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Cc: [REDACTED]
Subject: EN010085 - Cleve Hill Solar Park - The Applicant's Deadline 3 Submission (email 6 of 7)
Date: 01 August 2019 23:20:11
Attachments: [REDACTED]

Dear Hefin,

EN010085 - Cleve Hill Solar Park - The Applicant's Deadline 3 Submission (email 6 of 7)

Please find attached the Applicant's Deadline 3 submission.

Please do not hesitate to get in touch if you have any queries.

Kind regards,

Mike

Michael Bird

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CLEVE HILL SOLAR PARK

WRITTEN SUMMARIES OF ORAL SUBMISSIONS ISSUE SPECIFIC HEARING 2 ON THE DRAFT DCO

August 2019
Revision A

Document Reference: 11.1.4
Submitted: Deadline 3

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SOLAR PARK

**WRITTEN SUMMARY OF CLEVE HILL SOLAR PARK LIMITED'S ("THE APPLICANT")
ORAL CASE PUT AT ISSUE SPECIFIC HEARING 2 ON 18 JULY 2019**

1. INTRODUCTORY REMARKS

- 1.1 Issue Specific Hearing 2 ("ISH") dealing with matters relating to the draft Development Consent Order (DCO) was held at 10:00am on 18 July 2019 at The Alexander Centre, 17 Preston Street, Faversham, ME13 8NZ.
- 1.2 The ISH took the form of running through items listed in the agenda published by the ExA on 8 July 2019 (the "**Agenda**"). The format of this note follows that of the Agenda. The Applicant's substantive oral submissions commenced at item 3 of the Agenda, therefore this note does not cover items 1 and 2 which was procedural and administrative in nature.

2. AGENDA ITEM 1 – INTRODUCTION OF THE PARTICIPATING PARTIES

- 2.1 The ExA: - David Rose (Lead Panel Member), Andrew Mahon and Helen Cassini
- 2.2 The Applicant:
- 2.2.1 **SPEAKING ON BEHALF OF THE APPLICANT:** - Gareth Phillips (Pinsent Masons LLP).
- 2.2.2 Present from the Applicant: - Hugh Brennan and Simon McCarthy.
- 2.2.3 The Applicant's legal advisor:- Claire Brodrick and Peter Cole (Pinsent Masons LLP).
- 2.2.4 The Applicant's consultants: Mike Bird (Arcus Consultancy Services)
- 2.3 Swale Borough Council – Graham Thomas
- 2.4 The Faversham Society – Harold Goodwin and David Melville

3. AGENDA ITEM 3 – DRAFT DCO ARTICLES

- 3.1 **The Applicant to summarise the structure of the draft Order and the key revisions in its updates. Is the Order in a form that allows all parties to understand the fundamental parameters, structure, approach and limitations of the consent sought?:**
- 3.2 Peter Cole, on behalf of the Applicant, briefly outlined the provisions in the draft Order. Mr Cole explained that for a DCO application the draft Order was prepared by the Applicant. The draft Order was divided into three main sections. The Articles set out the powers to construct, use and maintain the development. For example, powers of compulsory acquisition and powers for stopping up footpaths. Mr Cole confirmed that the powers are required to build the Project.
- 3.3 Mr Cole then referred to Schedule 1 of the draft Order which is split into two sections. The first part sets out the works with reference to the Works plans (APP-007). Mr Cole explained that this Schedule controls what can be constructed and where it must be located on the site. Mr Cole referred to the second part of Schedule 1 which sets out the Requirements. Mr Cole explained that whilst the Articles provided the Applicant with the necessary powers, the Requirements restricted those powers. The Requirements set out the framework for the development and include a number of plans and schemes that must be submitted to Swale Borough Council (SBC) for approval.

