

West Burton Solar Project

The Applicant's Responses to ExA's Proposed Changes to the Draft Development Consent Order

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Issue Sheet

**Report Prepared for: West Burton Solar Project Ltd.
Examination Deadline 6**

Applicant's Responses to ExA's Proposed Changes to the Draft Development Consent Order

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1 Introduction

- 1.1.1 This report responds to the Examining Authority's (ExA) proposed schedule of changes to the draft Development Consent Order, issued on 19 April 2024 **[PD-016]**. It provides the Applicant's response to each of the numbered proposed changes.

2 Schedule of Proposed changes to the draft Development Consent Order

No.	Article/Schedule	Text in dDCO Rev F	ExA's Recommended Amendment	Reason and Notes	Applicant's Response
1	<p>Article 2- Interpretation</p> <p>Definition of 'Maintain'</p>	<p>"maintain" includes inspect, repair, adjust, alter, remove, refurbish, reconstruct, replace and improve any part of but not remove, reconstruct or replace the whole of, the authorised development and "maintenance" and "maintaining" are to be construed accordingly;</p>	<p>"maintain" includes inspect, repair, adjust, and improve any part of but not remove, reconstruct or replace the whole of, the authorised development and "maintenance" and "maintaining" are to be construed accordingly;</p>	<p>Current definition wide ranging in scope with insufficient justification for the extent of power sought provided.</p>	<p>The Applicant refers to its responses to First Written Question 1.5.3 [REP3-038] and to Second Written Question 2.5.2 [REP5-039]. The Applicant also notes that the terms "alter, remove, refurbish, reconstruct and replace" were included in the definition of maintain included in the recently granted National Grid (Yorkshire Green Energy Enablement Project) Development Consent Order 2024.</p> <p>The Applicant is mindful that the power to maintain the Scheme is found in article 5, with the definition of 'maintain' included in article 2 helping to clarify what is meant by that term. In order to limit the extent or scope of</p>

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					<p>a power, amendments would need to be made to the operative provision that grants the power. This is particularly the case in circumstances where the relevant definition is one with a well-understood meaning, with drafting guidance emphasising that definitions should not be given meanings that they cannot sensibly bear.</p> <p>The proposed removal of the words "alter, remove, refurbish, reconstruct, replace" from the definition of 'maintain' would, in the Applicant's view, restrict the concept of maintenance in a way that is a significant departure from the ordinary meaning of the word, and that this approach is unnecessary when the extent of the power</p>

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					<p>is managed and controlled by article 5 of the Order.</p> <p>The Applicant is also mindful that, in addition to the potential for individual items of equipment to become unrepairable, the anticipated lifespan of the battery energy storage system is approximately 20 years, whilst the lifetime of the Scheme is up to 60 years in duration. It is important that the omitted words are retained so that there is no doubt that this important part of the Scheme can be replaced or refurbished, ensuring that the Scheme can continue to provide on-demand power to help balance the Grid.</p> <p>The Applicant has reviewed article 5 of the Order in light of the concern that the extent of the power may not be justified. The general power to</p>

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					<p>maintain the Scheme provided by paragraph (1) of article 5 is restricted by paragraph (2) to the geographical extent of 'within the Order limits'. Paragraph (3) provides a further limit that the power to maintain the Scheme is not authorised in respect of the "carrying out of any works which are likely to give rise to any materially new or materially different effects that have not been assessed in the environmental statement".</p> <p>The <i>Rochdale Envelope</i> approach, where a DCO authorises a project to the extent that, in the implementation of that project, it does not exceed the environmental impact assessment contained in the environmental statement is well established and is widely accepted to be the</p>

