

Gate Burton Energy Park

EN010131

Written Summary of the Applicant's Oral Submissions at the Issue Specific Hearing 2 (ISH2) on 23 August 2023

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1. Introduction

- 1.1.1 The Issue Specific Hearing 2 (“**ISH2**”) on the draft Development Consent Order (the “**Order**”) for the Gate Burton Energy Park was held at 10:00am on 23 August 2023 as a blended event, with some parties in attendance at the Riseholme College, Showground Campus, Horncastle Lane, North Carlton, LN1 2ZR and others using the virtual platform of Microsoft Teams.
- 1.1.2 The ISH1 broadly followed the agenda published by the Examining Authority (the “**ExA**”) on 15 August 2023.

2. Agenda Item 1 – Welcome, Introductions, Arrangements for the Hearing

2.1 The Examining Authority

- 2.1.1 Kenneth Stone (the “**ExA**”).

2.2 The Applicant

- 2.2.1 Speaking on behalf of the Applicant: Amy Stirling (Senior Associate Solicitor at Pinsent Masons LLP) and Gareth Philipps (Partner at Pinsent Masons LLP) – the Applicant’s legal advisers for the Application.

2.3 Local Authorities

- 2.3.1 **Lincolnshire County Council (LCC)**: Stephanie Hall (Counsel) and Neil McBride (Head of Planning).
- 2.3.2 **West Lindsey District Council (WLDC)**: Shemuel Sheikh (Counsel), Russell Clarkson (Development Management Team Manager) and Alex Blake (Associate Director at Atkins).
- 2.3.3 **Nottinghamshire Country Council (NCC)**: Stephen Pointer (Planning Policy Team Manager).
- 2.3.4 **Sturton by Stow Parish Council**: Carol Gilbert.

2.4 Other Interested Parties

- 2.4.1 **Canal and River Trust (CRT)**: Sophie Summers, Ian Dickinson and Paul Gourn.
- 2.4.2 **7000 Acres Action Group**: Tony Court and Simon Skelton.

3. Agenda Item 2 – Purpose of the Issue Specific Hearing

- 3.1.1 The ExA summarised the purpose of ISH2, which is to consider the draft development consent order [REP2-027] (the “Order”). The Applicant did not provide comments against this agenda item.

4. Agenda Item 3 – General Update to the Order

- 4.1.1 The ExA asked the Applicant to explain any changes that have been made to the original Order [APP-215] and describe what the Order is seeking to provide.
- 4.1.2 Ms Stirling, on behalf of the Applicant, summarised the updates that have been made to the Order at Deadline 1 and then Deadline 2.

4.2 Deadline 1 Updates

- 4.2.1 The Order was updated at Deadline 1 in the following ways:
- a) The “Archaeology Mitigation Strategy” and “Vegetation Removal Plan” were added as certified documents to give certainty as to the scope of powers being sought and the control mechanisms that shall apply.
 - b) Advanced planting was added under the definition of ‘Permitted Preliminary Works’ to ensure that the necessary powers are available to the Applicant to carry out the advanced planting works. **Requirement 7** was also amended such that the outline landscape and ecological management plan (OLEMP) [REP2-037] must be discharged in respect of site vegetation clearance and advanced planting to ensure that the necessary controls are in place at the appropriate time.
 - c) The scope of **Article 6** was reduced to limit the scope of legislation being disapplied where the Environment Agency (EA) is the relevant consenting body, following discussions with the EA.
 - d) **Schedule 2** (Requirements) was updated to specify who the relevant local planning authority (LPA) is for the purposes of discharging each requirement, following engagement with LCC.
 - e) **Schedule 2, Requirements 6 and 7** were updated, amending the specified consultees following engagement with the relevant consultees including the EA, although the Applicant is aware of later submissions from the EA on this point.

- f) **Schedule 2, Requirement 19** was updated to secure that decommissioning must commence no later than 60 years following the date of final commissioning, to give certainty on the time-limited nature of consent.
- g) **Schedule 15** (Protective Provisions) was updated to reflect progressions in negotiations with Anglian Water Services Limited and the EA; to add new protective provisions in favour of Network Rail to reflect ongoing discussions between the parties; and to add placeholders for protective provisions in favour of the Canal & River Trust and Exolum Pipeline System Limited.
- h) New **Schedule 17** (hedgerows to be removed) was added to the Order to provide detail of hedgerows to be removed, by reference to the Vegetation Removal Plan [**REP2-017**].
- i) Various other errata and minor drafting updates to the Order.

