

South Humber Bank Energy Centre Project

Planning Inspectorate Reference: EN010107

South Marsh Road, Stallingborough, DN41 8BZ

The South Humber Bank Energy Centre Order

**Document Reference: 8.19 Submissions in Response to ExA's R17 Letter
Dated 28 April 2021**



**Applicant: EP Waste Management Ltd
Date: May 2021**

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GLOSSARY

Abbreviation	Description
D7	Deadline 7
DoV	Deed of Variation
ExA	Examining Authority: An inspector or panel of inspectors appointed to examine the application.
NELC	North East Lincolnshire Council
SoCG	Statement of Common Ground
TCPA	Town and Country Planning Act 1990

SHBEC DCO – Submissions In Response to ExA's R17 Letter Dated 28 April 2021

	ExA's Request for Information	Applicant's Response
1.	<p>Bearing the above in mind, the ExA asks, where possible, for outstanding matters between the Applicant and National Grid in regard to this SoCG be resolved. Subject to those outstanding matters being resolved, the ExA would request a signed and dated version of this final SoCG, between the Applicant and National Grid be submitted at D7 (5 May 2021). Should it not be possible to submit the signed and dated copy of this SoCG by D7 (5 May 2021), the Applicant and National Grid are asked to provide a detailed explanation as to why by D7 (5 May 2021).</p>	<p>The Applicant and National Grid have signed a Statement of Common Ground (Document Ref. 7.6) which is submitted at Deadline 7, along with a comparison showing the changes from the previous version of the Statement of Common Ground (the draft submitted at Deadline 4).</p>
2.	<p>The ExA notes the submission at D6 (23 April 2021) of a completed DoV under s.106 and 106A of the Town and Country Planning Act 1990 (TCPA), between the Applicant and NELC dated 19 April 2021 [REP6-009], together with the unsigned/ undated copy of a Confirmatory Deed attached at Appendix 1.</p>	<p>The Applicant agrees with the description, and notes that it is intentional that the confirmatory deed is not signed or completed now – that is part of the approach taken, explained further below.</p>
3.	<p>The s.106 agreement dated 19 April 2019 (Original Deed), which was completed by the parties, the Applicant and NELC, appears to have excluded the Mortgagee, Lloyds Bank plc, despite specifically referencing them in the Definitions of the Original Deed. Please could the Applicant/ NELC explain why they did not consider it necessary to bind the Mortgagee to the Original Deed?</p>	<p>The Applicant notes that the date of the Original Deed is 11 April 2019, and agrees that Lloyds Bank plc was not party to it. The Original Deed does not reference Lloyds Bank plc in the definitions (or elsewhere).</p> <p>When the Original Deed was completed, the Land Registry information which was used by EP SHB Limited and NELC did not show that Lloyds Bank plc had an interest in the site, and therefore the only parties to the Original Deed were EP SHB Limited and NELC. That Land Registry information was however out of date, and as Lloyds Bank plc had registered its charge over the site on 20 December 2018, up to date title information would have identified their interest. Their exclusion was therefore not deliberate.</p>
4.	<p>The ExA is concerned that the result of the Mortgagee not being party to the Original Deed is that it does not appear that the interests of the Mortgagee is currently bound by the Original Deed and as a</p>	<p>The reason Lloyds Bank plc was not party to the Original Deed is explained in response to point 3 above. As Lloyds Bank plc is now known to have a charge, its consent was sought in relation to the DoV. It has not been</p>