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					<p>appropriate mechanism to control the extent to which powers may be used in practice. The Applicant therefore considers that appropriate restrictions on the power to maintain the Scheme are included in the draft Order.</p> <p>Whilst the Applicant is confident that the interpretation of paragraph (3) was clear, it has added the defined term 'maintenance' before 'works', so that there can be no doubt that any maintenance activity carried out on the Scheme must be within the limits of the assessed <i>Rochdale Envelope</i>.</p>
2	<p>Article 2- Interpretation Definition of 'Order Land'</p>	<p>"Order land" means the land which is required for or is required to facilitate or is incidental to the authorised development and shown coloured pink,</p>	<p>"Order land" means the land and shown coloured pink, blue or yellow on the land plan which is within the limits of land to be acquired or used</p>	<p>The current definition is considered too broad with the potential to create uncertainty.</p>	<p>The Applicant refers to its responses to Second Written Question 2.5.1 [REP5-039]. The Applicant does not agree that the drafting is too broad or that it has the potential to</p>

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		blue or yellow on the land plan and which is within the limits of land to be acquired or used and which is described in the book of reference"	and described in the book of reference"		<p>create uncertainty. The definition is tied to the land plan and the book of reference which details the precise location of each plot forming the Order land.</p> <p>The definition also uses the language of section 122 of the Planning Act 2008 which requires that compulsory acquisition powers are only granted in respect of land that is (a) required for the development; (b) required to facilitate or is incidental to that development. The use of this terminology in the definition of Order Land actually provides a further restriction on the land over which compulsory powers can be exercised (as opposed to being too broad) as the Applicant will need to be able to demonstrate that the land is actually required for or is required facilitate or is</p>

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					incidental to the authorised development when exercising the compulsory acquisition powers.
3	Article 2- Interpretation Definition of MMO (Marine Management Organisation)	"MMO" means the Marine Management Organisation, Lancaster House, Hampshire Court, Newcastle upon Tyne, NE4 7YH;	<i>Removal of this definition in its entirety</i>	Consequential amendment arising from removal of Article 44 and Schedule 9 (see items 8 and 11).	Please refer to the Applicant's response to item no. 8.
4	<i>Row absent</i>				
5	Article 35(4) - Consent to transfer the benefit of the Order	(4) The Secretary of State must consult the MMO before giving consent to the transfer or grant to another person of the whole or part of the benefit of the provisions of the deemed marine licence.	<i>Removal of this paragraph in its entirety</i>	Consequential amendment arising from removal of Article 44.	Please refer to the Applicant's response to item no. 8.
6	Article 39 - Trees Subject to tree preservation orders	<i>Amendment to the Article to include reference to an accompanying Schedule and plan to specifically identify the affected trees.</i>		Reflecting Good Practice point 6 of Advice Note 15.	The Applicant notes that the equivalent article (Article 34) of the recently made Sheringham Shoal and Dudgeon Extensions Offshore Wind Farm Order 2024 does

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					<p>not refer to a specific schedule.</p> <p>A plan showing the location of all trees currently subject to tree preservation orders (TPO) within the Order limits is included within the outline Landscape and Ecological Management Plan (oLEMP) [EX6/WB7.3_E]. The Applicant has amended the drafting of paragraph (1) of article 38 to expressly refer to the trees listed in the oLEMP or the LEMP as approved, with a general power provided only where the tree protection order post-dates the approval of the LEMP. This power is required to ensure that maintenance of the Scheme can still be carried out in the event a tree obstructing the maintenance is made subject to a TPO. This is necessary to ensure that there is no impediment to the long-term</p>

