

**Sunnica Energy Farm EN010106**

# **Response by Suffolk County Council to Action Point No. 8 Consequent Upon ISH2 on Environmental Matters**

## **Deadline 4**

**16 December 2022**

**ACTION POINT No.8** is addressed to Suffolk County Council and is as follows:

**Item 2f) Adequacy of mitigation measures in general: connectivity: Identify suggested mechanism for inclusion in DCO about the return of land acquired compulsorily which is then subject to restrictions on future use including requirements for maintenance of habitat**

1. The context for Action Point No.8 is that the Applicant's proposals do not envisage that any part of the application site will be subject to any ongoing requirements after the 40-year operational period (as secured by Requirement 22(1) of the draft DCO [REP2-013]) and the completion of de-commissioning (as secured by Requirement 22(5) of the draft DCO). De-commissioning is assumed to take place over a 24-month period: para 2.2.1 of the Framework Decommissioning Environmental Management Plan (FDEMP) [REP2-029]. Save as regards the potential maintenance of grassland for a 3 year period prior to any resumption of arable use (which may or may not extend beyond the de-commissioning period depending on when that grassland is established), as proposed in Table 3-7 of the FDEMP, there is no proposal for subsequent maintenance or management following completion of de-commissioning.
2. The FDEMP states (in Table 3-7) that "*Landscape and ecological mitigation will be left in situ following decommissioning; however, the Scheme will be returned to the land owner in a condition where the previous farming activities, those undertaken prior to construction, could be undertaken.*"
3. The Applicant has further confirmed the absence of any proposals for longer term maintenance or management of any part of the site in its Response to Q1.6.7 of the

ExQ1s [REP2-037]. That Response states *“If after decommissioning, when the land is no longer under the control of the Applicant nor covered by this consent (if granted), a landowner decides to remove vegetation, this would be subject to applicable planning and/or licensing requirements at that point in time.”*

4. The landscape/ecological measures proposed as part of the application include the planting of 7.4 km of hedgerows and 50.24 ha of woodland, and the establishment of 99 ha (Sunnica East A), 60 ha (Sunnica East B), and 96 ha (Sunnica West A) of biodiverse habitats, including dry acid grassland: Table 3 and paras 1.7.32 to 1.7.33, 1.7.53, and 1.7.61 of the Outline Landscape and Ecology Management Plan (OLEMP) [REP3-012]. There are no proposals for long term management or maintenance of any of these measures in the OLEMP post de-commissioning. Whilst an Ecological Advisory Group is proposed, there is no current intention that it should endure after the de-commissioning period: para 1.9.5 of the OLEMP.
5. The Applicant contended in oral submissions at ISH2 that it would not be reasonable to expect any provision to be made in the DCO for the management or maintenance of landscape or ecological measures after the end of the operational/de-commissioning periods. In part, this stance was said to be justified by reason of the temporary nature of the development and in part it was justified on the basis that the Applicant would not have any control of the land once it had been returned to the previous land owners. At ISH3 the Applicant adopted a similar position (for similar reasons) on the question of whether any permanent public rights of way should be created on any parts of the site.
6. SCC does not accept that either argument (temporary nature or land control) is well-founded.
7. Dealing first with the time limited nature of the proposed development, it is of course correct that the Applicant is proposing a 40-year operational period followed by de-commissioning. SCC considers that such a duration should be regarded as a permanent change of the receiving environment for many (human) receptors (see paras 10.13 to 10.15, 10.155 to 10.161, 10.179 to 10.180 of the LIR [REP1-024]). Realistically, there will be many people in the local communities most affected by the Sunnica project who will not be alive when the operational period comes to an end in or around 2065. For those persons, as they travel around the local area, whether on the road network or on rights of way, their perceptions of the changes to their environment, particularly in landscape and visual terms, will be permanent.
8. However irrespective of whether the development is seen as permanent or as temporary for receptors, and accepting that the operational period is time limited, it is incorrect to assert that the proposed development will not have environmental impacts beyond the 40-year operational period. It is not the case that, after the operational period and de-commissioning, the land is to be returned in all respects to its pre-existing condition.
9. In order to achieve the proposed development, the Applicant intends to remove 1,068 metres of existing hedgerow: para 1.7.25 of the OLEMP. This existing hedgerow will be permanently and irreversibly lost. That loss will endure beyond the operational period. In addition, in order to achieve the proposed development, the Applicant intends the removal of 1.76 ha (17,600m<sup>2</sup>) of tree canopy cover: para

