



# CLEVE HILL SOLAR PARK

## **WRITTEN SUMMARIES OF ORAL SUBMISSIONS ISSUE SPECIFIC HEARING 5 - DRAFT DEVELOPMENT CONSENT ORDER**

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**CLEVE HILL**  
SOLAR PARK

**WRITTEN SUMMARY OF CLEVE HILL SOLAR PARK LIMITED'S ("THE APPLICANT")  
ORAL CASE PUT AT ISSUE SPECIFIC HEARING 5 ON 10 SEPTEMBER 2019**

**1. INTRODUCTORY REMARKS**

- 1.1 Issue Specific Hearing 5 ("ISH") dealing with matters relating to the draft Development Consent Order (DCO) was held at 2:00pm on 10 September 2019 at Hempstead House Hotel, London Road, Bapchild, Sittingbourne, ME9 9PP.
- 1.2 The ISH took the form of running through items listed in the agenda published by the ExA on 30 August 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 2 – 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 and Paul Phillips (Arcus Consultancy Services)
- 2.3 Swale Borough Council – Graham Thomas
- 2.4 Environment Agency - Karolina Allu, Jon Byne and Nick Reid
- 2.5 The Faversham Society – Harold Goodwin and David Melville
- 2.6 CPRE Kent – Richard Knox-Johnston

**3. AGENDA ITEM 3 – DRAFT DCO ARTICLES**

- 3.1 In response to a request from the ExA for an update from Applicant relating to permissive path and discussions with Kent County Council (KCC) regarding the process for securing the permissive path, Gareth Phillips for the Applicant explained that the Applicant had not yet reached agreement with KCC. However, some of the matters sought by KCC at Deadline 4 were agreeable.
- 3.2 Mr Phillips confirmed that the Applicant will tie the definition of the permissive path to rights of way plan and the draft DCO will be updated accordingly. The definition of the rights of way plan will also be moved to the correct alphabetical position.
- 3.3 In terms of securing the permissive path, Mr Phillips explained that by including the permissive path in the Outline Design Principles it was secured. However, the Applicant could not be required to dedicate the path as a public right of way due to land ownership issues.
- 3.4 Mr Phillips confirmed that the permissive path agreement proposed by KCC was broadly acceptable to Applicant. A draft version of the agreement had been received by the Applicant but it is drafted from the perspective of being entered into once the

path was laid out and ready for use (the agreement would annex the “as built” plan). Mr Phillips explained that the path would then be added to public register so that there was a record of its location in case of any dispute in the future. Mr Phillips reiterated that the Applicant was happy to commit to enter into a permissive path agreement at the appropriate time. Mr Phillips added that the Applicant was proposing to add a commitment in the Outline Design Principles to enter into a permissive path agreement once the path has been built. Mr Phillips reiterated that the obligation to deliver the permissive path was sufficiently secured as the Outline Design Principles are secured by requirement.

3.5 In respect of the ongoing management and maintenance of the permissive path, Mr Phillips explained that this would also be added to either the Outline Design Principles or one of the other management plans. The Applicant hoped to submit the amendments and secure KCC's agreement (either in a Statement of Common Ground or exchange of emails) by Deadline 5.

3.6 In response to a query from CPRE Kent as to why the path cannot be a public right of way, Mr Phillips explained that this point had been dealt with previously in the Examination. Mr Phillips added that the Project is not a permanent feature and when it has been decommissioned the landowner is then able to do as it wishes with the land. The Applicant should not be required to create a permanent right of way by dedication that would bind a future landowner once the Project has been decommissioned.

3.7 **Updates to proposed Articles since previous draft DCO Hearing.**

3.8 In response to a query from the ExA relating to the definition of Environmental Statement (ES) and the additional documents submitted during the Examination, Mr Phillips explained that the intention was to either update the definition to include a list of the additional documents or separate schedule towards the end of Examination. Mr Phillips confirmed that this will include all of the additional documents submitted during Examination that supplement the ES.

