PROGRESS POWER LIMITED’S RESPONSE TO SUBMISSION
ON BEHALF ‘THE EYE AIRFIELD PARISHES WORKING GROUP’

Introduction

1. On 2 October 2014 the Eye Airfield Parishes Working Group (‘EAPWG’) wrote to the Examining authority raising various issues relating to the forthcoming site visit and hearings and enclosing legal advice from their counsel, Jonathan Clay, and indicating that Mr Clay wishes to make legal submissions to the Examination on 17 October. Mr Clay’s legal advice related to (i) impact on the historic environment, (ii) the choice of electricity substation, (iii) the consideration of alternatives sites, and (iv) the need for a direction requiring the Applicant to provide further environmental information in relation to certain cultural heritage issues.

2. On 8 October 2014 the Examining Authority wrote to EAPWG in response indicating, amongst other things, that “any legal submission should be made in writing” and “submitted as soon as possible in order for me to consider it and for written responses from the applicant and any other interested parties”.

3. On 10 October 2014 Progress Power Limited’s (‘PPL’) solicitors, Pinsent Masons LLP, wrote to EAPWG in response to their letter of 2 October drawing attention to additional information that had already been submitted to the Examination in relation to the cultural heritage issues identified in EAPWG’s letter and enclosure.

4. Under cover of an email letter of 12 October 2014 EAPWG replied (with enclosure) to Pinsent Masons in response to Pinsent Masons' letter of 10 October 2014 - we are not sure whether this letter and enclosure were copied to the Examining Authority. The enclosure to that letter comprises the submissions of Jonathan Clay broadly relating to the matters raised in EAPWG’s 2 October letter. These submissions appear to be in response to the Examining Authority’s
letter of 8 October 2014 and so we assume have been sent to the Examining Authority under separate cover.

5. The EAPWG submissions raise three legal points on which we wish to comment briefly at this stage. These are:
   a. The adequacy of the Environmental Statement (‘ES’) and the need for ‘further information’ under regulation 17;
   b. The applicability of section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and
   c. The consideration of alternatives.

**The adequacy of the Environmental Statement and the need for ‘further information’ under regulation 17**

6. The Applicant provided an ES under the *Infrastructure Planning (Environmental Impact Assessment) Regulations 2009* (‘the IP(EIA) Regs 2009’).

7. Before starting the EIA process, PPL requested a Scoping Opinion from the SoS. This request was made on 7 May 2013, and was supported by a Scoping Report entitled ‘Progress Power Project Environmental Impact Assessment Scoping Report’. The Scoping Report describes the key anticipated environmental issues that would require detailed evaluation as part of the EIA process and the methodologies proposed to assess their impacts. Mid Suffolk District Council (MSDC), Suffolk County Council (SCC) and other local and national bodies were consulted by the Planning Inspectorate (PINS) on the Scoping Report. A Scoping Opinion was subsequently issued by the Secretary of State.

8. PPL subsequently consulted on a Preliminary Environmental Information Report (PEIR). Following the end of the statutory consultation phase of the Project, the information presented in the PEIR was then developed further in light of PEIR consultation responses and following further environmental assessment. The resulting information was presented in the ES submitted with the March 2014 Application for the Project.

9. Paragraph 71 of Mr Clay’s submissions state that:
“In the circumstances, the Examining Inspector is asked to recommend to the Secretary of State that a direction should be made under Regulation 17 of the Infrastructure Planning EIA Regulations 2009 requiring the applicant to submit further environmental information in respect of both designated and undesignated heritage assets and their settings. The Inspector is invited to consider including in such a direction a requirement to consider the impact on settings in winter, the details and consideration of alternatives (including the ECC model) and alternative sites and the cumulative impact of the proposals together with other energy development taking place in the Eye Airfield area.”

10. It is often the case that objectors to development projects claim that the ES for that project does not cover some environmental effect or comes to a conclusion with which the objector does not agree; that is not the same, however, as an ES being ‘inadequate’ such as to warrant the provision of ‘further information’ under regulation 17.