1.7.26 of the OLEMP. That removal comprises 9,250m<sup>2</sup> of tree cover within areas that have been subject to detailed tree survey and 8,300m<sup>2</sup> of tree cover within areas subject only to desk top study and a high-level walkover where possible: paras 1.7.26 and Table 2 of the OLEMP. The majority (12,650m<sup>2</sup>) of that tree cover comprises high or moderate (Category A or B) trees: paras 1.7.26 and Table 2 of the OLEMP. This tree loss will be permanent and irreversible.

10. It is not possible to state how many of the trees to be lost would potentially have become dead/dying during the operational period (had they not been removed) because the application does not provide sufficient detail for all of the trees. However, of those trees subject to detailed tree survey, it is apparent that the four Category A woodland groups that will experience partial loss (W94, W112, W255, and W256) are all assessed as having a minimum 40+ years of Estimated Remaining Duration and so could otherwise be expected to be in existence at the end of the operational period: Tables 1 and 4 and Appendix B (penultimate column) of the Arboricultural Impact Assessment Report (AIAR) [REP3-021]. Thus, it is apparent that a proportion of the permanent tree loss will comprise trees that, but for their removal to facilitate the development, would have endured beyond the operational period.
11. Thus, notwithstanding that the operational period is time limited, the loss of existing vegetation features will be permanent and will endure beyond the operational period. In addition, the character of the local landscape will have been changed by the introduction of new planting installed to screen the development. That planting may have long term benefits if it were to be retained (both in landscape and in ecological terms) but it may also have long term disbenefits (for example foreclosing or containing previously open views or altering the local landscape character). Whether that planting should be retained or not for the longer term is a matter which will be case sensitive. It is therefore not correct to assert that the development has no ongoing impacts once the operational period has ended and the solar panels and related hard infrastructure have been removed by de-commissioning.
12. Whilst the Applicant is proposing a greater quantum of hedgerow and tree planting than would be irreversibly lost, the Applicant is not proposing to secure the retention of any of that new planting after the end of the operational period. Thus, the features that will be permanently lost as a result of the proposed development are not proposed to be permanently replaced. The loss is permanent and irreversible rather than temporary and so will continue beyond the end of the operational period, whereas as the survival of the new planting beyond the operational period will depend on the actions of the land owners at that time.
13. As noted above, the Applicant has referred to any future removal of vegetation being subject to planning and licensing requirements at that time. Whilst it is possible that regulatory regimes might change, the use of land for agriculture would not currently require planning permission. The removal of hedgerows and the felling of trees that are not subject to the Hedgerow Regulations 1997 or a Tree Preservation Order may (in the case of trees) require a felling licence under the Forestry Act 1967 (depending on the individual circumstances), but would not currently otherwise require regulatory consent. The continued existence of grassland vegetation, the tree planting and the hedgerow planting after the operational period is therefore not secure.