- 3.4 Mr Cole then referred to the third section of the draft Order which was the deemed marine licence contained in Schedule 8. Mr Cole explained that part of the works to the flood defence may take place beyond the mean high water (MHW) and therefore require a marine licence which is administered by the Marine Management Organisation (MMO). A marine licence is typically a standalone consent but Mr Cole confirmed that it can be included in a DCO with separate conditions.
- 3.5 **Applicant to describe the extent of the Works, provisions and powers sought, and the implications or proportionality of rights sought over any land on a permanent or temporary basis:**
- 3.6 Mr Cole explained that the extent of the works is set out in Schedule 1 of the draft Order. Each Work number is shown as a different colour on the Works plan (APP-007). Work No 1 relates to the solar cells and includes connection cables, inverters etc. The site has been divided into different fields and the separate fields can be seen on the Works plan. Work No 2 is shown coloured yellow on the Works plan and contains the substation and either solar cells or energy storage. Mr Cole explained that whether solar panels or energy storage is taken forward is contingent on the business case for energy storage. Work No 3 relates to the substation and includes the flood protection bund. Work No 4 includes underground cables to connect the substation into National Grid's existing substation. The works relating to the habitat management areas to the east and south east are included in Work No 8. The flood defence works are set out in Work No 9.
- 3.7 Claire Brodrick on behalf of the Applicant explained that the compulsory acquisition powers contained in the draft Order are proportionate as the powers can only be exercised if required for the authorised project (as set out in Schedule 1) or to facilitate, or are incidental, to the authorised project. In respect of the temporary use powers in the draft Order, Mrs Brodrick confirmed that Articles 24 and 25 stipulate that the Applicant must not remain in possession of any land for longer than reasonably necessary and these powers are also proportionate.
- 3.8 **Article 2: Interpretation – definitions:**
- 3.9 In response to a question from the ExA relating to the definition of "commencement" in Article 2, Mr Cole confirmed that the definition had been amended in the version of the draft Order submitted at Deadline 2 (REP2-003).
- 3.10 Mr Cole explained that the reference to pre-commencement works had been removed and the draft Order now included a separate definition of "site preparation works". Mr Cole added that Requirements 7, 9, 10 and 13 had been amended accordingly so as to specifically apply to site preparation works.
- 3.11 **Article 5: Is the approach likely to be acceptable to the Secretary of State?:**
- 3.12 In response to a question from the ExA regarding the rationale for the reference to timescales and arbitration in Article 5, Gareth Phillips on behalf of the Applicant explained that if the Project is sold to a different developer then Article 5 provides that proper controls and balances are in place. Another hypothetical scenario when Article 5 would apply is if a separate a developer took forward the energy storage or part of the solar park. Mr Phillips added that there are controls on such a transfer and in certain circumstances the Secretary of State's consent is required.
- 3.13 Mr Phillips explained that a transfer of benefit article was first added to the Burbo Bank and Walney Extension DCOs and was principally introduced as offshore wind projects are legally required to transfer the transmission assets to an OFTO. A transfer of benefit provision has now become a fairly standard provision for subsequent energy DCOs.

- 3.14 Mr Phillips added that when the provision was first introduced not much thought was given as to how the application and consenting process would operate. The drafting has evolved over time to include other consultees such as the MMO and include other requirements (for example specifying the matters that the Applicant must set out in writing). Mr Phillips noted that the previous drafting omitted a process or timescale for determination once an application for consent had been made to the Secretary of State. This omission has resulted in a degree of uncertainty which is problematic in the context of the sale of a multi million pound project, especially if banks are involved. Mr Phillips explained that the Applicant has therefore sought to introduce a set of timescales.
- 3.15 Mr Phillips confirmed that similar wording was included in the draft Order for the Hornsea Three DCO (where Pinsent Masons were acting for the developer) and in the draft Orders for the Norfolk Vanguard and Norfolk Boreas DCOs (where different legal advisers are representing the developer). It is therefore clear that other developers see the benefit of taking this approach i.e. the inclusion of a process and timescale for the Secretary of State to grant consent.
- 3.16 Mr Phillips noted that the Examining Authority for the Hornsea Three DCO raised questions about the timescales in Article 5. Mr Phillips confirmed that the Department for Business, Energy and Industrial Strategy (BEIS) has not yet given any indication as to whether the proposed drafting was acceptable. Mr Phillips understood that to date only a handful of projects have made an application to the Secretary of State for consent to the transfer of benefit and it has taken between 3 and 4 months to obtain a decision. Mr Phillips noted that it hasn't been the same timescales for each application and no indication as to timing was given when an application was submitted to BEIS.
- 3.17 Mr Phillips confirmed that the proposed drafting was considered to be good practice and similar to the process for the discharge of requirements. Mr Phillips noted that Hornsea Three was due to be determined in October before end of the Cleve Hill Solar Park Examination. Mr Phillips confirmed that he would keep an eye on that decision and, if examination time permits, amendments to Article 5 could be made accordingly. However, if the decision is postponed for any reason it will fall to the ExA to make their recommendation, in which case Mr Phillips suggested that the ExA might wish to recommend that the Secretary of State determine the drafting of Article 5 as he/she sees fit having regard to any recently made DCOs. Mr Phillips reiterated that this was not an application specific amendment but instead good practice that was applicable to all DCOs.
- 3.18 In response to a question from the ExA relating to the justification for a Secretary of State decision being overruled by an arbitrator, Mr Phillips referred to the Burbo Bank DCO and the Triton Knoll DCO in which ExA and SoS confirmed that every matter and party to a DCO should be subject to arbitration.
- 3.19 Mr Phillips added that it was not a political decision as to whether to permit a transfer of benefit, instead the process is seeking to ensure that the transferee is bonafide. This decision requires professional judgment and mistakes can be made. Mr Phillips explained that if any refusal is reviewed by an independent arbitrator then the Secretary of State will be able to jointly appoint the arbitrator and submit evidence to the arbitrator. Mr Phillips confirmed that this was no different that any other body making a decision that is referred to a higher level. For example, Section 106 Agreements (which are planning agreements with local authorities exercising statutory powers) typically include dispute resolution provisions. A local authority, which is a statutory body, with a statutory function and powers is therefore subject to the decision of an expert/arbitrator. Mr Phillips emphasised that the Applicant was not seeking to fetter the powers of the Secretary of State but instead ensure that the draft Order included an evidence based and transparent process for the transfer of benefit.
- 3.20 **Article 7: Is there sufficient control over noise to justify the defence against proceedings in respect of statutory nuisance?:**

