

## Application by DS Smith Paper Limited for The Kemsley Mill K4 Combined Heat and Power Generating Station

**Table of Examining Authority Issues and Questions relating to the draft Development Consent Order** The issues and questions set out below expand on the Examining Authority's (ExA's) further identification of matters for examination in the draft Development Consent Order (dDCO) as submitted [APP-005]. They will be referred to in the third issue specific hearing (ISH3) into the dDCO on **Friday 14 September 2018**. The issues follow on from the matters addressed in the first ISH into the dDCO (ISH1) and the Applicant's subsequent Written Statement of Case [REP1-004] from which references are taken. They are principally addressed to the Applicant but observations from other interested parties (IPs) attending the hearing are welcome.

### Abbreviations Used

<b>PA2008</b>	<i>The Planning Act 2008 as amended</i>	<b>MP</b>	<i>Model Provision (in the MP Order)</i>
<b>Art</b>	<i>Article</i>	<b>MP Order</b>	<i>The Infrastructure Planning (Model Provisions)(England &amp; Wales) Order 2009</i>
<b>dDCO</b>	<i>Draft DCO [APP-005]</i>	<b>NPS</b>	<i>National Policy Statement</i>
<b>EM</b>	<i>Explanatory Memorandum [APP-006]</i>	<b>NSIP</b>	<i>Nationally Significant Infrastructure Project</i>
<b>ES</b>	<i>Environmental Statement [APP-008036]</i>	<b>R</b>	<i>Requirement</i>
<b>ExA</b>	<i>Examining authority</i>	<b>RR</b>	<i>Relevant Representation</i>
<b>LIR</b>	<i>Local Impact Report</i>	<b>SI</b>	<i>Statutory Instrument</i>
<b>LPA</b>	<i>Local planning authority</i>	<b>SoS</b>	<i>Secretary of State</i>

### The Examination Library

References in these questions set out in square brackets (eg [APP-010]) are to documents catalogued in the Examination Library. The Examination Library can be obtained from the following link which will be updated as the examination progresses:

<https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010090/EN010090-000344K4%20Internal%20Examination%20Library%20-%20PDF%20Version.pdf>

**Citation of Questions**

Questions in this table should be cited as follows:

Hearing reference: question number, eg **ISH3:1** – refers to question 1 in this table.

Q No.	Part of DCO	Drafting example (where relevant)	Question
ISH3:4	Art 2(1)	<p><i>“commence” means ...other than operations consisting of archaeological investigations, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, erection of any temporary means of enclosure, and the temporary display of site notices or advertisements</i></p>	<p>See ISH1:11.</p> <p>Further clarification is sought on the reasons for the proposed exceptions and why it is considered that these matters should not be addressed in a separate requirement relating to preliminary works.</p> <p>Does this definition create a potential conflict with R12 and R13? R13 prevents commencement until a scheme of investigation has been agreed but “archaeological investigations” will not constitute commencement and so can be carried out before the scheme is agreed. Similarly contaminated land remediation could be carried out before approval has been given for the piling risk assessment for which the EA has argued. In such a scenario could contaminated land remediation be carried out before the archaeological scheme has been agreed?</p> <p>The Applicant is asked to give further consideration to the proposed exclusions.</p> <p><b><u>Environment Agency comments:</u></b>  <b>There is guidance on contaminated land and archaeology (copy attached), but we would always advice some investigation of contamination is carried prior to any archaeological explorations so contamination presence can be determined before archaeologists put themselves at any risk of doing their work uninformed.</b></p>

			<p><b>From our view piling risk assessment is part of the assessment risk specifically for any proposed piling activities and to inform choice of best pile technique to avoid creating new risks. However it relies on the information gleaned from the contamination investigation and would also take account of any required remediation. If remediation removes most risks then piling technique is not so constrained, if remediation does not remove all contamination or treat it so it is innocuous then piling technique becomes more of an issue.</b></p> <p><b>In planning conditions the investigations are separate and so are pre-commencement conditions, but we believe the caveat about what constitutes the <i>development</i> commencing has often been added to confirm that investigations do not form part of the “development” per se and can legitimately be carried out before other works i.e. pre-commencement to the development.</b></p> <p><b>But as long as requirements for land contamination investigation/risk assessment are there and health and safety concerns are met for all concerned, if there is any presumed conflict between two requirements we are sure they can altered to avoid confusion.</b></p>
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<p><b>ISH3:6</b></p>	<p><b>Art 8(1)</b></p>	<p><i>"...nuisance falling within paragraph (a), (c), (d), (fb) or (g) of section 79(1) (statutory nuisances and inspections therefor)..."</i></p>	<p><b>Article 8: Defence to proceedings in respect of statutory nuisance</b> See ISH1:26.</p> <p>The Applicant has stated that this article is seeking to fill in a legislative loophole by extending the effect of s158. On what basis is it assumed that this is a loophole and was not an intention of legislators? Moreover, as the statutory protection afforded by s158 is not absolute and can be removed in a DCO, on what basis is it appropriate for such statutory protection to be provided? Further clarification is therefore sought in relation to the scope of Art 8.</p> <p>Whilst lighting would be covered by the DCO through R9 on what basis is it appropriate to rely on the statutory defence for the nuisances listed which do not appear to be covered by the DCO such as noise, fumes, gases etc.? On what basis would the identified potential nuisances result from the authorised development?</p> <p><b><u>Environment Agency comment:</u></b>  <b>We understand this is a question for the applicant. However, from our perspective, we wish to keep the lighting requirement (R9) in the DCO as it provides protection for sensitive environmental receptors including eels, elvers and other wildlife.</b></p>
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