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					operation and maintenance of the Scheme.
7	Article - 42(2) Arbitration	(2) Any matter for which the consent or approval of the Secretary of State or the Marine Management Organisation is required under any provision of this Order is not subject to arbitration.	(2) Any matter for which the consent or approval of the Secretary of State is required under any provision of this Order is not subject to arbitration.	Consequential amendment arising from removal of Article 44 and Schedule 9 (see items 8 and 11).	Please refer to the Applicant's response to item no. 8.
8	Article - 44 Deemed Marine Licence	The marine licence set out in Schedule 9 (deemed marine licence under the 2009 Act) is deemed to have been issued under Part 4 of the 2009 Act (marine licensing) for the licensable marine activities (as defined in section 66 of the 2009 Act) set out in Part 2, and subject to the conditions set out in Part 3, of the licence.	<i>Removal of this article in its entirety</i>	The ExA has noted the comments from the Marine Management Organisation (MMO) at Deadline 3 [REP3 047] which sets out the problems associated with the inclusion of a deemed marine licence (DML) in the dDCO. The ExA has considered the Applicant's response to Deadline 2 and 3 submissions [REP4-066], specifically Appendix A, and understands that the Applicant has included this provision in the dDCO on a	The Applicant does not agree with the removal of the DML from the draft Order for the reasons set out in Appendix A of [REP4-066] , and notes that the Marine Management Organisation has not acknowledged or responded to that submission. The Applicant also considers that it is entirely appropriate in the case of critical national priority infrastructure such as the Scheme, that where risks are identified and a mechanism to manage that

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				<p>precautionary basis. The ExA is minded to recommend the removal of these provisions from the dDCO.</p>	<p>risk is provided for within the DCO regime, the mechanism should be utilised to ensure that the risk is managed. As set out in [REP4-066], applications for marine licences can take well in excess of the 13 weeks aimed for by the MMO, with no guarantee that a licence would be granted. In this case, the conflicting guidance issued by the MMO, the potential for regulatory change, and the inherent risks associated with horizontal directional drilling all point towards the use of the deemed marine licence mechanism to ensure that there is no impediment to the implementation of this critical national priority infrastructure.</p>
9	Schedule 2, Requirement 9	(2) The biodiversity net gain strategy must include details of how the strategy	(2) The biodiversity net gain strategy must include details of how the strategy will secure	The proposed wording will be improved by reference to use of whichever is the	The Applicant does not agree to make this change, and notes that similar wording

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	(Biodiversity Net Gain)	will secure a minimum of 69.4% biodiversity net gain in habitat units, a minimum of 43.7% biodiversity net gain in hedgerow units and a minimum of 26.6% biodiversity net gain in river units for all of the authorised development during the operation of the authorised development, and the metric that has been used to calculate that those percentages will be reached.	a minimum of 69.4% biodiversity net gain in habitat units, a minimum of 43.7% biodiversity net gain in hedgerow units and a minimum of 26.6% biodiversity net gain in river units for all of the authorised development during the operation of the authorised development, and details of the current metric that has been used to calculate that those percentages will be reached.	current metric at the time the strategy is submitted and approved.	<p>was considered an error and corrected on the Longfield Solar Farm project.</p> <p>The Longfield Solar Farm Order 2023, in the form made by the Secretary of State, included in the relevant requirement that the details of "the current version of the metric ... when the plan is submitted for approval".</p> <p>The Longfield Solar Farm (Correction) Order 2023 removed this wording, replacing it with "or such other biodiversity metric approved by the relevant planning authority in consultation with the relevant statutory nature conservation body".</p> <p>The correction was made due to the unintended consequence that, if the metric is updated whilst the Applicant is preparing the</p>

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					<p>details of the BNG strategy for submission, this would potentially require all of the work preparing the strategy to be restarted, resulting in delays and unnecessary expenditure.</p> <p>The draft Order requires that the biodiversity net gain strategy is approved by the relevant planning authority in consultation with the relevant statutory nature conservation body, and requires the strategy to include the details of the metric used when this is submitted to the relevant planning authority for approval, consistent with the Longfield Solar Farm Order as amended.</p>
10	Schedule 2, Requirement 12 (Archaeology)	The authorised development must be implemented in accordance with the written scheme of investigation.	"12 (1) No part of the authorised development may commence until a written scheme of investigation has been submitted to and	Applicants proposed wording was based on the agreement of the either the written scheme of investigation (WSI) or the	As set out in the Applicant's response to Second Written Question 2.5.10 [REP5-039] , the Applicant's proposed wording has been put forward