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<p>consequence would not be bound by the DoV, which took effect on the 19th April 2021. If this is incorrect, please could the Applicant and NELC clearly explain why that is the case? Alternatively, if this view is correct please could the Applicant and NELC confirm this position?</p>	<p>possible to achieve that - through it directly being a party to the DoV - within the examination. Instead the approach is that there is a confirmatory deed appended to the DoV and which will (when entered into) provide that Lloyds acknowledges that the DoV has been entered into with its consent. Clause 4 of the DoV prevents implementation of the DCO or issue of a notice pursuant to article 5 until either Lloyds Bank plc has entered into the confirmatory deed (to give its consent to the DoV) or Lloyds Bank plc's charge has been discharged.</p> <p>Therefore, if the charge remains in place, development under the DCO cannot take place until Lloyds Bank plc are joined to the DoV through the confirmatory deed, and NELC has enforcement powers under the TCPA 1990 available to ensure that position is achieved. If Lloyds Bank plc's charge has been discharged, then it is no longer relevant to the site nor to the obligations in the Original Deed.</p> <p>If Lloyds Bank plc took possession of the land pursuant to its charge prior to development commencing under the DCO, then its interest would not be bound by the Original Deed. This scenario is relatively unlikely, but is a possibility, and there are two ways in which the risk of development taking place free of the development consent obligations is avoided – the existing provisions of the DCO, and potential additional provisions.</p> <p>Existing provisions in the DCO</p> <p>Only EP Waste Management Limited has the benefit of the DCO, as the defined 'undertaker' – unlike a planning permission, the DCO does not run with the land. Whilst there is a power to transfer the benefit of the DCO, this requires the consent of the Secretary of State in many cases, and in all cases can only be done by written agreement with EP Waste Management Limited. Therefore, even if Lloyds Bank plc did take possession of the land, it would only be in a position to lawfully carry out works pursuant to the DCO if the benefit of it had been transferred to it by EP Waste Management Limited. As Lloyds Bank plc does not come within any of the exceptions in Article 9(4)(a) to (c), the consent of the Secretary of State would be required for this.</p>

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		<p>If Lloyds Bank plc took possession of the site and purported to carry out works pursuant to the DCO without having the benefit of the DCO, it would have committed a criminal offence and would be liable to enforcement under section 160 of the Planning Act 2008 ('Development without development consent').</p> <p>Potential additional provisions</p> <p>In addition, and to put the matter beyond doubt, the Applicant is proposing additional drafting in Article 5. The Applicant's revised Draft DCO (Document Ref. 2.1, Deadline 7 version) includes a new paragraph (Article 5(12)) which must be complied with prior to serving an Article 5 notice (which itself must be done before commencing works under the DCO).</p> <p>Article 5(12) requires that one of the following must have taken place, to the satisfaction of the relevant planning authority:</p> <ul style="list-style-type: none"> • The charge is discharged; • Lloyds Bank plc provides its consent to the planning / development consent obligations binding the land; or • If Lloyds Bank plc has taken possession of land within the Order limits, then anyone who has an interest in the land at the relevant time must bind their interest to the planning obligations / development consent obligations. <p>The Applicant has also added definitions of 'charge', 'Lloyds Bank plc' and 'section 106 agreement' in Article 2, to ensure the new provision is clear.</p> <p>If the new Article 5(12) were not complied with, an offence would have been committed under section 161 of the Planning Act 2008 ('Breach of terms of order granting development consent'), and the relevant planning authority would be able to take enforcement action.</p> <p>The Secretary of State has the ability to include Article 5(12) in the DCO pursuant to either of the following powers:</p>

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		<ul style="list-style-type: none"> • Section 120(3) of the Planning Act 2008 – this is a broad power, permitting a DCO to “make provision relating to, or to matters ancillary to, the development for which consent is granted”. It is clear that mitigation necessary for the authorised development and how it is secured relates to or is ancillary to the development in question; and / or • Section 120(4) expands on section 120(3) by allowing for provision to be made under 120(3) for anything listed in Schedule 5 to the Planning Act 2008 (without limiting section 120(3)). Schedule 5 includes paragraph (11) (“the imposition or exclusion of obligations or liability in respect of acts or omissions” and paragraph (35) (“the payment of contributions”). Article 5(12) has the effect of imposing an obligation to secure a particular outcome, in order to mitigate the impacts of the authorised development. The impact is mitigated through the payment of a contribution. Therefore both paragraphs (11) and (35) are engaged, and allow the Secretary of State to include Article 5(12). <p>Separately, the Applicant considers that the same powers in the Planning Act 2008 could be used by the Secretary of State to directly impose an obligation to pay the Habitat Contribution (defined by reference to the Original Deed). Such an obligation would be phrased negatively, preventing construction of Work No. 1 starting until the Habitat Contribution has been paid to the relevant planning authority, matching the terms of the S106 agreement (as now varied).</p> <p>Such a restriction would apply to any person implementing the DCO, and a breach of it would lead to the person committing an offence under section 161 of the Planning Act 2008 and being liable to enforcement action. As noted above, any person purporting to implement the DCO but without the benefit of it would also be liable to enforcement action.</p> <p>In the event that such a provision is supported by the Examining Authority or Secretary of State, the Applicant has provided drafting for it as follows (note this is not included in the Applicant's updated Draft DCO (Document Ref. 2.1) submitted at Deadline 7):</p>

