

**Application by Equinor New Energy Limited for an Order granting Development Consent for the Sheringham and Dudgeon Extension Projects**

**- Comments on any other information and submissions received at Deadline 4**

**Submitted on behalf of Mr Clive Hay-Smith, Mr Paul Middleton and Priory Holdings Limited (refs: 20033312, 20032995 and 20033311)**

**Planning Inspectorate Reference: EN010109**

## **RESPONSE TO DEADLINE 4 SUBMISSION - 18.2 THE APPLICANT'S COMMENTS ON RESPONSES TO THE EXA'S 2WQ**

With references to the Applicant's comments on our Client's Responses to the ExA's 2WQ:

### **1. Spring Beck**

**1.1.** We do not consider that the Applicant has satisfactorily addressed the concerns raised in those responses, or that the Applicant has reasonably demonstrated that it has properly assessed and planned to mitigate the impacts of the development in the application.

**1.2.** We note the Applicant states:

*"The Applicant acknowledges that ES Appendix 18.3 Geomorphological Baseline Survey Technical Report [APP-212] does not specifically mention that the watercourse is a chalk stream, but is confident that the description of the baseline geomorphological characteristics of the proposed crossing location reflect the current condition of the watercourse. The Applicant notes that the Spring Beck Water Framework Directive Local Catchment Plan' acknowledges the current degraded condition of the watercourse."*

**1.3.** While the Applicant acknowledges omissions in the ES, their response misconstrues our client's concerns which are that the Applicant has failed to address *ecological* (and not geomorphological) significance of the chalk stream in their application.

**1.4.** We further note the Applicant states:

*"The Applicant would like to confirm that a survey of the Spring Beck (and where the proposed Order limits broadly intersect the Spring Beck), was undertaken in September 2021."*

Our Client's continue to assert that the Applicant did not in fact undertake an on-site ecological survey where the crossing is proposed under Spring Beck as no permission was sought from or granted by Mr Hay-Smith. The desk-top report referred to in the Applicant's response is nearly two years old. It not only failed to recognise the ecological and environmental significance of the chalk stream Spring Beck (referring to it as a "ditch") but also ignored the presence of endangered, indigenous species within the watercourse and adjacent habitat (including European Eel) and the planned re-introduction of native Crayfish.

**1.5.** We also note a further risk which we do not consider has been addressed in the Environmental Statement or in the Examination when assessing potential impact on sensitive ecological receptors. Under the Development Scenario flexibility sought by the Applicant, where SEP and DEP are constructed separately, up to two HDD crossings may be required under Spring Beck and other watercourses, with an associated increase in risk to these habitats.

**1.6.** We have been unable to identify if or where this is addressed in the ES, other than in the Applicant's responses to the ExA's Second Written Questions (and apparently only in relation to the Landfall HDD), where the Applicant indicates the Development Scenarios may result in multiple HDD crossings:

*“In terms of which scenarios would result in two separate HDD operations being undertaken concurrently or sequentially, these are scenarios 1(c) and 3”*

- 1.7. This would appear to be an unjustifiable and unnecessary risk and we request the Applicant consider how, in these circumstances, construction could be limited to a single HDD operation under sensitive water-courses including Spring Beck, and make associated commitments through the DCO.
- 1.8. Specifically in respect of Spring Beck, the Applicant has proposed a Site Specific risk assessment. Our Client's agree with this approach, but as a minimum it is reasonable and proportionate that this is undertaken and presented to Examination (and prior to any decision to grant the DCO) for the following reasons:
  - A. The Applicant has plainly not assessed or accounted for the ecological significance of the Chalk Stream habitat in this location.
  - B. The ES is supposed to identify potentially significant impacts on the environment. Chalk Streams are a globally rare habitat, however the ecological impacts have not been addressed at all in the ES. The Applicant is relying entirely on an HDD methodology to mitigate ecological impacts, despite acknowledging there are risks associated with this construction method. It is reasonable and proportionate that these risks be assessed in the Examination and appropriate mitigation designed into the development.
  - C. As referred to above, the implications of the Development Scenarios as we understand them, is that two separate HDD crossings may be used under Spring Beck (and other ecologically valuable water courses), exacerbating the risk of disturbance to flora, fauna and the integrity of the ecosystem. If this interpretation is correct and has not yet been considered in Examination, our Client's consider that this presents an unjustifiable and unnecessary risk, which should be addressed before the closure of the Examination.
- 1.9. The Applicant has not given in its response any good reason why the Site Specific Risk Assessment should not be undertaken now and we recommend this approach to them and the ExA.
- 1.10. Our Clients are ready to work with the Applicant to protect the ecological significance of Spring Beck and we look forward to their constructive engagement.

## **2. Negotiations update**

- 2.1. We note the Applicant's response as follows:

*“The Applicant met with the Respondent's appointed agent on 10th May 2022 to progress discussions in respect of outstanding matters related to the voluntary agreement and will continue to engage. The Applicant is hopeful of reaching agreement by the close of examination”*

- 2.2. Unfortunately little progress was made at the meeting referred to by the Applicant and the following key issues remain outstanding between the parties:
  - i. Our Client seek assurances regards the protection of 350 metres of mature hedgerows adjacent to the Works Access Route ACC05. These are at high risk of damage or removal by the proposed developments (as set out in our Deadline 4 response). Our Clients have offered the Applicant an alternative

access route, running over farmland immediately parallel to ACC05. This would provide a comparable route for construction traffic while mitigating any risk of damage to the hedgerow. The Applicant is yet to engage in any detail on this proposal.

