragraph (3)*" in the dDCO submitted at Deadline 7		

		In respect of the supervision of the works, the works must be carried out within the 28 day period in accordance with paragraph 3(3). The undertaker will give the Solar Operator the opportunity to supervise the works but if no supervision is provided then the undertaker can proceed with the works.		
19.	**7 Dec PPs: Paragraph 3(7)**	*(7) Where the undertaker has served written notice in accordance with sub- paragraph (1), the Solar Operator must, within 28 days of receipt of such notice, give written notice to the undertaker whether it requires the undertaker to reinstate the removed apparatus in accordance with such reasonable requirements as the Solar Operator may specify and if no notice is received by the undertaker, the undertaker is under no obligation to reinstate the removed apparatus.*	**Protective Provision for the Solar Operator: Removal of apparatus** Further to issues raised in question 17 above; does this provide a reasonable and sufficient process for a solar farm operator to agree the reinstatement or non-reinstatement of removed assets? It should be noted again (e.g.) that the number and siting of removed assets and the question or whether or not they may be permanently removed may be controlled by agreements or provisions outwith the scope of these provisions, such as conditions to the extant planning permission.	Applicant, Earthworm
		Applicant comment: The Applicant considers 28 days to be a reasonable time period for the Solar Operator to decide whether the removed apparatus should be reinstated. The Applicant has reviewed the extant planning permission for the solar farm and does not consider that the temporary removal and reinstatement of any of the solar panels would require an application to vary a condition.		
20.	**7 Dec PPs: Paragraph 4**	*Generally and* *(4) and its relationship with* *(5) If the Solar Operator in accordance with sub-paragraph (4) and in consequence of the works proposed by the undertaker, reasonably requires the removal of any apparatus and gives written notice to the undertaker*	**Protective Provision for the Solar Operator: Retained apparatus** Does this provision provide a reasonable and sufficient process for a solar farm operator to agree works where the undertaker does not propose to invoke Paragraph 3 and remove assets? More particularly, as sub paragraph (4) does not provide for written notice, how does the underlined text in sub paragraph 5 operate?	Applicant, Earthworm
		Applicant comment: Sub-paragraph 4 requires the Solar Operator to inform the Applicant within 21 days if it requires any "reasonable requirement".		

		The works must be carried out in accordance with such reasonable requirements (sub-paragraph 2). The purpose of sub-paragraph 5 is to make it clear that if the "reasonable requirements" notified to the Applicant include the removal of apparatus then the provisions of paragraph 3 apply. This wording is consistent with the process applicable to gas, electricity and water undertakers set out in Part 5 of Schedule 9 and Wales and West Utilities in Part 6 of Schedule 9. The Applicant considers that the provision is reasonable given it follows that for statutory undertakers (and it should be noted that the current Solar Operator, Earthworm, is not a statutory undertaker).		
21.	**7 Dec PPs: Paragraph 5 & 6**	*Generally*	**Protective Provision for the Solar Operator: Expenses and costs** Do these provisions provide a reasonable and sufficient extent for the repayment of expenses and costs occasioned by a solar farm operator as a consequence of the exercise by the undertaker of its proposed rights? See also Question 4 (Art 39) above.	Applicant, Earthworm
		Applicant comment: The Applicant refers to its response to question 4. The Applicant considers that the expenses and costs provisions in the draft protective provisions are reasonable and sufficient. This wording is consistent with the provisions for the benefit of gas, electricity and water undertakers set out in Part 5 of Schedule 9 and the provisions for the benefit of Wales and West Utilities in Part 6 of Schedule 9. In the event of the exercise of compulsory acquisition powers, the Solar Operator will also be entitled to claim compensation under the Compensation Code.		
22.	**7 Dec PPs: Paragraph 6(1)**	*(1) … if by reason or in consequence of…*	**Protective Provision for the Solar Operator: Expenses and costs** Should the underlined text read 'by reason of or'?	Applicant
		Applicant comment: The Applicant has added the suggested wording in the dDCO submitted at Deadline 7.		