4.3 Deadline 2 Updates

4.3.1 The Order was updated at **Deadline 2** in the following ways:

- a) **Article 11** (temporary stopping up of streets and public rights of way) was updated to clarify that the power is intended to extend to streets as well as public rights of way.
- b) **Article 39** (trees subject to TPOs) was updated to make the power to fell or lop such trees specific to the trees described in the new **Schedule 18**.
- c) **Schedule 9** (Deemed Marine Licence) was updated to clarify the extent of works to be carried out in the area of the deemed marine licence (DML), following discussions with the Marine Management Organisation (MMO).
- d) **Schedule 15** (Protective Provisions) was updated to reflect agreement on the form of protective provisions with National Grid Electricity Distribution (East Midlands) Plc.
- e) Various other errata and minor drafting updates to the Order.

4.4 Further Updates

4.4.1 In response to a query from Mr Court, Ms Stirling confirmed that the Applicant does not propose to change the drafting of Requirement 19(1), as the definition of 'Date of Final Commissioning' already refers to the authorised development commencing operation and is therefore sufficiently finite and certain.

Post-hearing submission: Following the request of the ExA at ISH2, the Applicant has submitted a composite Schedule of Changes, including the changes made at Deadline 1, Deadline 2 and Deadline 3. This has been submitted at Deadline 3.

5. Agenda Item 4 – Draft Development Consent Order – Articles

5.1 Article 9 – Power to Alter Layout Etc. of Streets

- 5.1.1 The ExA invited the Applicant to describe the purpose and extent of **Article 9**.
- 5.1.2 Ms Stirling explained that Article 9(2) is necessarily broad to provide a mechanism for the streets authority to approve any unforeseen street works identified during detailed design and enable them to be carried out, ensuring no unnecessary delay to the delivery of the Scheme.
- 5.1.3 The ExA also asked the Applicant to explain whether Article 9 replaces section 278 of the Highways Act 1980.
- 5.1.4 Ms Stirling noted that the principle is agreed between the parties that the street works can only be carried out with the consent of the street authority, which is provided for at Article 9(4). Ms Stirling added that the Applicant is discussing some amended wording with for Article 9(4), to provide more clarity as to the form of approval which may be given by the streets authority to ensure that they have sufficient control. The Applicant is confident that a form of wording will be agreed.

Post-hearing submission: The Applicant has updated Article 9(4) of the draft Order at Deadline 3, to confirm that the form of consent must be in the form reasonably required by the street authority to address LCC's concerns.

- 5.1.5 The ExA added that there is uncertainty as to whether Article 9 is covered by Schedule 16.
- 5.1.6 Ms Stirling confirmed that Schedule 16 only applies to the requirements specified in Schedule 2 and therefore Article 9 is not covered. This is due to Schedule 16 applying in respect of any application for consent etc. pursuant to a "requirement". Requirement is defined in article 2 of the Order as a matter set out in Schedule 2.

5.2 Article 44 / Schedule 9 – Deemed Marine Licence

- 5.2.1 The ExA invited the Applicant to clarify its intended approach in relation to the inclusion (or not) of the DML at **Article 44** and **Schedule 9** of the draft Order.
- 5.2.2 Ms Stirling responded that it is the Applicant's firm position that the works beneath the River Trent are marine licensable activities. The Applicant is aware that there is an exemption order in place, which does in certain circumstances provide an exemption for bored tunnels. The MMO requires that the Applicant satisfies itself that this exemption applies at the appropriate time, which is when the works are carried out, not several years in advance. The Applicant's position therefore remains that it is prudent and good administration to include the DML within the draft DCO for the following reasons:

- a) as a matter of law, the views and opinions of officers are not binding on a decision-making body, here the MMO;
- b) whilst officers may be of the view now that the exemption applies, such that a DML is not needed, without it the applicability of the exemption would be considered several years in the future, when the MMO officers, their views, and consequently the MMO's position on exemptions may have changed;
- c) in those circumstances, without the benefit of a DML, the developer would incur cost and delay having to apply directly to the MMO for a marine licence.

