

1. INTRODUCTION

- 1.1 The Cleve Hill Solar Park (the "project") proposals comprise a solar generation station and energy storage facility. The project is proposed to be located on the north Kent coast near Faversham and adjacent to an existing flood defence beneath the Saxon Shore Way public footpath.
- 1.2 The project constitutes a Nationally Significant Infrastructure Project ("NSIP") under the Planning Act 2008 (the "2008 Act"). An application for a development consent order ("DCO") in respect of the project is expected to be submitted by Cleve Hill Solar Park Ltd ("CHSPL") to the Planning Inspectorate by 31 October 2018 for determination by the Secretary of State.
- 1.3 This note sets out the position agreed between CHSPL and the Environment Agency (the "EA") in relation to the inclusion of the existing flood defence within the project's Order limits (i.e. redline boundary), and the powers and rights needed to maintain it, in the DCO application. This note explains:
- 1.3.1 the pre-application consultation undertaken between CHSPL and the EA;
 - 1.3.2 the works that CHSPL seeks the powers and rights to undertake to the existing flood defence that would constitute "maintenance" and/or "emergency" works;
 - 1.3.3 the EA's powers to undertake works to the flood defence;
 - 1.3.4 the marine licencing exemptions available to the EA in respect of maintenance and emergency works; and
 - 1.3.5 the exemptions sought by CHSPL in the draft DCO.

2. PRE-APPLICATION CONSULTATION

- 2.1 CHSPL has engaged in pre-application consultation with the EA and the EA's proposals for management of the existing flood defence, set out in the draft Medway Estuary and Swale Strategy ("MEASS"). In summary, the EA has confirmed that in the event the project is built it would not maintain that flood defence. The maintenance of the flood defence is necessary to protect the project during its operational phase. Therefore, CHSPL proposes to include the flood defence in the project's Order limits in the DCO application, along with the powers and rights necessary to maintain it. This would enable CHSPL to effectively "step in to the shoes" of the EA in terms of maintaining the flood defence.
- 2.2 The EA confirmed in a letter to CHSPL dated 8 May 2018 that:

"The proposed policy set out within MEASS will become adopted once the strategy is officially signed off. We would therefore respond to any formal Development Consent Order application stating, as outlined within MEASS, that publicly funded maintenance of the defences is not economically viable without the associated justification of managed realignment in the future. We would expect major infrastructure owners such as CHSPL, National Grid and BTLAL [Blue Transmission London Array Limited] to undertake maintenance of the defences whilst occupying the site. In the case of CHSP, we would expect this to come into effect once construction / use of the site commences."

"We discussed your proposal to extend the [project's] red line boundary to include the flood defences protecting the site, and the inclusion of powers and rights in your DCO to enable CHSPL to undertake maintenance works to the defences. We would not have any concerns or objections with this approach in order to give CHSPL the ability to maintain the defences in the future. The defences beyond the [project's] site boundary would be maintained by the Environment Agency within MEASS Benefit Area 7.2b (subject to partnership funding being available)."

- 2.3 Therefore, since May 2018, CHSPL and the EA have engaged further to help CHSPL better understand the flood defence maintenance regime undertaken to date by the EA and identify a scope of maintenance works that should be included in the DCO application and accompanying environmental statement ("ES") as part of the baseline assessments.
- 2.4 On 23 July 2018 representatives of CHSPL met with those of the EA and were able to agree a scope of maintenance and emergency works, which is set out in section 3 of this note. Subsequent to that further dialogue took place between the legal representatives of CHSPL and the EA respectively, and the EA confirmed its agreement with the content of this note.

3. MAINTENANCE & EMERGENCY WORKS TO THE FLOOD DEFENCE

- 3.1 CHSPL's marine engineering consultants, JBA, have suggested four parameters and a scope for day to day maintenance works to the flood defence, which has been agreed with the EA as follows.
- 3.2 The four parameters are:
- 3.2.1 use the same materials as those present to date;
 - 3.2.2 not alter the plan form or cross section of the original defences;
 - 3.2.3 not provide an overall increase/reduction in flood level; and
 - 3.2.4 not require excavations of beach material deeper than 1.5m.
- 3.3 The scope of day to day maintenance works comprises the following non-exhaustive list of the type of works/activities undertaken:

(i)	Inspection
(ii)	Investigation (above MHWS, inclusive of trial pitting)
(iii)	Replacement of expansion joint material
(iv)	Concrete repair (to BS EN 1504)
(v)	Replacement of concrete toe beam
(vi)	Vegetation management (grass cutting, removal of larger vegetation)
(vii)	Replacement of loose and missing block work
(viii)	Repair of voids

(ix)	Fencing repair / replacement
(x)	Servicing outfalls
(xi)	Cleaning outfall ancillary structures
(xii)	Topping up of embankment crest levels at localised low spots
(xiii)	Vermin control
(xiv)	Repairs of rutting in crest
(xv)	Repointing of jointed structures
(xvi)	Replacing modular blocks
(xvii)	Replacement of toe armour as required
(xviii)	Reinstatement of timber toe piles (on river frontage)
(xix)	Timber groyne plank replacement
(xx)	Replacement of bolts on groyne
(xxi)	Placement of timber rubbing boards on groyne
(xxii)	Localised movements of beach material
(xxiii)	Cleaning/dredging of drainage ditch channels
(xxiv)	Replacement of pitching where present
(xxv)	Replacement of access structures
(xxvi)	Painting
(xxvii)	Any other activities required to be undertaken within the four parameters set out in 3.1.1 to 3.1.4.