- 3.21 The Applicant notes that the ExA confirmed that it was content with the Applicant's response to the ExA's written questions on this issue (REP2-006).
- 3.22 **Articles 10 and 11: Safeguards:**
- 3.23 The Applicant notes that the ExA confirmed that it was content with the Applicant's response to the ExA's written questions on this issue (REP2-006).
- 3.24 **Articles 24 and 25: The relevance of the Neighbourhood Planning Act 2017:**
- 3.25 The Applicant notes that the ExA confirmed that it was content with the Applicant's response to the ExA's written questions on this issue (REP2-006).
4. **Articles 28 and 29 and Schedule 8: Marine Licence**
- 4.1 **Applicant to confirm agreement with MMO and outline the proposed deemed Marine Licence:**
- 4.2 In response to the ExA's request for an update on the current position with the MMO, Mr Phillips explained that the application version of the draft Order contained two methods by which the Applicant could undertake works beyond MHW. Mr Phillips reiterated that the MMO has jurisdiction over the intertidal zone. Typically an independent party without statutory powers would need to apply to the MMO for a marine licence to carry out works in the intertidal zone. However, there is a mechanism under PA 2008 to bring a marine licence within a DCO and it is deemed to be granted by the Secretary of State. Once granted, the marine licence is administered by the MMO in the usual way.
- 4.3 Mr Phillips explained that in respect of the flood defence within the Order limits, the Environment Agency (EA) has statutory powers and benefits from an exemption under the marine licencing legislation. The Applicant is seeking to step into the EA's shoes in order to maintain the flood defence. Mr Phillips confirmed that the Applicant had sought to clarify the powers that the EA considers it has and the extent of powers the MMO considers the EA has. As the PA 2008 enables a DCO to amend other the legislation, the Applicant had suggested that either a marine licence is included in the draft Order or the draft Order amends the legislation to make the exemption apply to the Applicant. Mr Phillips confirmed that the EA was agnostic as to the approach taken. The MMO reserved its position at the point of submission of Application.
- 4.4 Mr Phillips explained that post submission of the Application the MMO had firmed up its position and its preferred approach is to included a deemed marine licence. The MMO provided the Applicant with copies of draft licences used on other projects. Mr Phillips confirmed that the Applicant had now reached agreement with the MMO on all matters and this was reflected in Statement of Common Ground submitted prior to the hearings (AS-028). Mr Phillips added that the MMO wanted to ensure that the conditions in the marine licence in the draft Order are the same as those included in separate licences for works of the same nature.
- 4.5 **Article 33**
- 4.6 In response to a question from the ExA relating to the date in Article 33, Mr Phillips explained that the drafting is consistent with previously made orders. The Applicant cannot control when tree preservation orders (TPO) are granted within the application site. If a TPO is in place at the point of application for a planning permission under the Town and Country Planning Act 1990, then the planning permission includes deemed consent for works under the TPO and there is no need for a separate consent. Article 33 makes it clear that this power applies to any TPO whether it was made before or after the submission of the Application. Mr Phillips confirmed that Article 33 would be amended to make it clear that it also included a TPO made on 18 November 2018.

4.7 **Article 35**

4.8 In response to a question from the ExA relating to Article 35, Mr Phillips confirmed that Article 35 applies to all parties subject to arbitration. Mr Phillips reiterated that the Article was not seeking to fetter any statutory powers but that the dispute resolution process applies to all parties.

4.9 **Article 36**

4.10 In response to a question from the ExA relating to Article 36, Mr Phillips confirmed that Article 36 applies when there has been a failure to determine an application. The appeal mechanism in respect of the Requirements is the same as the appeal mechanism for applications to discharge conditions in a planning permission. However, Mr Phillips explained that if there is a technical disagreement then such a matter could be resolved via arbitration. An independent view made be needed on an aspect of evidence and an arbitrator may have the appropriate skill set to deal with certain matters, for example expertise on fire safety. Mr Phillips added that arbitration has been included as it is a helpful mechanism.

4.11 In response to a question from the ExA as to whether there was the potential for the expertise of one Secretary of State to be over ruled by another Secretary of State. After some discussion Mr Phillips confirmed that the ExA was correct.

4.12 **Article 39**

4.13 In response to a question from the ExA, Mr Phillips confirmed that Article 39 was also subject to arbitration as Article 35 referred to any difference under any provision.

5. **Schedule 1, the Authorised Development**

5.1 **Work No. 2 seeks flexibility for either an energy storage facility or an extension of the PV array: is this degree of flexibility appropriate and is it adequately covered by the EIA and RIAA?**

5.2 In response to a question from the ExA regarding whether the flexibility for energy storage or PV array in Work No 2 had been appropriately and adequately assessed, Mike Bird on behalf of the Applicant referred to the Applicant's response to written question 1.5.6 (REP-006). Mr Bird explained that the area in question is surrounded by solar arrays and the bund and there are no additional receptors. Mr Bird confirmed that the Applicant would provide clarification in writing that all aspects, including glint and glare, had been properly assessed. A clarification note in respect of glint and glare has been prepared and submitted at Deadline 3 (see document reference 11.4.2). The clarification note confirms that all aspects have been properly assessed.