11. In R (Bedford & Clare) v. Islington LBC and Arsenal FC [2003] Env. LR 22 463 (paragraph 203), Ouseley J. stressed that the mere fact that the contents of an ES may be controversial is not enough to invalidate it:

“Whilst one should not be over-impressed by the volume or weight of documents – and even very lengthy documents can omit significant factors – I confess to approaching [counsel for the claimant’s] submissions with a degree of doubt as to whether the deficiencies to which he drew attention could be such as to mean that Islington could not reasonably regard the material as constituting an Environmental Statement. It is inevitable that those who are opposed to the development will disagree with, and criticise, the appraisal, and find topics which matter to them or which can be said to matter, which have been omitted or to some minds inadequately dealt with. Some or all of the criticism may have force on the planning merits. But that does not come close to showing that there is an error of law on the local planning authority’s part in treating the document as an Environmental Statement or that there was a breach of the duty in Regulation 3(2) on the local authority’s part in granting planning permission on the basis of that Environmental Statement.” (emphasis added)

12. What is required is an assessment of the “likely significant effects of the development on the environment” (Schedule 4 to the IP(EIA) Regs 2009). The meaning of those words (in the context of the then Town and Country Planning (Environmental Impact Assessment)(England
and Wales) Regulations 1999) was considered by Sullivan J (as he then was) in R v. Rochdale MBC, ex parte Milne (No. 2) [2001] Env. LR 22 406 (paragraph 113):

“... [T]he environmental statement does not have to describe every environmental effect, however minor, but only the “main effects” or “likely significant effects”. It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, “losing the wood for the trees”. What is “significant” has to be considered in the context of the kinds of development that are included in Schedules 1 and 2. Details of landscaping in an application for outline planning permission may be “significant” from the point of view of neighbouring householders, and thus subject to reserved matters approval, but they are not likely to have “a significant effect on the environment” in the context of the assessment regulations.”

13. In R (Blewett) v Derbyshire CC [2003] EWHC 2775 Sullivan J (as he then was) again stressed that:

“In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant’s environmental statement will always contain the “full information” about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting “environmental information” provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (Tew was an example of such a case), but they are likely to be few and far between.”

This passage was approved by the House of Lords in R (Edwards) v Environment Agency [2008] UKHL 22 (paragraph 38).

14. Thus, merely because an objector considers that an ES should contain additional or different information does not mean that the document ceases to be an ES, such that it is necessary or
appropriate for the Examining Authority or Secretary of State to require “further information” pursuant to regulation 17 of the IP(EIA) Regs 2009. In this case there is clearly a valid ES before the Examination and Mr Clay’s submissions do not, therefore, reveal any proper basis on which the Examining Authority or Secretary of State should require ‘further information’ under regulation 17.

15. The Applicant notes the availability of the alternative power to require ‘further information’ under rule 17 of the Infrastructure Planning (Examination Procedure) Rules 2010. This power does not require any conclusion that an ES is ‘inadequate’, but is not referred to in Mr Clay’s submissions.

16. In this case, however, the Applicant considers that it has in fact provided the further information that the EAPWG has indicated it wishes to see produced for the Examination. In its letter of 10 October 2014 Pinsent Masons indicated that additional cultural heritage information has been provided to the Examination and stated that it would be willing to meet to discuss any questions / points that the EAPWG may have arising from that material.

17. It is noteworthy that the Mr Clay’s submissions state in terms (paragraph 4) that “in order to ensure that this submission was produced promptly, it has been drafted without having sight of those additional responses and information from the applicant.” (emphasis added). It is perhaps disappointing that EAPWG have pressed their request for a regulation 17 request without considering the additional information and / or agreeing to discuss the same with the Applicant.

18. EAPWG’s application seeking ‘further information’ under regulation 17 is misconceived, therefore, in that it:

a. does not disclose proper grounds for concluding that the ES is ‘inadequate’; and
b. does not identify why the additional information already supplied to the Examination does not meet its concerns.