5.2.3 Ms Stirling continued that the DML applies only to the extent that the exemption does not apply. Therefore, if, at the appropriate time, the MMO agrees the exemption applies, then the DML will no longer be required. However, if, at the appropriate time, the MMO comes to a different view as to the applicability of the exemption, the DML would be in place and provide appropriate controls and conditions which would allow the undertaker to construct the works under the River Trent.

5.2.4 Ms Stirling explained that the Applicant will continue to apply for the DML to be included within the Order. Ms Stirling also confirmed that the Applicant has provided the MMO with the environmental information they have requested. The DML has been altered to reflect the consent of the scope of the works and the form of the licence has been adapted from the structure and content of the DML included in the Cleve Hill Solar Farm Park Order 2020.

5.2.5 Mr Phillips, on behalf of the Applicant, provided further clarification that the availability of the exemption does not prevent the inclusion of the DML within the Order. The Applicant has the opportunity to include consents within the DCO that may be needed for the Scheme to ensure that it may proceed without doubt. The inclusion of the DML removes any uncertainty and covers the possibility of any other later interpretation of whether the exemption applies.

Post-hearing submission: The Applicant will continue its engagement with the MMO to seek agreement on the inclusion of the DML, failing which confirmation from the MMO on a without prejudice basis that the form of DML within the Order is acceptable.

6. Agenda Item 5 – Draft Development Consent Order – Schedules

6.1 Schedule 2 – Requirements

6.1.1 The ExA sought clarification on a number of requirements in **Schedule 2**, namely **Requirements 5, 6, 10, 11 and 19**. These are addressed in turn below:

Requirement 5 (Detailed design approval)

6.1.2 The ExA highlighted that the EA have asked in its written representation [**REP2-061**] to be a specific named consultee in relation to **Requirement 5** and have suggested some additional wording.

6.1.3 Ms Stirling replied that the amendments proposed by the EA are not necessary as the EA already has sufficient protection via its role as consultee in other requirements (including for example requirement 12, construction environmental management plan) and protective provisions. The Applicant has discussed this issue with the EA and understands the EA is reconsidering its position on this matter.

Post-hearing submission: The Applicant has sought to clarify this position with the EA after the hearing and is awaiting confirmation from the EA.

6.1.4 The ExA noted that EDF Energy (Thermal Generation) Limited has requested an additional requirement in relation to the cable route and the layout of the connection adjacent to Cottom Power Station and asked the Applicant whether this is necessary. Ms Stirling explained that this is not appropriate as the cable corridor and the layout of the connection adjacent to Cottom Power Station forms part of the authorised development and so detailed design would have to be approved under **Requirement 5**. The Applicant is engaged with EDF regarding protective provisions which should give them sufficient protection for their interests.

Requirement 6 (Battery safety management)

6.1.5 Ms Stirling confirmed that the Applicant is happy to have the EA as a named consultee in relation to **Requirement 6**.

Post-hearing submission: The Applicant has updated the draft DCO at Deadline 3 to insert the EA as a named consultee.

Requirement 10 (Surface and foul water drainage)

6.1.6 The ExA asked whether WLDC must be consulted in respect of Requirement 10. Ms Stirling responded that there is no requirement for the LCC to consult with WLDC however it is open to LCC to do so if they consider it appropriate at the relevant time.

Requirement 11 (Archaeology)

- 6.1.7 The ExA invited the Applicant to comment in relation to Historic England being added as a named consultee for Requirement 11.
- 6.1.8 Ms Stirling explained that it is the Applicant's understanding that the archaeological mitigation strategy ("**AMS**"), as defined and secured in the Order, is agreed between the Applicant and relevant planning authorities. Therefore, it is not necessary to have any amendments to the requirement or named consultees.
- 6.1.9 Mr Court, on behalf of 7000 Acres Action Group, asked whether Lincolnshire University Archaeological Department could be added as a consultee. The ExA acknowledged that it would not be normal for the Department to be added as a consultee, however Ms Stirling, on behalf of the Applicant, added that the Applicant would review the terms of the AMS.

Post-hearing submission: All relevant stakeholders were consulted in the preparation of the cultural heritage assessment, which incorporates the AMS. This consultation process is set out in Section 7.2 of Chapter 7 of the ES: Cultural Heritage [**APP-016**].