5.3 In response to a question from the Faversham Society, Mr Bird explained that the worst case in terms of design had been assessed in the Environmental Statement (ES). The worst case assumes that the energy storage will be implemented. Mr Bird referred to the Applicant's response to written question 1.5.6 (REP2-006) which sets out the consideration of an alternative worst case if solar panels are implemented. However, Mr Bird confirmed that in the ES the worst case includes the energy storage.

5.4 In response to a question from the Faversham Society as to whether the bund would be built if the energy storage was not built, Mr Bird explained that the specification of the flood protection bund depends on the timing of the decision of whether to proceed with the energy storage. If a decision is made prior to construction of the wider site (Phase 1) then a smaller bund for the substation will be constructed. However, if a decision has not been made prior to construction of the main site then the full flood protection bund will be constructed and sufficient space will be left for the energy storage to be constructed at a later date.

- 5.5 In response to a question from the Faversham Society regarding the need for greater specification in the draft Order, Mr Phillips explained that the construction of a larger bund will have a considerable cost consideration. If there is a question mark over energy storage a decision will be made before costly earth works are undertaken.
- 5.6 Mr Phillips explained that in the event that the Secretary of State is not minded to grant development consent for the energy storage then it would be possible for the Secretary of State to strike out the energy storage facility from the DCO. If the Applicant had not assessed an alternative then the Secretary of State would not be able to grant development consent for solar panels as an alternative.
- 5.7 Mr Phillips added that the detailed design is subject to approval by SBC. In light of the concerns relating to safety, Mr Phillips confirmed that the Applicant would include an obligation to provide a safety management plan as part of the Outline Design Principles (see Deadline 3 submission document reference 7.1, revision B). Once details have been submitted to SBC, SBC would then be able to consult other stakeholders (such as the fire service) and members of the public on the safety management plan and if there was a need for independent adjudication, then SBC could refer the matter to arbitration.
- 5.8 Mr Phillips reiterated that the draft Order does not set out the detailed design and that SBC is the enforcing and determining body on reserved matters relating to the detailed design.
- 5.9 **Works No. 8 and further associated development (g) relating to habitat area creations and management.**
- 5.10 In response to a question from the ExA relating to associated development and whether the Applicant believes that the nature of the proposed works might be more clearly set out in draft Order, Mr Cole confirmed that the Applicant would consider this point further and respond in writing.
- 5.11 In response to a suggestion from Mr Bird that the Accompanied Site Inspection could include a water control structure, the ExA confirmed that it would be very useful to see the type of structure. The Applicant notes that the ExA also requested photographs of typical structures and these are included as Deadline 3 submission document reference 11.4.11.
- 5.12 **Powers sought for maintenance of the existing sea defences.**
- 5.13 In response to a request from the ExA for clarification as to the power to remove the existing flood defence, Mr Phillips explained that the works sought in Schedule 1 and the deemed marine licence are for day to day maintenance. The Applicant was not proposing to completely reinstate the flood defence and this was not something that EA would be able to do under its exemption. Mr Phillips clarified that the Applicant may undertake emergency works but a separate marine licence would be required for any substantial reconstruction as such works would be outside the scope of the deemed marine licence.
- 5.14 In response to a query from SBC relating to the EA's powers being transferred to a private developer, Mr Phillips reiterated that the Applicant was not seeking to rely on the EA's powers but had included a deemed marine licence in the draft Order instead.
- 5.15 In response to a question from SBC relating to imposing a positive obligation on the Applicant to maintain the flood defences and a community fund. Mr Phillips explained that the EA will typically look to neighbouring landowners to finance repairs to flood defences. If there are no landowners of financial means then the EA will carry out the works using its own resources (i.e. paid for by the public purse). However, all works carried out by the EA will be subject to cost benefit analysis which seeks to weigh the costs of works and the degree of risk.

