



# Sheringham Shoal and Dudgeon Offshore Wind Farm Extension Projects

The Applicant's comments on Mr Clive Hay-Smith,  
Mr Paul Middleton and Priory Holdings Limited's  
Deadline 5 Submission

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<b>The Applicant's comments on Mr Clive Hay-Smith, Mr Paul Middleton and Priory Holdings Limited's Deadline 5 Submission</b>	
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## **1 The Applicant's comments on Mr Clive Hay-Smith, Mr Paul Middleton and Priory Holdings Limited's Deadline 5 Submission**

1. This document presents the Applicant's response to Mr Clive Hay-Smith's, Mr Paul Middleton's and Priory Holdings Limited's Deadline 5 submissions [REP5-098], [REP5-100] and [REP5-101].

**Table 1 The Applicant's comments on Mr Clive Hay-Smith, Mr Paul Middleton and Priory Holdings Limited's Deadline 5 Submission**

ID	Clive Hay-Smith, Paul Middleton & Priory Holdings Comment	Applicant Response
<b>RESPONSE TO DEADLINE 4 SUBMISSION - 18.2 THE APPLICANT'S COMMENTS ON RESPONSES TO THE EXA'S 2WQ</b>		
0	With references to the Applicant's comments on our Client's Responses to the ExA's 2WQ	Noted. No response required.
<b>1. Spring Beck</b>		
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.	The Applicant refers the Respondent to <a href="#">The Applicant's comments on Mr Clive Hay-Smith, Mr Paul Middleton and Priory Holdings Limited Deadline 4 Submission</a> [REP5-052].
1.2	We note the Applicant states:  <i>"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."</i>	The Applicant maintains that the Environmental Statement adequately assesses potential impacts in relation to chalk streams both in <a href="#">Chapter 18 Water Resources and Flood Risk</a> [APP-104] and <a href="#">Chapter 20 Onshore Ecology and Ornithology</a> [REP3-026].  The Applicant has committed to undertaking further ecological surveys pre-construction. Through carrying out additional, pre-construction surveys, the Applicant will be made aware of further changes to the ecological baseline and be able to implement mitigation based on up-to-date information.  With regards to HDD, the Applicant has provided the following: <i>"The Applicant recognises that trenchless crossing techniques could potentially have some impact upon groundwater-dependent surface watercourses such as chalk streams, for example by changing groundwater flow patterns or releasing drilling fluids into the water column (see Sections 18.6.1.3 and 18.6.1.4 of ES Chapter 18 Water Resources and Flood Risk [APP-104]). The Applicant has therefore committed to undertake a site-specific hydrogeological risk assessment at each trenchless crossing location, as stated in Section 7.1.3 of the Outline Code of Construction Practice (Revision C) [REP3-064] submitted at Deadline 3, which is secured under Requirement 19 of the draft Development Consent Order (Revision G) [document reference 3.1], also submitted at Deadline 3. The results of the hydrogeological risk assessment will allow the trenchless crossing to be designed to minimise risks to groundwater bearing strata and the</i>
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:  <i>"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."</i>	

ID	Clive Hay-Smith, Paul Middleton & Priory Holdings Comment	Applicant Response
	<p>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.</p>	<p><i>groundwater-dependent surface water features associated with them (primarily, in this instance, Spring Beck)".</i></p> <p>The Applicant refers to the comments in ID1.4 and notes that the Respondent was aware and communicated with the Applicant on 13<sup>th</sup> September 2021, acknowledging the ecological surveys required on 15<sup>th</sup> September 2021.. A licence agreement to access the land to carry out environmental surveys was also in place for the land covering Spring Beck, which permitted access for day and night environmental surveys at this location.</p>
1.5	<p>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.</p>	
1.6	<p>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:</p> <p><i>"In terms of which scenarios would result in two separate HDD operations being undertaken concurrently or sequentially, these are scenarios 1(c) and 3"</i></p>	
1.7	<p>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.</p>	
1.8	<p>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</p>	

ID	Clive Hay-Smith, Paul Middleton & Priory Holdings Comment	Applicant Response
	<p>presented to Examination (and prior to any decision to grant the DCO) for the following reasons:</p> <p>A. The Applicant has plainly not assessed or accounted for the ecological significance of the Chalk Stream habitat in this location.</p> <p>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.</p> <p>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.</p>	
1.9	<p>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.</p>	<p>The Applicant confirms that a site-specific risk assessment would be undertaken as part of the post consent detailed design process (see <a href="#">Outline Code of Construction Practice (Revision E)</a> [REP5-029]).</p>
1.10	<p>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.</p>	<p>Noted.</p>
<p><b>2. Negotiations update</b></p>		