19. For the Examining authority (and EAPWG’s) ease of reference, the Applicant has set out below a response to the particular points raised in the EAPWG’s letter of 12 October 2014 where they noted the Applicant’s "widely recognised failures", in particular "(a) to
carry out a comprehensive assessment of the effect on the setting of listed buildings and conservation areas

(i) during winter,

(ii) in accordance with English Heritage (2011) Guidance;

(iii) which includes an assessment of cumulative effect; and

(b) to provide any assessment of alternatives in accordance with paragraph 18 of Schedule 4 of the 2009 Regulations, and established case law, or even to identify what those alternatives might be... ".

20. In this regard, the Applicant can confirm that:

i. The assessment of the importance of the setting to the significance of the heritage assessments was undertaken on three occasions with the first of these being early summer (June 2013). The second visit took place in late winter (early March), and finally in mid-summer (July 2014). As such, the Applicant has carried out a comprehensive assessment on the setting of both listed buildings and conservation areas, including during winter. This assessment was, at the request of SCC and MSDC, revisited and this exercise was reported on in Annex B to the Applicant’s Response to SCC MSDC Local Impact Report (October 2014);

ii. The assessment process followed the EH 2011 guidance which presents a numbers of steps with Step 1 (EH 2011, 17) being the identification of the heritage assets. This is presented in Section 4 Historical and Archaeological Baseline of the DBA. Step 2 (EH 2011, 19) is the assessment of how and to what degree settings make a contribution to the significance of the assets. This is considered in Section 3.4.1 to 3.4.3 and Table 4 of the DBA. The EH Step 3 (EH 2011, 20) is the assessment of the effect of the proposed development on the significance of the assets. This is considered in paragraph 3.4.4 and Table 5 of the DBA. The entire methodology for setting is presented in the Section 3 of the DBA (paragraphs 3.4.1 to 3.4.8). This clearly states that the assessment included a consideration of the contribution of the setting to the significance of the assets and the potential attributes of the setting and factors to consider are presented in Table 4. This is followed by Table 5 which presents factors to be considered when considering the potential attributes of the project. Table 6 offers definitions
of sensitivity for the settings and Table 7 the criteria for the assessment of the magnitude of an impact on the setting of asset.

iii. The ES assessment considered the cumulative impact from National Grid Work on the setting of heritage assets, including in paragraph 13.9.29 which states "The new OHL diversion towers would be 39m in height. Whilst this may cause a negligible cumulative impact for the setting for some of the designated heritage assets, it is not considered to be significant. The construction phase will only be in place for six weeks whilst the diversion works take place, although there would be a long-term impact during their operation".

iv. In relation to point (b) of the letter of 12 October 2014 regarding consideration of alternatives, the Applicant notes its September 2014 response to Examining Authority question 2.5, which sets out the relevant policy and legislative requirements regarding alternatives and notes that "the Applicant considers that it has complied with all policy and legislative requirements to give thought to and provide information on alternatives to all or part of the Project. In particular:

- the Environmental Statement (Document Reference 6.1) (including at section 5) sets out the main alternatives that the Applicant has studied, together with the main reasons for its choice taking into account the environmental, social and economic effects and including, where relevant, technical and commercial feasibility;

- the Electrical Connection Siting Report (Document Reference 10.3) provides detail on the options considered as part of the siting of the Electrical Connection;

- The Design and Access Statement (Document Reference 10.2) explains the process that has led to the chosen design; and how the proposals have been designed to be attractive, durable, adaptable, functional, and minimise visual intrusion;
• The Consultation Report (Document Reference 5.1) explains how community and statutory consultees were able to influence the consideration of certain alternatives;

• Finally, the Planning Statement (Document Reference 10.1) sets out the Applicant’s policy case for the development based upon an assessment against the relevant NPSs and other important and relevant considerations”.

21. In light of the above, the Applicant does not consider that the Examining authority, in fact, needs to make a direction under Rule 17 that further information is required, as the information noted by the EAPWG as being missing has already been submitted to the Examination.