- 5.16 Mr Phillips added that where there are landowners of substantial means (for example National Grid), the EA would normally ask for a contribution and set up a financing agreement which is similar to Section 106 or Section 278 Agreement. The EA then carries out works that are part financed by the landowner.
- 5.17 Mr Phillips explained that if substantial works to the flood defence are required then the EA would normally approach the Applicant, National Grid and London Array Limited for a contribution towards the costs of the works. This is the current position. Mr Phillips confirmed that there is no legal framework to provide for funding and the EA will only proceed with works that the EA deems appropriate subject to cost benefit. This may not necessarily include works required to protect infrastructure or insure it.
- 5.18 Mr Phillips confirmed that the Applicant was therefore seeking the powers to carry out maintenance works in the draft Order as security. If the Applicant carries out the works then it will pay for it, not the public purse. Mr Phillips noted that the Applicant could ask for a contribution from London Array Limited and National Grid. Mr Phillips concluded that there was no other way for the Applicant to be able to ensure that it could protect the Project from flooding.
- 5.19 In response to comments made by the Faversham Society, Mr Phillips confirmed that it was actually a misconception that the EA has a duty to maintain flood defences. The EA has the statutory power to do the works but no statutory obligation to do so.
- 5.20 Mr Phillips added that if the Project does not go ahead there is no guarantee that the EA will maintain the flood defence. Mr Phillips reiterated that the Applicant is not seeking to take anything away from the EA as the EA's powers will continue to be in place. Mr Phillips noted that an environmental permit will be required separately for the works and this permit is approved by the EA. Therefore regardless of what is agreed with SBC and the MMO, the Applicant will additionally need consent from the EA. As part of the permitting process the Applicant will need to provide a detailed methodology and design for works to the flood defence. However, in reality the Applicant would consult SBC, the MMO and the EA in parallel with all three organisations being asked to approve one set of documents.
- 5.21 In response to a comment from the Faversham Society relating to strategic flood defence decisions by the EA, Mr Phillips explained that this point was outside the scope of the Examination. However, given the value of the equipment and insurance obligations the Applicant would be maintaining the flood defence if necessary.
- 5.22 In respect of the issue of managed realignment, Mr Phillips explained that it was unlikely that a realigned flood defence would be constructed to the south of the existing power lines due to the costs associated with relocating the pylons. Mr Phillips added that there was no guarantee that the Saxon Shore Way would be realigned to provide exactly the same recreational opportunities.
- 5.23 **Powers sought for the dedication of a permissive path.**
- 5.24 The ExA referred to the Compulsory Acquisition Hearing on 16 July 2019 and noted that the Applicant was going to provide further clarification as to the nature of the works as development and associated development. Further details of the construction and surface treatment of the permissive path are set out in the updated version of the Outline Design Principles (see Deadline 3 document reference 7.1, revision B). Operational management of vegetation in relation to public and permissive footpaths is set out in the updated Outline Landscape and Biodiversity Management Plan (see Deadline 3 document reference 6.4.5.2, revision B).
- 5.25 **Proposed time limit set out in the DCO for the Proposed Development.**
- 5.26 This was not discussed in detail, but the Applicant notes that the five year period sought for implementation of the draft Order is consistent with other made DCOs.

- 5.27 **The identification and definition of ‘significant effects’ and the adequacy of the Mitigation Schedule for ensuring that all necessary measures will be readily auditable at the discharge of Requirements.**
- 5.28 In response to a question from the ExA regarding the consideration of mitigation for any effects that are not significant in terms of the EIA regulations, Mr Bird confirmed that the Applicant would update the Mitigation Schedule. The Mitigation Schedule has been updated at Deadline 3 (see document reference 7.2, revision C) and the Applicant confirms that the Mitigation Schedule includes all mitigation referred to in the ES, including mitigation of not significant effects. No specific threshold has been used for mitigation of effects in the ES, however, mitigation has been proposed and applied where practicable for any identified adverse effect of greater than negligible significance.
- 5.29 In response to comments made by the Faversham Society relating to traffic impacts on the school, Mr Phillips explained that an Outline Construction and Traffic Management Plan (CTMP) was submitted with the Application (APP-205). Mr Phillips added that if any Interested Parties wished to include additional provisions then these should be submitted into the Examination so that the Applicant can consider them. Mr Phillips explained that the starting point for the CTMP was the measures imposed when the Cleve Hill substation was being constructed. The Applicant had reviewed the conditions and consulted with the highways authorities to establish the measures that had worked and the measures that didn't work. Mr Phillips clarified that the final CTMP would be approved by SBC and Kent County Council (KCC) and subject to further consultation. The Applicant considered that it was appropriate to finalise the CTMP once the detailed design is known.
- 5.30 **Sufficiency of the Outline Design Principles and Mitigation Schedule documents for certification to ensure that the Works authorised through any DCO do not exceed the worst-case scenario assessed in the Environmental Statement.**
- 5.31 In response to a question from the ExA as to whether all design mitigation measures and worst-case design assumptions considered in the ES had been captured in the Outline Design Principles or other outline plans (e.g. the outline construction environmental management plan”), Mr Phillips confirmed that the Applicant would carry out an audit of the Outline Design Principles and the Mitigation Schedule against the ES and confirm in writing. Following the hearing the Applicant has carried out this audit and it has informed the updates to the Mitigation Schedule (see document reference 7.2, revision C) and the Outline Design Principles (see document reference 7.1, revision B) which have been submitted at Deadline 3.
- 5.32 **Are all of the necessary parameters of the Proposed Development that require a ‘Rochdale envelope’ for the purposes of the EIA included as such in the Outline Design Principles and thus assured in the draft DCO?**
- 5.33 In response to a question from the ExA as to whether all necessary parameters are included in the Outline Design Principles, Mr Phillips confirmed that the Applicant was confident that all parameters had been included in the Outline Design Principles. Mr Phillips noted that some parameters are not linked to the worst case scenario. For example, the height of each solar panel is an important consideration, however, the angle is not one that needs to be secured as it does not have an impact on LVIA.
- 5.34 The ExA referred to Table 5.1 in the Outline Design Principles and queried whether some aspects may have some environmental impact, for example the depth, size dimensions and finish of the tracks, road and permissive path, the depth of the piles and cables could have secondary effects in terms of traffic and noise.
- 5.35 Mr Phillips confirmed that the Applicant did not expect to carry out extensive works that would have significant effects in environmental terms, the works referred to were not so extensive that they would have an impact in EIA terms but would still constitute

development. However, Mr Phillips confirmed that the Applicant would carry out an audit to confirm that all parameters had been included. Following the hearing this audit has been carried out and the subsequently updated Outline Design Principles document has been submitted at Deadline 3 (see document reference 7.2, revision B).