Historic England's response [**REP2-103**] to Question 1.6.36 of the ExA's first written questions also confirms that the Local Authority archaeological advisors would be advising the LPA's on post-consent discharges to any archaeological requirements. The AMS has been prepared and agreed in consultation with the Archaeological Advisors to the relevant LPA. The AMS sets out the Roles and Responsibilities of all relevant parties, including the Archaeological Advisor to the relevant LPA who will be responsible for ensuring that the requirements of the Order are met, in accordance with any conditions relating to archaeology.

Section 6 of the AMS (Part 1 and Part 2) includes the requirement for public outreach and community engagement. The objective will be to provide information to a wide variety of audiences ranging from those with a strong interest in archaeology and heritage, to those with no specific involvement. The public outreach and community engagement could include public talks and lectures to local historic / archaeological interest groups / societies. The archaeological contractor will be responsible for preparing Site-specific Written Schemes of Investigation (SSWSI), in accordance with the AMS, which will identify relevant local groups which could include the Lincoln University Archaeological Society.

Requirement 19 (Decommissioning)

- 6.1.10 In relation to **Requirement 19(2)**, the ExA queried whether there should be any provisions to notify the LPAs of the Applicant's decision to decommission as provided for within that requirement.
- 6.1.11 Ms Stirling noted that the Applicant's intention is for the requirement to operate such that the submission of the decommissioning environmental management plan ("**DEMP**") itself would be the notification that the undertaker plans to decommission the scheme.

- 6.1.12 The ExA then raised that the drafting of the clause requires the DEMP to be submitted for approval “within 12 months of the date that the undertaker decides to decommission”, which is unclear.
- 6.1.13 Ms Stirling acknowledged the ambiguity and confirmed that the drafting would be reconsidered.
- 6.1.14 Mr Blake, on behalf of WLDC, noted that there is a concern around the environmental baseline at the point of decommissioning and asked whether changes in the baseline and further environmental information coming forward would trigger an amendment process to the Order and whether this can be addressed either within the Requirements or DEMP to require an update to the baseline plan without triggering an amendment process.
- 6.1.15 Ms Stirling replied that the Applicant would consider the amendments to the DEMP that are necessary to put a process in place on how this will be dealt with at the appropriate time in 60 years.

Post-hearing submissions:

- a) The Applicant is reviewing the DEMP to clarify the way in which environmental baseline will be considered at the point of decommissioning. If appropriate, the Applicant will submit an updated DEMP at Deadline 4.
- b) The Applicant has amended Requirement 19 of the Order submitted at Deadline 3 to give certainty as to the notification required in relation to the timescales for decommissioning and the submission of the DEMP for approval, and to clarify the definition of the date of final commissioning following submissions from WLDC.

6.2 Schedule 15 – Protective Provisions

- 6.2.1 The ExA invited the Applicant to provide an update on the status of the discussions with the Canal & River Trust (“CRT”) regarding protective provisions, as the other protective provisions were dealt with at CAH1.
- 6.2.2 Ms Stirling confirmed that the protective provisions with the CRT are in almost agreed form and the Applicant is confident that they can be included in the Order by either Deadline 3 or Deadline 4.

Post-hearing submission: The Applicant has now agreed protective provisions with the Canal & River Trust which have been inserted at Part 11 of Schedule 15 of the draft DCO submitted at D3. The Applicant has also committed to a minimum HDD depth of 5m to cross the River Trent, which will be secured in the updated Outline Design Principles at Deadline 4.

- 6.2.3 Sophie Summers, on behalf of the CRT, noted its concern regarding the disapplication of the Trent (Burton on Trent and Humber) Navigation Act 1887 which includes powers to dredge the River Trent.
- 6.2.4 Ms Stirling responded to confirm that it is not the Applicant’s intention to override the CRT’s dredging powers, and noted that Ms Summers has

proposed some alternative drafting. The exact wording remains to be agreed but there is nothing controversial and the principle is agreed.

Post-hearing submission: The Applicant has updated the wording of Article 6 in the draft Order to reflect the request from CRT.

6.3 Schedule 16 / Article 46 – Procedure for Discharge of Requirements

6.3.1 The ExA asked for WLDC's and LCC's views in relation to deemed approval, consultees, timescales and fee provisions. Ms Stirling responded on each point as summarised below.