3.4 The EA has also confirmed that works required in an emergency would be defined as activities carried out in response to any flood, or in response to the imminent risk to property (including the project's infrastructure) from flooding.

3.5 Therefore, CHSPL intends to include in the DCO the powers and rights necessary to undertake maintenance and emergency works of the nature described above.

4. THE EA'S POWERS

4.1 The EA has powers to undertake flood and coastal risk management works relating to main rivers and the sea under section 165 of the Water Resources Act 1991 ("WRA").

4.2 In summary, section 165 of the WRA provides the EA with the power to undertake flood risk management works and those may include:

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- (a) to maintain existing works (including buildings or structures) including cleansing, repairing or otherwise maintaining the efficiency of an existing watercourse or drainage work;
 - (b) to operate existing works (such as sluice gates or pumps);
 - (c) to improve existing works (including buildings or structures) including anything done to deepen, widen, straighten or otherwise improve an existing watercourse, to remove or alter mill dams, weirs or other obstructions to watercourses, or to raise, widen or otherwise improve a drainage work;
 - (d) to construct or repair new works (including buildings, structures, watercourses, drainage works and machinery);
 - (e) for the purpose of maintaining or restoring natural processes;
 - (f) to monitor, investigate or survey a location or a natural process;
 - (g) to reduce or increase the level of water in a place; and
 - (h) to alter or remove works.
- 4.3 In order to undertake (a) to (f), the conditions are: (i) that the EA must consider the work desirable having regard to any national flood and coastal erosion risk management strategy; and (ii) that the purpose of the work is to manage a flood risk from the sea or a main river. The works in (g) and (h) require only that condition (i) be satisfied.
- 4.4 In addition to section 165, under section 38 of the Flood and Water Management Act 2010 ("FWMA") the EA has a power to carry out the kinds of works "*in the course of flood or coastal erosion risk management*" (e.g. erecting or maintaining structures) that will or may cause flooding or coastal erosion where certain conditions have been satisfied. These include if it is in the interest of nature conservation and the benefits outweigh the harmful consequences.
- 4.5 The national flood and coastal erosion risk management strategy was published in 2011¹, and provides a framework for managing flood and coastal erosion. That strategy contains broad principles such as to implement risk management measures to reduce risk of flooding from rivers and the sea, and to maintain flood risk management systems to reduce likelihood of harm to people and damage to the economy, environment and society. Therefore, principle of maintaining the flood defence in question accords with the strategy.
- 4.6 Section 165 of the WRA states that it only authorises entry onto land of any person for maintenance of existing works. Whilst it does not mention emergency works, it does not either specify any conditions which would prevent works being undertaken in an emergency. There is no clarification of the term "land" beyond this, nor any terms or conditions set for it. The EA has confirmed that in practice it agrees entry onto third party land, for maintenance purposes, via correspondence.
- 4.7 Neither section 165 of the WRA or section 38 of the FWMA provide development consent for the works it sets out, but the EA has the benefit of such consent in other legislation, e.g. permitted development rights and exemptions (see below).

¹ "*Understanding the risks, empowering communities, building resilience*" DEFRA/Environment Agency 2011 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228898/9780108510366.pdf

- 4.8 Section 165 of the WRA contains the ability for the EA's powers under this section to be delegated to a local authority. However, there is no provision for this to effectively be delegated to a third party. Section 38 of the FWMA does not provide for delegation.
- 4.9 The EA also has wide powers under section 37(1) of the Environment Act 1995 to do anything "*which, in its opinion, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions*" which may permit a third party, such as CHSPL, to benefit from the power.

5. THE EA'S MARINE LICENCE EXEMPTION

- 5.1 Section 65 of the Marine and Coastal Access Act 2009 ("MCAA") provides that defined licensable activities require a marine licence. Such activities largely relate to the deposit of materials seaward of mean high water springs, or undertaking works in that area. The works described in section 3 above constitute licensable activities, such that normally a marine licence would be required by a party carrying out those works.
- 5.2 Section 74 of the MCAA permits exemptions to the requirement for a marine licence. These are contained in the Marine Licensing (Exempted Activities) Order 2011 (the "Order"). Of relevance here are Articles 19 and 20, which provide an exemption to marine licencing for:

Article 19: "an activity carried on by or on behalf of the Environment Agency for the purpose of maintaining any—

(i) coast protection works;

(ii) drainage works; or

(iii) flood defence works,"

Article 20: "an activity carried on by or on behalf of the Environment Agency for the purpose of executing emergency works in response to any flood or the imminent risk of any flood".