- 5.36 In response to comments made by the Faversham Society in respect of the lack of detail regarding the energy storage, Mr Phillips confirmed that the Applicant was satisfied that the Rochdale envelope had been complied with. Mr Phillips reiterated that the detailed design was subject to further regulation and approval by SBC. Mr Phillips added that the Applicant would provide a summary of the relevant legislation that applies to safety related matters for energy storage for Deadline 3 (see document 11.4.1). Mr Phillips concluded that Interested Parties could be reassured that the Outline Design Principles comply with the Rochdale envelope and outside of the planning regime there are a number of electricity installation regulations that apply before the Applicant can operate the energy storage.
- 5.37 In response to comments made by the Faversham Society relating to the level of detail provided for offshore wind turbines, Mr Phillips explained that different levels of detail are provided for each technology. Certain details for wind turbines are linked to environmental effects; for example, the turbine height has an impact on collision risk for birds. Mr Phillips confirmed that for wind turbines the detail is provided and secured so as to guarantee a form of mitigation. For energy storage, the environmental effects are related to LVIA so the details required relate to size and height.
- 5.38 Mr Phillips explained that the Applicant requires flexibility to respond to national need and technology innovation, including fire suppressant systems. It would not make sense to commit to particular technology when new technology may be better and safer. Mr Phillips reiterated that Interested Parties had the security of knowing that SBC must approve the final detailed design and that there is other legislation to control the safety of the energy storage.

6. **Schedule 2, Requirements**

- 6.1 **Requirement 3: Is the outline phasing scheme in sufficient detail to reassure that the EIA and RIAA were properly informed?**
- 6.2 In response to a question from the ExA regarding the outline phasing scheme, Mr Bird confirmed that sufficient detail had been provided and referred to the Applicant's response to written question 1.4.48 (REP2-006). Mr Bird confirmed that the Applicant would provide an update to the outline SPA construction noise management plan for Deadline 3 (see document reference 6.4.12.10, revision B).
- 6.3 **6.3 Requirement 10: CEMP and subordinate plans and assurance of mitigation implementation; how are documents including the Outline Design Principles and the outline CEMP properly secured in the draft DCO? Should the draft DCO be amended to include reference to the specific documents and plans that are relied upon?**
- 6.4 In response to a query from the ExA, the Applicant confirms that the pollution prevention plan is an integral part of the CEMP, so would not be part of the list of documents under requirement 10(2). The Applicant has amended the outline CEMP submitted at Deadline 3 (document reference 6.4.5.4, revision B) to make clear that it is the equivalent of a pollution prevention plan.
- 6.5 **Requirement 13: Is the Secretary of State able to rely on a current outline and future detailed Special Protection Area Construction Noise Management Plan to be certified by the local authority in respect of the Habitats Regulations Assessment or is more detail needed before close of Examination and certification by the Secretary of State required?**

- 6.6 In response to a question from the ExA, Mr Bird reiterated that the Applicant would be providing an updated version of the SPA Construction Noise Management Plan for Deadline 3 (see document reference 6.4.12.10, revision B) and confirmed that this updated version would be adequate for the Secretary of State to conclude that the requirements of the Habitats Regulations Assessment had been secured.
- 6.7 In response to a question from the ExA relating to financial commitments for decommissioning, Mr Phillips referred to the strength of the enforcement powers under the PA 2008 compared to the Town and Country Planning Act 1990. Mr Phillips explained that planning permissions often required a decommissioning fund partly due to the lack of enforcement powers. However, the PA 2008 has stronger powers and the relevant planning authority could bring criminal prosecution against personal officers and company itself. Mr Phillips added that the drafting was consistent with other DCOs where there was no requirement to provide a decommissioning fund. Mr Phillips confirmed that the enforcement powers would apply to non-resident directors.
- 6.8 In response to a query from SBC regarding timescales in Requirement 16 (decommissioning), Mr Phillips explained that a DCO does not normally impose a time limit on the operational life of the development. The only DCO to date with a time limit is the North Wales Wind Farm Connection DCO which was primarily linked to the time limit imposed in associated planning permissions for the onshore windfarms and to deal with impacts on historic assets.
- 6.9 Mr Phillips confirmed that here a time limit was only being considered due to the EA's proposals for managed realignment. Mr Phillips explained that the EA was waiting for the Medway Estuary and Swale Strategy (MEASS) to be approved by Defra and this would provide some certainty to the Examination. Mr Phillips added that it would be helpful if the ExA could ask Defra for an update on the approval of the MEASS.
- 6.10 Mr Phillips explained that the EA has a strategic policy but there are many checks and balances before managed realignment can be implemented. For example, Gateway 3 is when the EA will need to obtain the necessary investment, consents and land to carry out the works. However, when discussing decommissioning there was a great deal of uncertainty as to when, or if, managed realignment would be carried out. The EA has not yet confirmed which epoch the EA will choose to deliver managed realignment in, if at all.
- 6.11 Mr Phillips clarified that it is only the MEASS that is dictating an operational time limit for the Project. It will only be in the public interest to stop generating electricity if managed realignment is definitely going to be delivered. Additionally it may not be the whole of the site that would be required for managed realignment. The forty year time period suggested in the draft Order is consistent with the timing in the current MEASS (i.e. managed realigned will not take place within 40 years). Mr Phillips confirmed that the Project was therefore consistent with the MEASS.
- 6.12 Mr Phillips explained that an updated draft Requirement 16 was submitted into Examination last week (AS-031) and has been agreed with the EA at officer level but requires further senior management level approval. The draft Requirement requires the Applicant to serve a notice on EA and SBC when commissioning starts and this is the starting point for the 40 years to run.
- 6.13 Mr Phillips explained that the next step is that the authorised development must stop within 40 years unless a later period is agreed via the decommissioning review. Mr Phillips confirmed that the EA was originally nervous about the timescales, as the EA did not know whether 12 months would be enough time to obtain the necessary land, consents and funding. The EA therefore suggested that the Requirement included a review mechanism.
- 6.14 Mr Phillips explained that sub paragraph 3 sets out a review process that is undertaken no later than 35 years by the EA and Applicant to ascertain how far the EA