The applicability of section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990

22. It is important to note, first of all, that this issue does not go to the question of whether the ES is adequate or inadequate and / or whether there should be further information under regulation 17, but to the quite separate question of the ‘weight’ to be attached to that information in decision-making.

23. In the legal advice attached to EAPWG’s 2 October 2014 letter it was stated that “The effect on the heritage assets is a matter which is not merely a material consideration but places a special duty on the decision-maker by the operation of section 66 of the Town and Country Planning (Listed Buildings and conservation Area) Act 1990 to consider the effects of the development on the settings of historic buildings and conservation areas.”

24. PPL’s response to Relevant Representations dealt with this point at paragraphs 13.2.24-27

“In the context of listed buildings, regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010 (the "Decisions Regulations") sets out that it is necessary for the Secretary of State to “have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses” (emphasis added). This language differs from the duty in section 66 of the Planning (Listed Buildings and Conservation
Areas) Act 1990 ("PLBCAA") for a decision maker to have “special regard” (emphasis added) and indicates that Parliament intends that a particular approach be taken in the case of NSIPs.

In the case of East Northamptonshire DC v Secretary of State for Communities and Local Government [2014] 1 P & C.R. 22 (the “Barnwell Manor” case), the Court of Appeal held that a decision maker should give “considerable importance and weight” to the desirability of preserving the setting of listed buildings when coming to their decision on an application for planning permission, pursuant to the overarching statutory duty contained in section 66(1) “PLBCAA”. However, the strict relevance of the decision is limited to applications falling within the Town and Country Planning Act 1990 regime, not DCO applications pursuant to the Planning Act 2008. This is because section 66(1) of the PLBCAA states:

“In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses” (emphasis added).

The definition of “planning permission” in the PLBCAA links back to the definition in the Town and Country Planning Act 1990. DCO applications do not fall within the definition of planning permission pursuant to the Town and Country Planning Act 1990. This is because section 336 of the Town and Country Planning Act 1990 defines the term by reference to Part 3 of the Town and Country Planning Act 1990. Within Part 3, section 57 of the Town and Country Planning Act 1990 states that planning permission is required for the carrying out of any development, but this is subject to section 33(1) of the Planning Act 2008 (the exclusion of the requirement for planning permission etc. for development for which development consent is required).

PPL’s reading of the situation is that applications for development consent are excluded from the ambit of section 66 of the PLBCAA. This interpretation is supported in that the provisions in relation to the restriction on works to a listed building, and the control of demolition of listed buildings set out in the PLBCAA specifically carve out applications for development consent (again, pursuant to the Planning Act 2008). However, the duty to have special regard could be
considered by the Secretary of State to be “relevant and important” in the context of his decision making under section 104 of the Planning Act 2008.”

25. A number of simple propositions emerge:

a. Section 66 does not apply to decisions to grant development consent under the Planning Act 2008;

b. The Barnwell Manor and Forge Field Society decisions were concerned with the duties to have “special regard” under section 66 or to pay “special attention” under section 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 (‘PLBCAA 1990’); and

c. For decisions under the planning Act 2008, regulation 3 of the Infrastructure Planning (Decisions) Regulations 2010 provides that:

“(1) When deciding an application which affects a listed building or its setting, the [Secretary of State] must have regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses.

(2) When deciding an application relating to a conservation area, the [Secretary of State] must have regard to the desirability of preserving or enhancing the character or appearance of that area.

(3) When deciding an application for development consent which affects or is likely to affect a scheduled monument or its setting, the [Secretary of State] must have regard to the desirability of preserving the scheduled monument or its setting.”

d. Thus the decisions in Barnwell Manor and Forge Field Society are not directly applicable to the current application.

26. In Mr Clay’s submissions attached to EAPWG’s 12 October letter, there is an acknowledgement (paragraph 29) that the word ‘special’ does not appear in regulation 3. There then follows a series of propositions that seek to suggest that regulation 3 should be read as if that word did appear and that, by extension, the duty to apply ‘considerable weight’, as in the Barnwell Manor and Forge Field Society decisions, should be applied. No authority or proper basis is advanced for this proposition.