4. **AGENDA ITEM 4 – SCHEDULE 1, THE AUTHORISED DEVELOPMENT**

4.1 **Works No. 8 and further associated development (g) relating to habitat area creations and management.**

4.2 In response to a query from the Faversham Society relating to the details of the Habitat Management Areas (HMA), Mike Bird on behalf of the Applicant explained that the proposals for the HMA were set out in the Outline Landscape Biodiversity Management Plan (LBMP), which was updated for Deadline 4 [REP04- 007]. Mr Bird confirmed that the Applicant was continuing to discuss the details of the mitigation proposals and management with the relevant stakeholders and the Applicant intended to submit a further updated version for Deadline 5.

4.3 Mr Phillips added that the Outline LBMP was being improved every time the Applicant met with the Habitat Management Steering Group (HMSG) and would continue to evolve. Mr Phillips explained that the Applicant would continue to seek suggestions as to how the LBMP can be improved as part of the iterative process. The final version of Outline LBMA will be referred to in the DCO and certified.

4.4 **Powers sought for maintenance of the existing sea defences.**

4.5 In response to a query from CPRE Kent relating to the maintenance of the sea wall, Mr Phillips explained that if the Project proceeds the Applicant would have the power to maintain the existing flood defence alongside the existing powers of the Environment Agency (EA). Mr Phillips reiterated the position set out in previous hearings that it was a misconception that there was a statutory obligation for the EA to maintain the existing flood defence. Mr Phillips added that the EA has a suite of statutory powers available to carry out maintenance works but the EA needs to have

budget for it and the process is subject to procurement and value for money. Mr Phillips explained that the Applicant had accounted for maintenance costs for the flood defence as part of the operational costs for the Project. Mr Phillips emphasised that there was no-one with a greater interest in maintaining the flood defence than the Applicant, because it is required to protect a multi-million pound Project.

4.6 The Applicant notes that the EA confirmed that Mr Phillips was correct and that the EA has permissive powers only and can choose whether to maintain the flood defence or not. The EA added that a landowner can take on any maintenance works and pay for the works out of its own pocket.

4.7 **Powers sought for the dedication of a permissive path.**

4.8 N/A

4.9 **Proposed time limit set out in the DCO for the Proposed Development and the arrangements for decommissioning.**

4.10 N/A

4.11 **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.**

4.12 In response to comments made by the ExA relating to the need to demonstrate that the Project is built within the parameters assessed in the ES and that all mitigation measures have been secured, Mr Phillips explained that the approach taken by the Applicant to mitigation was very similar to lots of other DCOs. The Secretary of State will have to have regard to all the information submitted. Mr Phillips added that the Applicant had responded to the ExA's concerns and was satisfied that all mitigation has been secured and documents.

4.13 Mr Phillips confirmed that the Applicant would have another look at the format of the mitigation schedule and emphasised that the Applicant wanted to ensure that there was clarity. However, Mr Phillips added that the Applicant had made a change each time the ExA had made a specific suggestion but it was difficult to understand exactly what the ExA required based on previous DCOs. Mr Phillips reiterated that the candidate design refers to measurements that do not need to be secured in order to mitigate environmental impacts.

4.14 Paul Phillips on behalf of the Applicant added that the Applicant would consider how best to update the mitigation schedule or produce a new document to address the comments made.

4.15 **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.**

4.16 N/A

4.17 **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?**

4.18 In response to comments made by the Faversham Society relating to the detail provided for the battery storage, Mr Phillips stated that the Applicant had made its position very clear in previous hearings and written representations – the Applicant needs to retain flexibility to take advantage of technological improvement.

4.19 Mr Phillips added that the Applicant had arranged for representatives of battery storage providers, Leclanché, to attend the issue specific hearing on 11 September 2019 to answer questions relating to battery safety.