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		<p><i>"[New article/paragraph]</i> Construction of Work No. 1 must not start until the habitat contribution (as that term is defined in the section 106 agreement) has been paid to the relevant planning authority."</p>
5.	<p>Additionally, the ExA would question whether the confirmatory deed achieves its intention due to the fact that it states that it is entered into under s.106 of the TCPA, but it does not appear to comply with the requirements of s.106. This is due to the fact that the confirmatory deed does not appear to contain any obligation under s.106(1) of the TCPA. Consequently, there is nothing in the deed which complies with s.106(9)(a) or (aa) of the TCPA.</p>	<p>The Original Deed contains obligations under section 106 of the TCPA 1990, and the DoV varies the terms of the Original Deed. The Original Deed and the DoV are therefore legally, one instrument (an agreement, subsequently varied). The legal effect of the confirmatory deed is (once completed) equivalent to Lloyds Bank plc being party to the DoV, through providing their consent to it binding its interest, at a later date. It is therefore appropriate for the confirmatory deed to be made pursuant to s106, as it is supplemental to the DoV, and which as noted above varies the terms of the Original Deed, which comply with s106(1). The same position applies in respect of s106(9)(a) and s1069(aa), in that the confirmatory deed is not a standalone document, it is supplemental to the DoV, which itself varies the Original Deed, and which contains the planning obligation / development consent obligation.</p> <p>The confirmatory deed is also to be made under s111 Local Government Act 1972 which enables NELC to do any thing which is calculated to facilitate, or is conducive or incidental to, the discharge of any of its functions.</p>
6.	<p>In consideration of the above, the ExA would ask the Applicant and the NELC for legal submissions, by D7 (5 May 2021), on the enforceability of the s.106 agreement (as varied) on the Mortgagee, if they take possession: (a) if the Development Consent Order (DCO) is granted; and (b) if the DCO were to be refused. Additionally, the ExA would ask, by D7 (5 May 2021), if the Applicant can suggest any alternative way to secure the habitats mitigation, should a s.106 which binds the Mortgagee to the Original Deed not be signed by the Mortgagee by the close of examination on the 10 May 2021?</p>	<p>If the DCO is refused, then the enforceability of the Original Deed (as varied) is a matter solely for NELC as local planning authority. There would be no DCO capable of implementation, and therefore no possibility of impacts on over-wintering birds arising from development pursuant to a DCO. The only consent in place would be that for the Consented Development. The Applicant and NELC are discussing the planning obligations further in that context, separately to the DCO process, with a view to ensuring that the Consented Development can only proceed if the planning obligations are complied with. Any update will be provided at Deadline 8.</p> <p>If the DCO is granted, the position as regards the planning / development consent obligations if Lloyds Bank plc has taken possession of the site is set out at point 4. above.</p>

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		Also set out at point 4. above are potential additions to the DCO, to provide certainty to the Secretary of State that there are no circumstances in which there could be development pursuant to the DCO without compliance with the development consent obligations.
7.	The ExA notes that the draft DCO, submitted at D6 (23 April 2021) [REP6-003] and the Explanatory Note on Page 55, where it refers to where the documents listed in that paragraph can be viewed. The address given is New Oxford House, Grimsby. However, this address appears to be imprecise, especially bearing in mind that there appear to be two New Oxford House in Grimsby. One appears to be the Royal Mail Delivery Centre, whilst the other is not far away in Osbourne Street, Grimsby, DN31 1EY. Please could you clarify where the documents listed in that paragraph can be viewed and amend the dDCO accordingly by D7 (5 May 2021).	The Applicant's revised Draft DCO (Document Ref. 2.1) has been updated to include the full address.