27. Once again, therefore, this submission is misconceived.
28. The Applicant has acknowledged that pursuant to section 104(2)(d) of the Planning Act 2008 the Secretary of State must have regard to “any other matters which the Secretary of State thinks are both important and relevant”. The last sentence in paragraph 13.2.27 on the Applicant’s response to Relevant Representations (above) was not intended to indicate that the Secretary of State should apply the duty to have ‘special regard’ to the setting of listed buildings in section 66, but simply to draw attention to the fact that he could have regard to the fact that there is such a duty in the Town and Country Planning Act regime when determining what weight to apply to the issue.

29. In any event, whether the Secretary of State applies ‘considerable weight’ or not to the effect on the setting of listed buildings and conservation areas, the Applicant is of the very firm view that the adverse impacts of the proposed development do not outweigh its benefits (section 104(3) and (7)).

The consideration of alternatives

30. With respect, Mr Clay’s submissions conflate two different concepts with regard to alternatives. First, the Applicant’s acknowledge that there is a duty under the IP(EIA) Regs 2009 for the ES to give “an outline of the main alternatives studies by the applicant and an indication of the main reasons for his choice taking into account environmental effects”. That duty has been discharged by section 5 of the ES (‘Site Selection, Alternatives and Design Evolution’). Second, is the issue of whether there is a legal or policy duty to consider alternatives in the decision-making process and, if so, how. Where there is a legal or policy requirement to alternatives, paragraph 4.4.3 of NPS EN-1 provides a number of ‘principles’ when deciding what weight to be given to them. Those principles will not be repeated here in full as the Examining authority will be familiar with them, but certain principles are highlighted below:

- alternatives not among the main alternatives studied by the applicant (as reflected in the ES) should only be considered to the extent that the Secretary of State thinks they are both important and relevant to its decision;
- alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable or alternative
proposals for sites would not be physically suitable, can be excluded on the grounds that they are not important and relevant to the Secretary of State’s decision;

- alternative proposals which are vague or inchoate can be excluded on the grounds that they are not important and relevant to the Secretary of State’s decision; and

- it is intended that potential alternatives to a proposed development should, wherever possible, be identified before an application is made to the Secretary of State in respect of it (so as to allow appropriate consultation and the development of a suitable evidence base in relation to any alternatives which are particularly relevant). Therefore where an alternative is first put forward by a third party after an application has been made, the Secretary of State may place the onus on the person proposing the alternative to provide the evidence for its suitability as such and the Secretary of State should not necessarily expect the applicant to have assessed it.

31. Section 5 of the ES sets out the alternatives considered by the applicant and refers to other reports as supporting its conclusions. From Mr Clay’s submissions, and EAPWG’s other representations, it is not clear what alternatives the Secretary of State is being urged to consider, other than the Gas Insulated substation (‘GIS’) design for the Electrical Connection Compound (‘ECC’) and on that there is considerable material before the Examination.

32. Again, the suggestion that the material before the Examination is inadequate is simply misconceived.

33. In light of the above, the Applicant would like to make clear that it supports the Examining authority's proposed approach, as set out in its letter to EAPWG of 8 October, namely that "[y]ou have requested that the issue of field boundaries and ancient hedgerows should be deferred in order to allow you and your advisers time to respond to the submissions recently received from Progress Power. I propose to go ahead with questions on these issues at the hearing on 16-17 October on the basis of the material I have in front of me. But I would welcome written responses from your Working Group and others to the new material that has been submitted. I will set a deadline for those responses following the hearing. If, after receiving those responses, I have further questions to ask then I will include an item in the agenda for the hearings scheduled for 10-11 December".
34. As such, the Applicant intends to arrive on 16 October prepared to deal with all matters relating to cultural heritage, acknowledging that there may be an exchange of written representations on the Chadwick Report, which the Examining authority may want to then follow up on in December.

Michael Humphries QC
Mark Westmoreland-Smith
13 October 2014