## 5. **AGENDA ITEM 5 – SCHEDULE 2, REQUIREMENTS**

### 5.1 **Applicant to briefly introduce each of the updates to the draft Requirements since the previous draft DCO Hearing and their purpose**

5.2 Peter Cole on behalf of the Applicant provided an explanation for the changes made to Schedule 2. Mr Cole confirmed that the majority of the changes were minor amendments requested by ExA. For example, typographical changes to Requirements 7, 9 and 13 relating to speech marks. Requirement 13 had been updated to refer to the correct numbering of the Habitats Regulations.

5.3 Mr Cole explained that Requirement 16 relating to decommissioning had been updated following discussions with Swale Borough Council (SBC) and the EA and was now in an agreed form.

5.4 Mr Cole explained that Requirement 19 was a new requirement that had been included following discussions with SBC to give clarity regarding consultation. SBC had requested that the Applicant consult with certain stakeholders prior to submission of an application to discharge a requirement where such stakeholders would need to be consulted by SBC in discharging the requirement. The Applicant considered that a reasonable and prudent developer would undertake such consultation in any event but a specific requirement had been included to give SBC comfort.

5.5 In response to a query from the ExA regarding the extension of Requirement 13 to domestically protected species, Mr Bird explained that the Applicant had discussed the point with NE and KCC. Mr Bird confirmed that the Applicant does not have a strong view either way and is happy to include if requested. However, the Applicant considered that it was duplication.

5.6 Mr Phillips added that this specific requirement was requested by Natural England in all DCOs to date notwithstanding that it was duplication.

5.7 The Applicant notes that the ExA indicated its preference was for the wording to be added, so that it could later take a view on whether or not to recommend it to the SoS.

5.8 In response to a query from the ExA relating to the 5 year review period in Requirement 16, Mr Phillips explained that 5 years had been agreed as the period gave sufficient flexibility and certainty for all parties. Mr Phillips added that a shorter period would make commercial operation difficult (for example financing would be difficult if there was a rolling 12 month period). It was considered that a 5 year period was reasonable and would give all parties sufficient time to bring forward managed realignment and maintain/operate the development.

5.9 The Applicant notes that the EA confirmed that the 5 year time period sits well with the EA's horizon planning and funding 6 year periods. There were a number of practical requirements to get a project up and running which take approximately 5 years. The 5 year time period was therefore based on a practical lead in time for an EA programme so the EA was happy with the formal part of process. The EA added that it envisaged that conversations would continue between the parties outside of formal process.

5.10 In response to a query from the ExA relating to the earliest period for serving a decommissioning notice, Mr Phillips confirmed that the earliest date was 40 years from commissioning.

5.11 In response to a query from the ExA relating to the contents of the Construction and Environmental Management Plan (CEMP) in Requirement 10, Mr Phillips explained

that it was a non exhaustive list of matters to be included in the CEMP. Mr Phillips confirmed that crucial items have been included so as to secure mitigation.