has got with the plans for managed realignment and establish a route map to achieve steps to delivery. The EA and Applicant will then submit a programme for approval by SBC. The EA and Applicant will keep SBC informed so that SBC has oversight as to what has been agreed between EA and the Applicant.

- 6.15 Mr Phillips confirmed that sub-paragraph 3(a) stipulates that decommissioning is not required before 40 years have expired, this provides certainty for the Applicant. In the event of any disagreement then arbitration can be used, for example if the timing is not agreed.
- 6.16 Mr Phillips referred to sub-paragraph 4, if the EA is not quite ready to commence with managed realignment then the decommissioning review programme can be reviewed every 5 years so that electricity generation can continue until managed realignment comes forward.
- 6.17 Mr Phillips then referred to sub-paragraph 5 which requires a decommissioning notice to be served by SBC based on the evidence received from EA that all matters relating to funding, consents and land have been secured. Mr Phillips noted that SBC can require further information to be provided, for example if SBC has concerns relating to timescales or decommissioning and managed realignment works (e.g. traffic concerns). The decommissioning notice should include a plan setting out the extent of the Order limits that needs to be decommissioned and whether any areas can remain in operation and continue to generate electricity.
- 6.18 Mr Phillips added that the area for realignment may be smaller than the Order limits due to the power lines and the realignment of the flood defence. It is very unlikely that managed realignment is going to require the removal of the London Array Substation or cables. The Applicant anticipates that the flood defence will be relocated to go around the substation and protect it. It is therefore possible that some parts of the authorised development, e.g. the energy storage facility, could continue with managed realignment.
- 6.19 Mr Phillips explained that the remainder of the Requirement (from sub-paragraph 7 onwards) purely deals with decommissioning of the Project and provides that a decommissioning and restoration plan is submitted to SBC for approval. The intention is for the land to be restored to its current agricultural status in the absence of managed realignment. However, if such restoration is not consistent with the EA's objectives for management realignment then a different type of restoration may be agreed. For example, the Applicant may not be required to reseed the land. Mr Phillips reiterated that the extent of restoration would be determined by the EA and approved by SBC.
- 6.20 In response to a comment from SBC regarding the use of the terms "power" and electricity", Mr Phillips confirmed that the Applicant would review the drafting to ensure consistency.
- 6.21 In response to a query from SBC regarding the need for a reference to the fortieth anniversary, Mr Phillips confirmed that it doesn't have to be included but the Applicant felt that including the milestone would be of benefit to the EA. Mr Phillips added that the Applicant had tried to come up with drafting that would satisfy a number of people and that the EA had agreed to the drafting.
- 6.22 The Applicant notes that SBC made a series of comments relating to the drafting of the Requirement and Mr Phillips confirmed that the Applicant would review the drafting and try to make the process clearer. The Applicant and SBC agreed to discuss the drafting further following the hearing.
- 6.23 In response to a comment from SBC that the Applicant could try to prevent managed realigned by refusing to give the necessary land to the EA, Mr Phillips confirmed that in theory this was correct. However, if the EA could not obtain the land voluntarily then

the EA would need to use its compulsory purchase powers. Mr Phillips added that the situation was the same with or without the Project as the EA has to convince all affected landowners (including Kent Wildlife Trust, the Goodmans, National Grid, London Array Limited and the chalet owners) to sell their land, and the value of that land to the current owners may well exceed the level of compensation that might be payable under the Compensation Code.