14. In the context of landscape features that are permanently (and irreversibly) lost as a consequence of the development, SCC does not consider that the provision of new planting which is secure only for the duration of the operational period provides adequate mitigation or compensation for what is permanently lost. SCC considers that any new planting needs either to be retained on a permanent basis, or subject to a process of considered review to determine whether it should be retained or not, if it is to be relied on as mitigation or compensation for that irreversible loss.
15. For the purpose of these submissions, SCC uses the terms 'avoidance', 'mitigation' and 'compensation' to cover different elements of the mitigation hierarchy (in line with the guidance at para 180(a) of the NPPF), albeit it accepts that the boundaries of these concepts may blur at the edges when particular measures are being considered.
16. SCC notes that EN-1 generally uses a broader meaning for what it describes as 'mitigation', which it indicates may include enhancing existing landscapes or creating new habitats (para 5.3.18), or improving green infrastructure networks (para 5.10.20), or using high quality design to improve visual or environmental experiences (para 5.12.9). SCC would regard all of these examples which are described in EN-1 under its references to 'mitigation' as measures concerning compensation rather than mitigation since they do not directly reduce adverse impacts of a development but offset for them by providing related benefits. However, the question of whether 'mitigation' should have a broad or a narrow meaning, and whether it embraces or is different to 'compensation' is simply a question of terminology. EN-1 does not suggest that enhancement or improvement measures should be limited to be of only temporary duration, even though many forms of energy development (notably wind power) are typically proposed for a temporary period. SCC repeats the point made above that even time limited developments can have permanent impacts where they involve the irreversible loss of existing environmental assets or features. Even where impacts are time limited, SCC does not accept that there is anything in the policy guidance in EN-1 which would preclude an improvement/enhancement measure put forward to offset an adverse impact from enduring beyond the temporal period of that impact.
17. Where measures are put forward or can serve as compensation for a residual impact that is not capable of avoidance or mitigation, SCC considers that there is no reason of principle why the measures should only endure (or be secured) for the temporal duration of the impact. By definition, a compensatory measure does not directly address or reduce an adverse impact. Rather, it provides a related benefit which may be capable of offsetting the residual (and unmitigable) impact. Because the relationship between the benefit and the impact is indirect, there is no necessary reason why they should share the same temporal period. It may be appropriate for the benefit to endure for longer than the impact so as to provide a sufficient degree of offsetting. Whether that is appropriate or not is a matter of planning judgment depending on the specifics of the particular case.
18. For example, a visual impact may not be capable of full mitigation and so may result in a residual adverse impact for the duration of the operational period. The views of Sunnica West A from the Limekilns would be one such example. To offset that

residual impact, it may be appropriate to enhance the local landscape in a nearby location by new planting (without prejudice to the local authorities' concerns about the impacts of Sunnica West A). That enhancement may be of only limited effectiveness during the operational period but may have the potential to offer a real landscape benefit in the longer term. An example could be the proposed new woodland planting at the Avenue, between parcels W04 and W05 (without prejudice to the local authorities' concerns about the retention of those parcels). It would appear that such planting is likely to be predominantly nursery transplants of up to 80cm in height with some feathered trees of up to 250cm in height: para 1.7.62 of the OLEMP. The full effectiveness of such planting is unlikely to be achieved during the operational period. If the judgment were to be reached that Sunnica West A should be approved, having regard (amongst other things) to the proposed new planting at the Avenue, it would not be acceptable for that planting to be at risk of removal at the land owners' behest, at the end of the operational period.

19. Turning to the Applicant's second objection to long term management and maintenance, based on an alleged lack of control, it must be noted that any such issues would be wholly self-created by the Applicant.
20. The land within the site that is proposed to accommodate landscape or ecological measures in the form of new hedgerows, new woodland areas, or new biodiversity habitats, is land where the Applicant seeks powers of compulsory acquisition to acquire the freehold and all lesser interests in that land. Examples of such powers can be seen in relation to Land Plot 5-03 (which broadly equates to parcels EC03 and E12 in Sunnica East B) and Land Plot 13-02 (which includes the Avenue). Land Plot 5-03 is shown on Sheet 5 of the Land and Crown Land Plans [APP-006] and Plot 13-02 is shown on Sheet 13 [APP-006]. The interests in those Plots are described in the Book of Reference [APP-024] and it is clear that the Applicant is seeking to acquire both the freehold and all lesser interests in those Plots: para 1.1.7 of the Book of Reference.
21. The Applicant is in an advanced state of negotiations with the main property interests in many of the plots where it is seeking powers of compulsory acquisition (including Plots 5-03 and 13-02), as summarised at Table 5-1 of the Statement of Reasons [APP-022] and as described in the updated Schedule of Negotiations and Powers Sought [REP3-008]. Nonetheless, the Applicant still seeks powers of compulsory acquisition for all of those plots, for the reasons stated in the Statement of Reasons at para 5.2.3:

*“Notwithstanding the position reached in respect of part of the Sites, it is necessary for the Applicant to be granted the compulsory acquisition powers included in the Sunnica DCO so as to protect against a scenario whereby the freeholder owners of the Sites (where agreement has been reached) do not grant a lease of the Sites in accordance with the terms of the completed option agreements. The Applicant also needs powers to extinguish private rights in the Sites to the extent that they would conflict with the Scheme.”*

22. It is therefore the Applicant's case that it should be given, and needs to be given in order to secure the delivery of the project, powers of compulsory acquisition in

relation to all of the Order Land where freehold ownership is sought as shown on the Land and Crown Land Plans [APP-006], notwithstanding that it may or may not ultimately exercise those powers in relation to any individual plot, if suitable arrangements are reached with all relevant land interests and property rights holders. It is no part of SCC's case to suggest that if the DCO is to be made it should not include the compulsory acquisition powers as sought by the Applicant.

23. In considering the long term future management and maintenance of the land that will accommodate landscape and ecological measures, it must therefore be assumed that (if the DCO is made in the terms sought) it will be open to the Applicant to take freehold control of that land. The Applicant cannot say that it will not have the power to take the freehold interest in all of that land because the DCO (if made) will give it precisely that power in Article 18(1) of the draft DCO [REP2-013]. A freehold interest is by definition without limit of time and once taken will vest in the person holding that interest unless and until the interest is transferred to another person. Any subsequent transfer to another person (whether the previous owner or not) would be on such terms as the Applicant, as transferor, wished to set.
24. It would, of course, be open to the Applicant, against the backdrop that it has been granted powers of compulsory acquisition for the freehold interest, to negotiate with the current owners for the Applicant to agree to take some lesser interest, such as the grant of a lease, or to agree to give the current owners a right of pre-emption to re-acquire the land at some future point post de-commissioning, but that would in no way detract from the powers that would be available to the Applicant under the terms of the DCO. Once granted, those powers may be exercised by the Applicant in relation to any Plot within the Order Land for any purpose "*as is required for the authorised development or to facilitate it, or as is incidental to it*": Article 18(1) of the draft DCO [REP2-013]. Any such agreements to take lesser rights could include, if the Applicant so chooses, provisions that would impose management or maintenance obligations for the land after the end of the operational period. One obvious mechanism for imposing such restrictions in a way which would bind the land in future would be by the execution of a deed containing planning obligations comprising development consent obligations under s.106(1) and s.106(14) Town & Country Planning Act 1990. The Applicant cannot properly say that it would not be within its power to secure the long term management or maintenance of the land that is proposed to accommodate landscape and ecological measures.
25. If it were the case that one (or more) of the control documents secured by the Requirements of the DCO included requirements for the long term management or maintenance of the landscape and ecological measures that are proposed to be established, it would be necessary for those requirements to be complied with: Article 3(1) of the draft DCO [REP2-013]. Exercising powers of compulsory acquisition to enable the Applicant to be in a position of land control sufficient to achieve that purpose would patently fall within the scope of the powers given by the DCO.
26. The fact that the benefit of the DCO is intended to accrue only to the Applicant (and NGET), unless there is a transfer to another party under Article 33, and that the Applicant intends that the land it acquires will be transferred (returned) to its former owners after de-commissioning, is no impediment to the imposition of long term controls over parts of the Order Land. A land owner does not need the benefit of the powers given by the DCO to exercise powers of land management or maintenance of

land which is under that land owner's control by virtue of ownership. However, non-compliance with the terms of a Requirement of the DCO would be a criminal offence under s.161(1)(b) Planning Act 2008, whether committed by the land owner or by any other person. It is not the case that that offence can only be committed by persons holding the benefit of a DCO.