- 5.3 Guidance we have seen from the MMO², which it also made as part of a representation in the Galloper Offshore Wind Farm Order examination³ defines maintenance as "*upkeep, repair or reasonable improvement of works*". This would cover the type of maintenance works set out in section 3 of this note.
- 5.4 The only qualifications in respect of the scope of works that may be covered by the exemption in Article 19 are that the works must be undertaken within the "*existing boundaries*" of the works being maintained and cannot include beach replenishment. Article 20 does not define emergency works. However, the MMO provides guidance on its website⁴ which says that "*“emergency” has been defined by the MMO as imminent risk to human health, property or the environment*".
- 5.5 The works defined within section 3 above would fall within the marine licence exemptions available to the EA, such that it would not be required to apply for a marine licence in respect of day to day maintenance or emergency works.

² MMO: *Marine Licensing of Emergency Activities*, <http://www.se-coastalgroup.org.uk/wp-content/uploads/2014/08/Marine-Licensing-of-emergency-activities.pdf>

³ [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010003/EN010003-001672-121129%20EN010003%20MMO%20response%20to%20Rule%2017%20request%20\(2\).](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010003/EN010003-001672-121129%20EN010003%20MMO%20response%20to%20Rule%2017%20request%20(2).)

⁴ <https://www.gov.uk/government/publications/marine-licensing-exempted-activities/marine-licensing-exempted-activities>

6. DCO PROVISIONS – EXEMPTIONS FOR CHSPL

6.1 CHSPL proposes to include the flood defence in the Order limits for the project's DCO application, along with the powers and rights necessary to maintain it. This would enable CHSPL to effectively "*step in to the shoes*" of the EA in terms of maintaining the flood defence. Without the benefit of the exemption held by the EA, CHSPL would need the benefit of a deemed marine licence under the 2008 Act or a marine licence under the MCAA.

6.2 Given that CHSPL only proposes to do those works that would be carried out by the EA on a day to day basis, it makes sense for CHSPL to benefit from the same marine licence exemption as the EA in relation to those works. Otherwise it would need to apply for a marine licence in relation to works for which the EA would not need to apply for such consent. That would be an undesirable and unnecessary administrative burden for all concerned.

6.3 A DCO may include provisions to apply, modify or exclude existing legislation. Section 120(5) of the Planning Act 2008 provides that a DCO may:

"(a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order;"

6.4 Therefore, CHSPL proposes to include drafting in the DCO to modify the Order such that the marine licence exemptions available to the EA, may apply to CHSPL.

6.5 Similar drafting is used regularly within DCOs to apply, or disapply, statutory provisions that would otherwise apply to an undertaker or activity. The amendments are known as "non-textual" as they amend the legislation in relation to another legislative instrument only, in this case, the DCO for CHSP.

6.6 The draft DCO extends the exemption to CHSP as follows:

(1) Subject to paragraph (2), article 19 (Maintenance of coast protection, drainage and flood defence works) and article 20 (Emergency works in response to flood or flood risk) of the Marine Licensing (Exempted Activities) Order 2011 applies to any activity carried on by the undertaker as part of, for the purposes of or in connection to Work No 8 of Schedule 1 to this Order as it would as at the date of this Order have applied to any such activity if it had been carried out by the Environment Agency.

(2) In its application to such activities, paragraph (2) of article 19 and paragraph (2) of article 20 are substituted by—

"Paragraph (1) is subject to the condition that the activity is carried on within the Order limits."

6.7 Work No. 8 of the draft Order only comprises the flood defence and land on the foreshore required for access to the flood defence and the description of the development in that Work would include the scope of works referred to in section 3 above.

7. Entry onto third party land

7.1 CHSPL would undertake maintenance and emergency works to the existing flood defence under the powers and rights contained in the DCO and not pursuant to the EA's powers under section 165 of the WRA, or other legislation.

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7.2 CHSPL would obtain entry onto third party land in order to undertake works authorised by the DCO either: (a) by private agreement, e.g. a deed of licence or easement; or (b) compulsorily via compulsory acquisition or temporary use powers in the DCO. CHSPL would not be reliant on the EA's powers of entry onto land. CHSPL has commenced negotiations with relevant interested parties with the objective of having agreements in place before construction starts.

7.3 In view of the above, in practice third party landowner consent would either have been obtained by CHSPL, or would not be required, by the time maintenance or emergency works are required to be undertaken. CHSPL does not intend to rely on the EA's powers generally, or specifically in relation to powers of entry onto or possession of land.

8. Conclusion

8.1 This note sets out the joint position of CHSPL and the EA. It explains why CHSPL requires the powers and rights to carry out works to the existing flood defence in order to protect the project during its operational phase. It also explains the exemption to marine licencing of benefit to the EA and why CHSPL requires the same so that it may, in effect, carry out the same works to the existing flood defence as may be undertaken by the EA, without having to apply for a deemed marine licence under the 2008 Act or a marine licence under the MCAA.

Pinsent Masons LLP (for Cleve Hill Solar Park Limited)

Environment Agency