- ii. Our Clients seeks constructive engagement with the Applicant to properly assess and mitigate the risk of adverse impacts to Spring Beck as set out above.
- iii. Our Clients seek indemnity on their professional fees which have been incurred solely due to the Applicant's proposals. These include fees for advice obtained by Mr Hay-Smith relating to a previous preferred route (which directly affected the house and land on which he planned to redevelop his new home), and for which he reasonably took advice around mitigation of loss. The Applicant has repeatedly declined to reimburse these costs and Mr Hay-Smith considers the Applicant's approach to professional fees to be unreasonable. It should be noted that, to date, our Clients have expended years of considerable unpaid time and effort dealing with the implications of the Applicants proposals. Furthermore our Clients continue to incur professional expenses that, if unrecovered, would equate to the entire annual profitability of our Clients' farming enterprise

**2.3.** Our Clients would welcome consideration of ADR to resolve these issues, as recommended in government guidance (Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land, Department for Communities and Local Government):

***“Use of alternative dispute resolution techniques***

*27. In the interests of speed and fostering good will, applicants are urged to consider offering full access to alternative dispute resolution techniques for those with concerns about the compulsory acquisition of their land. These should involve a suitably qualified independent third party and should be available throughout the whole of the compulsory acquisition process, from the planning and preparation stage to agreeing the compensation payable for the acquired properties.”*

**RESPONSE TO DEADLINE 4 SUBMISSION - 18.4 THE APPLICANT'S COMMENTS ON POST-HEARING SUBMISSIONS**

**3. Temporary Possession, Blight and Compensation**

Temporary Possession and Blight

**3.1.** The Applicant states as follows in its comments on Post-Hearing submissions (submitted at Deadline 4):

*“In the sequential scenario, there could be a gap between the first project commencing and the second project commencing of up to four years. Each project will take approximately two years to construct. The worst case scenario, as assessed in the Environmental Statement, is that the first project would reinstate the land after construction and before the second project commenced.”*

**3.2.** If the dDCO is consented, the Applicant would have up to 7 years to take temporary possession. On the Applicant's assumptions above, our Clients and other affected

parties could be blighted by TP powers for 15 years or more. Our Client's concerns on this were originally raised in their Relevant Representations and we understand are shared by many other Interested Parties. We are unaware of any other NSIP with such a potentially long TP period, nor that has envisaged taking temporary possession, re-instating land on completion of a phase, and then later re-possessing land for further construction works.

- 3.3.** Our Clients therefore agree with the ExA's Proposed Change to the DCO that a time limit should be included to protect the distinction between TP and CA, and reinforce the temporariness of TP provisions in the dDCO. We suggest however this time limit should apply to Article 26 (3) of the most recent version of the dDCO [REP4-003] (not Article 27 (4) which relates to maintenance of the development and which we comment on further below).
- 3.4.** TP powers are typically not subject to a fixed time limit; instead the DCO 'Model Provisions (from 'The Infrastructure Planning (Model Provisions) (England and Wales) Order 2009) refer to a limit one year beginning with the date of completion of the part of the authorised project specified in relation to the subject land.
- 3.5.** The Model Provisions are not mandatory; indeed the Applicant is seeking to vary the Model Provisions in the dDCO, including (which is relevant) the 'Time limit for exercise of authority to acquire land compulsorily' (including Temporary Possession) which is 5 years in the Model Provisions, but for which the dDCO seeks an extended 7 year time limit.
- 3.6.** Our Clients therefore agree with the ExA that a fixed time limit in the DCO for TP powers for carrying out the project would be a proportionate mitigation in order to provide Affected Parties with some certainty to what is, as acknowledged by the Applicant, a novel approach to development, and given the very long time-scales envisaged in the Development Scenarios.
- 3.7.** We further note Article 26 (4)(d) of the dDCO submitted at Deadline 4 [REP4-003] which provides that where the Applicant has exercised powers of Temporary Possession under Article 26 it is nevertheless not required to:  
  
*"(d) restore the land on which any works have been carried out under paragraph (1)(g) in so far as the works relate to mitigation works identified in the environmental statement or required pursuant to the requirements in Schedule 2."*
- 3.8.** This clause in the dDCO is a departure from the Model Provisions and creates further uncertainty and blight for Affected Parties, as 'mitigation works identified in the environmental statement' is a very wide definition. Affected Parties may discover that Temporary Possession land they assumed would be returned re-instated will in fact be subject to permanent works authorised under the DCO.
- 3.9.** To mitigate this uncertainty / blight and to protect the distinction between TP and CA, it would be appropriate and proportionate for the Applicant to define specifically which works in the ES may permanently affect land which is ostensibly subject only to Temporary Possession.

#### Compensation

- 3.10.** The potential for SEP and DEP to be constructed separately also creates risk of significant complexities for affected parties claiming compensation for loss or damage for Temporary Possession under Article 26. In our experience during the

construction of NSIPs there is frequently disagreement between the promoter and their contractors as to liability for compensation claims, with the landowner / business left 'in the middle', with significant challenges to recovering losses.

- 3.11.** If the SEP and DEP are constructed separately (or with shared ducts), this exacerbates the risk that the separate promoters of each independent development, and their contractors will blame each other for any loss or damage, thereby significantly increasing the complexity of claims for Temporary Possession. Added to the potentially very long period of TP referred to above, this materially increases the risk to Affected Parties that compensation claims will not be resolved and paid within a reasonable time frame thereby increasing the risk of dispute proceedings.
- 3.12.** If the ExA is minded to recommend approval of the dDCO Development Scenarios, a minimum and proportionate mitigation would be for the Applicant to provide a comprehensive Alternative Dispute Resolution mechanism for any compensation disputes, in accordance with Government Guidance (see 2.3 above). The absence of an ADR policy in circumstances where the Development Scenarios may significantly complicate compensation issues, is in our view relevant to whether the Applicant has made reasonable endeavours to use CA / TP as a last resort.