27. SCC has no strong views as to which control document would be the most appropriate vehicle for setting out requirements for the long term management and maintenance of the proposed landscape and ecological measures but the main candidates would be either the final Landscape and Ecology Management Plan (LEMP), as required by Requirement 8, or the final Decommissioning Environmental Management Plan, as required by Requirement 22 (DEMP). Depending on which vehicle is chosen, revisions would be required to the corresponding OLEMP or FDEMP to establish the parameters for that management/maintenance regime.
28. Simply for the purpose of illustrating one mechanism that could be adopted, SCC has considered the OLEMP [REP3-012]. SCC would suggest that a new section is added to section 1.8 of the OLEMP, after "*Post-construction Monitoring*", which could be framed as follows:

*"Long Term Management and Maintenance of Landscape and Biodiversity*

*1.8.33 The detailed Landscape and Ecology Management Plan(s) to be produced in accordance with this OLEMP shall include provisions for the long term management and maintenance of the landscape and ecological features described in section 1.7 of the OLEMP after the end of the operational period. Such provisions shall include an audit of the condition of all such features derived from a walkover survey of the Order Limits undertaken between April and October in Year 39 post-construction so as to inform a review of which features shall be retained and which features shall be removed as part of the de-commissioning and restoration required by Requirement 22 of the Order. Where features are to be retained, the review shall specify a management regime for the periodic maintenance of those features on an on-going [annual] basis, and specify the persons or bodies responsible for carrying out that management regime. The review shall be submitted to the relevant planning authorities for their approval prior to the end of the calendar year which includes Year 39 post-construction. The approved review shall be implemented in accordance with its terms."*

29. SCC would be content for the proposed Ecology Advisory Group to play a role in the review process, but would note that the features in question have landscape functions as well as ecological functions, so a wider group of stakeholders may be appropriate.
30. Thus, SCC considers that the Applicant's objections to the imposition of requirements for long term management and maintenance of the proposed landscape and ecological features are not well-founded. SCC considers there is no impediment to the imposition of such controls, provided that as a matter of planning judgment they are considered to be necessary to make the impacts of the proposals acceptable in planning terms. That, of course, entails forming a judgment about the nature, extent, and severity of the residual impacts of the proposals in the light of the Applicant's currently proposed mitigation, and the extent to which longer term management

could be seen to constitute an environmental benefit capable of offsetting (or compensating for) those residual impacts. For its part, SCC is entirely satisfied that such long term management would be a necessary measure to be included as a component part of a suitable package of offsetting for the proposal's residual impacts.

31. Consequently, SCC considers that the mechanism of revising the text of the OLEMP to set out a need for the detailed LEMP to include provisions for the long term management and maintenance of the proposed landscape and ecological features is an available mechanism which could be used (and in SCC's view should be used) to impose restrictions on the future use of that land after it has been returned to its previous owners. The same mechanism could be used even if the Applicant negotiates land agreements with those owners in lieu of exercising its powers of compulsory acquisition. In such a case it would be for the Applicant to ensure that those owners were made aware of the revised terms of the OLEMP and the consequences that would follow in relation to the detailed LEMP.
32. SCC accepts that if this mechanism were to be adopted, there may be a need for consequential revisions to some of the other documentation (potentially to the DCO Requirements that address the LEMP and the DEMP, and potentially to the DEMP) to ensure that they are consistent with the revised text of the OLEMP.