- 6.24 In response to a question from the ExA relating to the link between the 40 years and land acquisition, Mr Phillips explained that 40 years was the milestone that the EA had indicated. However, there would be some lead in time required for some of the consents and these could take 1-2 years to achieve. For example, prior to making a compulsory purchase order (CPO) the EA would need to show that it had made attempts to acquire the land by negotiation (this could take over a year). The CPO process could take a further 1-2 years to complete. Overall, the Applicant considered that it could take up to 5 years to get all the consents, land and funding and therefore had introduced the review process in year 35 and then a rolling 5 year review.
- 6.25 In response to a question from SBC regarding the appeal and arbitration process, Mr Phillips referred to the arbitration timescales set out Schedule 9 to the draft Order. Any appeal would be as per the timescales under the Town and Country Planning 1990. Mr Phillips noted that judicial review has separate timescales and couldn't be specified in the draft Order as it is determined by the Court. However, the timescale for judicial review is normally 9 to 10 months.
- 6.26 In response to a query from SBC relating to the outline decommissioning and restoration plan, Mr Bird confirmed that an outline plan was included in the Application documents (APP-206)
- 6.27 In response to a question from the Faversham Society relating to the possibility of the energy storage being retained even if the solar array was decommissioned, Mr Phillips confirmed that this scenario could arise. The energy storage facility could serve another purpose, for example the import/export capability could be used for importing power from grid or from London Array. Mr Phillips added that it would depend on whether there was a business case at that time for an energy storage facility alone.
- 6.28 **Requirement 18: Is it likely to be acceptable to have something which is approved by the Secretary of State being varied by the local authority or another person?**
- 6.29 In response to a question from the ExA, Mr Cole explained that Requirement 18 essentially provides some limited flexibility where Requirements have been discharged. Mr Cole emphasised that there is an important limitation that any variation must be in line with the ES. Requirement 18 cannot be used to make material changes.
- 6.30 Mr Phillips added that wording similar to Requirement 18 first featured in the Hinkley Point C DCO and has been carried forward into subsequent DCOs. The provision acknowledges that details may be submitted well in advance of works commencing and at the time of actually undertaking the works (once a contractor has been procured) there may be a better way of carrying out those works.
- 6.31 For example on the Walney Extension DCO, the use of HDD was very expensive at time of seeking consent. However, at the time of construction technology had developed to enable trenchless construction beneath ditches and footpaths which would mean that there was no need to stop up the footpath. Details submitted to discharge the Requirements had to be amended to enable the trenchless technology to be used.
- 6.32 Mr Phillips reiterated that SBC is bound by the ES and can only allow a variation if it is unlikely to give rise to any materially new or materially different environmental effects

from those assessed in the ES. The Applicant would typically submit an application for a variation with an ES audit, setting out the Applicant's view as to why the variation is unlikely to give rise to any materially new or materially different environmental effects from those assessed in the ES. Mr Phillips emphasised that SBC had discretion as to whether there would be materially new or different environmental effects.

- 6.33 Mr Phillips added that the Environmental Impact Assessment is iterative and the EIA Regulations continue to apply up to the point where the final consent or approval is given by SBC. The EIA Regulations enable SBC to request further information if required. Mr Phillips confirmed that the Secretary of State has been and continues to be satisfied with this drafting.
- 6.34 In response to a query from the ExA relating to the use of quotation marks (for example in Requirement 13(5)), Mrs Brodrick confirmed that the Applicant would review the drafting and ensure that a consistent approach was taken.
- 6.35 In response to a question from the ExA regarding pyranometers across the site, Mr Bird confirmed that the Applicant would update the Outline Design Principles accordingly (see document reference 7.2, Revision B).
- 6.36 Mr Cole confirmed that the Applicant would correct a typographical error identified by the ExA in paragraph 7 of Part 2 of Schedule 8.
- 6.37 In response to a comment from the ExA on the use of "shall" in the draft Order, Mr Phillips confirmed that the Applicant would replace with the word "must". However, Mr Phillips noted that the Secretary of State was not entirely consistent on this point.
- 6.38 In response to a request from the ExA for an update on discussions with KCC relating to footpath closures, Mr Bird explained that as set out in the Rights of Way Management Plan in the CTMP the intention is to keep rights of way open during construction. Mr Bird confirmed that discussions are ongoing with KCC.
- 6.39 In response to a question from the ExA relating to the location of the temporary construction compounds, Mr Bird explained that the compound would be located in the closest point to the spine road in the adjacent field closest to field under construction.
- 6.40 Mr Phillips added that the ES had assessed that the construction compound could be any where with the field next to site under construction and therefore there was no need for limits of deviation. Mr Phillips clarified that the Applicant was not seeking to place a restriction on the part of field where the construction compound is to be located. Mr Phillips confirmed that the Outline Design Principles would be amended to clarify this point (see document reference 7.2, revision B).
- 6.41 Mr Phillips also confirmed that further details relating to the finish and materials would be included in the Outline Design Principles (see document reference 7.2, revision B).
- 6.42 In response to a question from SBC relating to the requirement to consult with third parties, Mr Phillips confirmed that this was a departure from the model provisions but this was due to the fact that the model provisions assumed that the Secretary of State (as opposed to the local planning authority) was approving the Requirements. Mr Phillips clarified that the Applicant would typically consult with stakeholders prior to submitting an application for discharge of a Requirement as it was in the Applicant's interests to do so.
- 6.43 The Applicant notes that SBC referred to the drafting in Requirement 8 and 13 relating to prior consultation being slightly different from the drafting in Requirements 10 and 11 and the need to be consistent.

6.44 Mrs Brodrick informed the ExA that Schedule 5 would be updated in the version of the draft Order submitted for Deadline 3 to include rights of improve the access for plot 3/10 which had been omitted in error.