- 5.12 In response to comments made by SBC relating to enforcement and the content of the outline plans, Mr Phillips noted that the Applicant was being put in a slightly unfair position as it was having to address questions from SBC and others based on a lack of familiarity with the DCO process. Mr Phillips added that Pinsent Masons have been involved in over 50 DCOs and therefore has considerable experience of what has been acceptable to relevant planning authorities, the ExA, the Secretary of State and what works in practice.
- 5.13 Mr Phillips explained that the Applicant did not consider that it would be difficult or confusing for anyone to locate the construction working hours and other controls for construction in the CEMP. It appeared that SBC was suggesting that the Applicant should remove the outline plans altogether and list every obligation as a separate DCO requirement. Mr Phillips added that this would be a significant departure from the approach taken in all DCOs to date. Mr Phillips emphasised that it was reasonable and appropriate to expect SBC to be on top of the documents and capable of enforcing any breaches. Members of the public are not expected to monitor compliance, that obligation is on the relevant planning authority. Mr Phillips reiterated that the Applicant was following the model that works for DCOs all over the country but here it was being asked to reinvent the wheel. Mr Phillips noted that whilst SBC only mentioned four obligations, other interested parties were now suggesting that other provisions in the CEMP were listed as separate requirements and queried where the Applicant should be expected to draw the line.
- 5.14 Mr Phillips explained that failure to comply with a DCO is a criminal offence and that includes failure to comply with any of the documents secured under the DCO. From an enforcement perspective, it makes no difference if the obligation is contained in a plan or in a standalone requirement.
- 5.15 Mr Phillips explained it order to make a non-material change to the wording of a requirement a non material change application would need to be submitted to the Secretary of State. This process includes consultation and can take over 6 months. The Applicant was seeking flexibility but such flexibility works both ways. For example, if the event that the CEMP was working well but there had been a number of complaints over the construction working hours either side of school drop off for example, the obligations in the CEMP could be changed with the agreement of the relevant planning authority. If the obligation is included as a standalone requirement then the relevant planning authority does not have the ability to agree to a change.
- 5.16 Mr Phillips reiterated that the Applicant was not seeking flexibility for Applicant to do what it likes but flexibility for everyone. Mr Phillips strongly opposed any suggestions that the Applicant was trying to "bury things" in plans.

## **6. AGENDA ITEM 6 – SCHEDULE 7, PROTECTIVE PROVISIONS**

### **6.1 NGET plc.**

- 6.2 Mr Phillips confirmed that the protective provisions had now been agreed with National Grid, together with a side agreement. Mr Phillips explained that the updated version of the draft DCO submitted for Deadline 5 will include the agreed amendments to the protective provisions. Mr Phillips added that he was hopeful that the agreement will be entered into and National Grid's objection withdrawn prior to Deadline 6.

### **6.3 Blue Transmission / London Array Limited.**

- 6.4 In response to a question from the ExA as to the status of each of the parties, Mr Phillips confirmed that London Array Limited (LAL) is the entity that owns the London Array offshore wind farm. Blue Transmission London Array Limited (BTLAL) is the

offshore transmission owner (“OFTO”) that owns and operates the transmission assets. Mr Phillips added that the assets were held by separate companies as required by law. On the site, LAL have land interests (freehold/leasehold) and have leasehold arrangements with BTLAL. BTLAL is therefore the tenant. Mr Phillips confirmed that BTLAL is responsible for getting power from the offshore wind farm to the grid. However, LAL and BTLAL clearly have aligned interests and the parties have been negotiating trilaterally.

6.5 Mr Phillips confirmed that if bespoke protective provisions were to be included in the DCO then they would be for the benefit of BTAL as they own and operate the apparatus that could be affected by the Project.

6.6 Mr Phillips explained that the parties have been working on suite of documents and Heads of Terms were agreed. The parties have agreed a milestone of 30 September 2019 and will review the status at that point in time. The parties are hoping to have agreements entered into by then. Mr Phillips added that as soon as agreements are in place then the Applicant will notify the ExA.

## 7. **AGENDA ITEM 7 – SCHEDULE 9, APPEAL AND ARBITRATION RULES**

7.1 N/A

## 8. **AGENDA ITEM 8 – ANY OTHER ISSUES RELATING TO THE DRAFT DCO**

8.1 **Outstanding issues relating to flexibility between battery energy storage and extended solar array, and the approach taken to the EIA.**

8.2 In response to a question from the ExA, Mr Bird confirmed that all aspects had been properly assessed if additional solar panels were constructed instead of the energy storage, including construction noise, operational noise and glint and glare.

8.3 Mr Bird explained that the approach taken in the ES is the assessment of the worst case. In response to written question 1.5.6, the Applicant clarified the position in respect of construction noise and glint and glare if solar panels were constructed instead of the energy storage. In respect of glint and glare, the Applicant had submitted a clarification note at Deadline 3 [REP3-022] which clarified that there would be no changes to the conclusions in the ES if solar panels were constructed instead of the energy storage.