ID	Clive Hay-Smith, Paul Middleton & Priory Holdings Comment	Applicant Response
2.1	<p>We note the Applicant's response as follows:</p> <p><i>"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"</i></p>	Noted.
2.2	<p>Unfortunately little progress was made at the meeting referred to by the Applicant and the following key issues remain outstanding between the parties:</p> <ul style="list-style-type: none"> <li>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.</li> <li>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.</li> <li>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,</li> </ul>	<ul style="list-style-type: none"> <li>i. The Applicant refers the Respondent to <a href="#">The Applicant's comments on Mr Clive Hay-Smith, Mr Paul Middleton and Priory Holdings Limited Deadline 4 Submission</a> [REP5-052] at ID 26 and ID 27 which addresses the concerns in relation to Works Access Route ACC05.</li> <li>ii. The Applicant notes the Respondent's comment and will seek to engage with the Respondent on further pre-construction surveys, survey findings and any proposed mitigation measures at Spring Beck. As detailed above, the Applicant has committed to undertaking further ecological surveys of Spring Beck pre-construction. These pre-construction surveys will inform the mitigation measures and will based on up-to-date information.</li> <li>iii. The Applicant has engaged with the Respondent's appointed land agent on the matter of professional fees on several occasions and has requested a claim with corresponding timesheets to be submitted for review. This was last requested on 7<sup>th</sup> June 2023.</li> </ul> <p>The Applicant has to date reimbursed the Respondent's previously appointed land agent's fees prior to the appointment of the latest land agent and continues to reimburse reasonable land agent fees for landowners and occupiers affected by SEP and DEP.</p>



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	<p>would equate to the entire annual profitability of our Clients' farming enterprise.</p>	
2.3	<p>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):</p> <p><i>"Use of alternative dispute resolution techniques</i></p> <p><i>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."</i></p>	<p>As previously stated in <a href="#">The Applicant's response to the Examining Authority's Third Written Questions [REP5-049]</a> (Q3.8.2.1), the Applicant has made it clear that it is willing to use ADR if requested by an affected party. The use of ADR was originally mentioned in Clive Hay-Smith's Deadline 1 Submission <a href="#">Written Representations [REP1-171]</a> in which the Applicant replied to the suggestion of ADR in <a href="#">The Applicant's Comments on Written Representations [REP2-017]</a> at ID 61 stating that ADR was not considered necessary due to progress being made through voluntary negotiations. The Applicant would welcome discussion with Ardent and their clients to establish whether ADR is likely to be an effective means of resolving the issues remaining between the parties, as at this time the Applicant is awaiting a response on the terms offered.</p>
<p><b>RESPONSE TO DEADLINE 4 SUBMISSION - 18.4 THE APPLICANT'S COMMENTS ON POST-HEARING SUBMISSIONS</b></p>		
<p><b>3. Temporary Possession, Blight and Compensation</b></p>		
<p><b>Temporary Possession and Blight</b></p>		
3.1	<p>The Applicant states as follows in its comments on Post-Hearing submissions (submitted at Deadline 4):</p> <p>"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."</p>	<p>Noted.</p>
3.2	<p>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</p>	<p>The Applicant refers to <a href="#">The Applicant's response to the Examining Authority's Third Written Questions [REP5-049]</a> (Q3.8.2.2) which confirms that a blight claim cannot be made once powers of compulsory acquisition have been exercised. This is because at that point, land is no longer considered "blighted" because there is certainty over the land that will</p>

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	<p>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.</p>	<p>be subject to the compulsory acquisition powers. The Applicant is only able to take temporary possession of land within the 7 year period authorised by Article 19(2) of the <b>draft DCO (Revision I)</b> [document reference 3.1]. It is acknowledged that the Applicant is then able to remain in temporary possession of that land for a longer period but after 7 years it may not take temporary possession for the construction of the projects of any new land not previously occupied within that 7 year period. The Applicant therefore does not accept that affected parties could be blighted by compulsory acquisition powers for 15 years or more as there will be certainty over which land will be affected by temporary possession under Article 26 within the 7 year period authorised by Article 19.</p>
3.3	<p>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).</p>	<p>The Applicant refers to its <b>The Applicant's response to the ExA's commentary on or proposed schedule of changes to the draft DCO</b> [REP5-051] (response to DC1.5.1.1).</p>
3.4	<p>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.</p>	
3.5	<p>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.</p>	
3.6	<p>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.</p>	