Deemed Approval

6.3.2 Mr Sheikh's raised concerns, on behalf of WLDC, in relation to deemed approval.

6.3.3 Ms Stirling reiterated that deemed approval is required as the Planning Act 2008 establishes a process to ensure that the Scheme can continue in a timely fashion to achieve policy objectives. It is well precedented in numerous DCOs to date. The principle itself is not in dispute, but timescales are to be agreed with the LPAs.

Consultees

6.3.4 Ms Stirling, on behalf of the Applicant, confirmed that copies of documents may be provided to named consultees for the purposes of the Requirements.

Post-hearing submission: The Applicant has updated Schedule 16 of the draft DCO to provide that the Applicant must submit a copy of any discharge application to any requirement consultee, when submitting it to the relevant planning authority for approval.

Timescales

6.3.5 In response to comments from Shemuel Sheikh, on behalf of WLDC, Ms Stirling provided that:

1. The Applicant maintains that eight weeks is an appropriate notice period for paragraph 1(2)(1) of Schedule 16 as it ensures that the NSIP can proceed in a timely fashion given that the principle of consent will have already been established at that point in time. The Applicant noted that the main concern appeared to be in relation to detailed design approval (requirement 5); and
2. The reference to six weeks at **Article 46** is errata and will be amended to eight weeks at Deadline 3.

Post-hearing submission: The Applicant has updated Schedule 16 to provide that the deemed approval period is 10 weeks for requirement 5. The Applicant has also updated Article 46 to refer to a period of eight weeks.

6.3.6 In relation to the timescales in paragraph 3 (Further information and consultation), Ms Stirling noted that the Applicant has been monitoring the

progress being made in other examinations and noted that the DCO would be updated to reflect the timescales in the Mallard Pass DCO.

Post-hearing submission: The Applicant has updated the draft Order at Deadline 3 to extend the timescales at paragraph 3 of Schedule 16 as follows:

- a) '10 working days' updated to 20 working days in paragraph 3(2); and
- b) 'Five working days' updated to 10 working days in paragraph 3(3); and
- c) '15 working days' updated to 20 working days in paragraph 3(3).

Fee Provisions

6.3.7 Shemuel Sheikh (on behalf of WLDC) and Stephanie Hall (on behalf of LCC) queried why provision in relation to fees is not included in the draft Order.

6.3.8 Ms Stirling responded that the Applicant is not opposed to the payment of fees for the discharge of requirements, however, the normal process is to deal with this matter via a planning performance agreement rather than a requirement or condition in the Order. The Applicant has offered planning performance agreements to the various authorities. Nevertheless, Ms Stirling confirmed that the principle is agreed and so this is something the Applicant can take away and consider.

Post-hearing submission: The Applicant has updated the draft Order at Deadline 3 to include a fee schedule in the form requested by the LPAs.

7. Agenda Item 6 – Consents, Licenses and Other Agreements

7.1.1 The ExA invited the Applicant to discuss any other consents or licences to be required. Ms Stirling noted that the Applicant has no updates to provide as the Applicant does not consider that any other consents or licences are required.

8. Agenda Item 7 – Any Other Matters

8.1.1 In response to a request from Mr Sheikh regarding the inclusion of retention clauses at requirements 6, 8, 15 and 18 of Schedule 2, Ms Stirling confirmed that the Applicant is happy to add in clarification before the next deadline.

Post-hearing submission: the Applicant has updated the draft DCO at Deadline 3 to add in retention clauses to requirements 6, 8, 15 and 18.

8.1.2 In response to a query from Mr Court regarding contributions to the local parishes, Ms Stirling noted that the Applicant is engaged with the LPAs in relation to community benefit but this is not relevant to the Order application.

- 8.1.3 In response to Mark Prior's suggestion that the Scheme generation capacity should be capped, Ms Stirling referred to previous submissions detailing why it is not necessary or desirable to include a generation cap. For example, see the Applicant's response to Q1.5.9 of the ExA's first written questions [**REP2-041**] and the Written Summary of the Applicant's Oral Submissions at the Issue Specific Hearing (ISH1) on the Draft Development Consent Order on 5 July 2023 [**REP-036**].