8.4 Mr Bird confirmed that the operational noise of the energy storage had been assessed and secured and the noise of the energy storage would exceed the noise emitted from the additional solar panels.

8.5 In response to a query from the Faversham Society regarding when the Applicant would decide if the energy storage was going ahead, Mr Phillips explained that in terms of timing, a financial investment decision would only be made once the DCO is made by the Secretary of State. It would then take several months to discharge the pre-commencement requirements. It was therefore likely to be towards the end of 2020 or the beginning of 2021.

8.6 Mr Phillips added that the decision to proceed with the energy storage was dependent on ongoing discussions with National Grid and what type of system would benefit the local electricity network. Mr Phillips emphasised that the Applicant had been quite clear on its position in previous hearings and that it was becoming increasingly common for energy storage to be co-located with other technologies.

8.7 Mr Phillips clarified that a sequential approach was being sought in the DCO. The civil engineering would enable the energy storage to be constructed in phase 2 if required. Mr Phillips confirmed that the Applicant has committed to an energy storage facility that is based on a containerised solution.

- 8.8 In response to comments from the Faversham Society on the total construction period, Mr Bird confirmed that the Project would either be constructed in one phase (consisting of all of the development and lasting for 24 months) or in two phases which would include a further 6 months for the construction of the energy storage.
- 8.9 Claire Brodrick on behalf of the Applicant referred to the Requirement 3 which requires the Applicant to have the phasing approved prior to commencement of construction. Mr Phillips added that the phasing plan would need to accord with the ES in order to be approved.
- 8.10 Mr Phillips clarified that the DCO contained the standard requirement that requires the authorised development to be commenced within 5 years. However, the time period for construction would need to be set out in the phasing plan. If the Applicant needed extra time, beyond that approved in the phasing plan, then it would need to demonstrate that the extended time period accorded with ES or would not create any new or materially different environmental effects. Mr Phillips added that the drafting was based on a lot of experience of other DCO projects.
- 8.11 Mr Phillips noted that in practice the Applicant would need to make decision to proceed with the Project much earlier so as to have sufficient time to discharge the pre-commencement requirements and carry out implementation works before the expiry of the 5 year period.
- 8.12 In response to comments made by SBC, Mr Phillips explained that there could be unforeseen events, such as extreme weather, that would result in the Applicant needed to apply for an extension to the construction period. The relevant planning authority would not be able to reasonably refuse such an application provided that there were no materially new or different environmental effects. Mr Phillips added that if the Applicant did not comply with the phasing plan (i.e. it "sat on its hands") then SBC could take enforcement actions.
- 8.13 Mr Phillips referred to the EIA Regulations and explained that the final consent is not when the DCO is granted but when requirements are discharged.
- 8.14 In response to comments from the ExA, Mr Phillips confirmed that Requirement 2 would be amended to provide further clarity regarding safety management. Mr Phillips confirmed that the HSE had carried out peer review of the Outline Battery Fire Safety Management Plan and the Applicant had taken into account the HSE's comments in the submitted version [REP4-045]. Mr Phillips explained that the Kent Fire and Rescue Service has been provided with a copy of the plan and is still reviewing it. Mr Phillips added that the plan will be updated as soon as any comments from Kent Fire and Rescue are received.
- 8.15 In response to comments from the Faversham Society, Mr Phillips confirmed that the Outline Battery Fire Safety Management Plan included a requirement to consult with the HSE and Kent Fire and Rescue Service. It was envisaged that Kent Fire and Rescue Service would develop a response plan for the facility. The Applicant would be required to feed into that response plan as part of Outline Battery Fire Safety Management Plan.
- 8.16 Mr Phillips confirmed that the MMO's request for an amendment relating to its contact details would be included in the version of the DCO submitted for Deadline 5.
- 8.17 Mr Phillips confirmed that the Applicant would correct an error in Article 34(3).
- 8.18 Mr Phillips confirmed that the drafting of Article 34(1)(q) was correct.