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3.7	<p>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:</p> <p><i>“(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.”</i></p>	Noted.
3.8	<p>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.</p>	<p>The Applicant refers to paragraph 110 of the <b>Explanatory Memorandum (Revision G)</b> [REP5-011], which confirms as follows in relation to Article 26:</p> <p><i>“110. The article is based on article 28 of the model provisions, with the modifications listed below, which are included to minimise the amount of land that is required to be subject to permanent acquisition and to extend the notice period from a minimum of 14 days to a minimum of 28 days. These modifications are preceded in numerous development consent orders including, in respect of the first and second bullet points, in Article 26 of each of Hornsea Three, Norfolk Boreas, Norfolk Vanguard, East Anglia One North and East Anglia Two. The modifications are:</i></p>
3.9	<p>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.</p>	<ul style="list-style-type: none"> <li><i>• First, the ability to occupy land temporarily that is subject to powers of permanent acquisition but that has not yet been acquired (paragraph (1)(a)(ii)) has been added. This allows the undertaker to occupy land without having to acquire it immediately and allows for permanent acquisition of land for the as-built scheme.</i></li> <li><i>• Secondly, paragraph (1)(e) has been added so that permanent works specified in column (2) of Schedule 9, and any other permanent mitigation works in connection with the authorised development, may be left on land that has been temporarily occupied, rather than having to acquire such land for this purpose. The intended scope of 'mitigation works' is any permanent works necessary and appropriate to mitigate the impacts of the authorised development (e.g. landscaping or ecological mitigation works).</i></li> <li><i>• Thirdly, paragraph 2 requires at least 28 days' notice of entry to be served on the owners and occupiers.</i></li> </ul>

ID	Clive Hay-Smith, Paul Middleton & Priory Holdings Comment	Applicant Response
<b>Compensation</b>		
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.	Noted.
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.	<p>As set out within the <b>Scenarios Statement</b> [APP-314] and the <b>Supplementary Information to the Scenarios Statement</b> [REP3-074], 'a Cooperation Agreement between SEL and DEL will govern the necessary cooperation between the two projects' and this includes the 'sharing of costs between the two entities'.</p> <p>The Applicant also highlights that it will operate an Environmental Management System (EMS) which includes the preparation and implementation of a programme of environmental monitoring and auditing to ensure that environmental standards and commitments are being adhered to during construction of both projects. This would include any impacts arising from working crews operating under all construction scenarios. This is secured through the CoCP under Requirement 19 of the <b>draft DCO (Revision I)</b> [document reference 3.1]. Please refer to paragraphs 20 and 21 of the <b>oCoCP (Revision E)</b> [REP5-029].</p> <p>Construction work in sensitive locations will be supervised by a suitably qualified Ecological Clerk of Works (ECoW), who will provide reports to the Applicant, the Contractor, the Environment Agency, and the Local Authority. Even though the ECoW will be appointed by the Applicant, they will be a registered professional and therefore obliged to provide an independent opinion and reporting. The ECoW is secured in the <b>draft DCO (Revision I)</b> [document reference 3.1] via Requirement 19 Code of Construction Practice.</p>

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		<p>As set out within the response to WQ1.6.2.12 in <b>The Applicant's Responses to the Examining Authority's First Written Question</b> [REP1-036], it is the duty of the Applicant to appoint a Principal Contractor to coordinate the construction phase of the project. There will be one Principal Contractor for the onshore civils element, one of the offshore element and one for the electrical installation and commissioning and the substation. The construction activities will therefore be coordinated centrally and so it would be known who the responsible contractor is in relation to any individual claim for loss or damage arising from the works.</p>
3.12	<p>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.</p>	<p>As stated previously, the Applicant is willing to consider the use of ADR where appropriate in relation to the compulsory acquisition process. This would include in relation to any claims for compensation under Article 26(5) or 27(6) of the <b>draft DCO (Revision I)</b> [document reference 3.1]. As stated in Article 26(6) and 27(7) any dispute as to that compensation is to be dealt with under Part 1 of the Land Compensation Act 1961, which provides that if compensation cannot be agreed between the parties then a reference can be made to the Upper Tribunal (Lands Chamber) for determination. The Applicant notes that ADR is encouraged by the Tribunal as an alternative to a reference being made and would be willing to consider that process if appropriate in the individual circumstances.</p>