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			<p>approved by the relevant planning authorities in consultation with Historic England.</p> <p>(2) For the purpose of (1) "commence" includes any permitted preliminary works.</p> <p>(3) The scheme submitted under sub-paragraph (1) must –</p> <p>(a) identify areas where archaeological work is required;</p> <p>(b) identify the measures to be taken to protect, record or preserve any significant archaeological remains that may be found; and</p> <p>(c) be carried out by a suitably qualified and competent person or body previously notified to the relevant planning authority.</p> <p>(4) Pre-construction archaeological investigations and pre commencement</p>	<p>Without Prejudice WSI by the relevant host authorities. The ExA notes that updates to both of these documents have been submitted at Deadline 5. Should agreement to either WSI or the Without Prejudice WSI not be secured by the end of the Examination, the parties should give consideration to the alternative wording for this Requirement proposed by the ExA. Reference to Historic England has been retained due to the presence of the Scheduled Ancient Monument adjacent to the Order limits.</p>	<p>specifically because it is unlikely that agreement will be reached with the relevant planning authorities on the form of WSI.</p> <p>The Written Scheme of Investigation [REP5-016] provides a methodology for how any items of archaeological interest that are found during the construction of the Scheme are managed. The WSI is not in outline nor subject to development, refinement or changes reflecting the detailed design of the Scheme. Accordingly, it is not necessary for the WSI to be finalised post-consent and subject to further approval; it may be approved by the Secretary of State as a final-form document that provides the appropriate mitigation measures identified within ES Chapter 13: Cultural Heritage</p>

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			<p>material operations which involve intrusive ground works may take place only in accordance with the approved written scheme of investigation.</p>		<p>[APP-051] to avoid impacts to archaeological finds.</p> <p>As set out in paragraph 1.1.5 of the WSI [REP5-016], the Applicant has consulted and engaged with the Lincolnshire County Council (LCC) Historic Environment Team (who confirmed to PINS that the other host authorities are either represented by LCC's archaeology officers or else defer to LCC¹) and Historic England. More recently the Applicant has also been engaging with Nottinghamshire County Council's archaeology officers. The Applicant notes that LCC and NCC do not agree with the Applicant's approach. Further details are set out in the Statements of Common Ground [EX6/WB8.3.1_A] and</p>

¹ See the meeting with the Planning Inspectorate, Lincolnshire County Council and the Applicant of 9 June 2022, in Appendix 13.9 [APP-124].

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					<p>[EX6/WB8.3.8_B], and in section 3.1 of the Applicant's Responses to Deadline 5 Submissions [EX6/WB8.1.36]. The Applicant notes that there are a number of points on which it has not been possible to reach agreement.</p> <p>The Applicant submits that there is a risk to the deliverability of the Scheme for Requirement to be imposed for a further WSI to be approved by the relevant planning authority, where that same planning authority does not agree in principle with the approach proposed by the Applicant. The Applicant submits that the approach taken by LCC and NCC to date on this topic is indicative that any requirement to obtain further approval would result in a protracted approval procedure, with the potential for the relevant planning</p>

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					<p>authority to issue a refusal to discharge the requirement unless further trial trenching is undertaken which the Applicant considers is not necessary and onerous. This cannot be a satisfactory outcome, given the Government's policy announcements within the NSIP Action Plan² of February 2023. Accordingly, the Applicant has not revised Requirement 12 in the draft DCO [EX6/WB3.1_G], and notes that LCC has not identified specific changes that are being sought to the WSI, providing only general comments in response to the ExA's request that it should do so following ISH5 (for LCC's comments and the Applicant's</p>

² <https://www.gov.uk/government/publications/nationally-significant-infrastructure-projects-nsip-reforms-action-plan/nationally-significant-infrastructure-action-plan-for-reforms-to-the-planning-process>

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					<p>response, see Section 3.1 of [EX6/WB8.1.36]</p> <p>The Applicant has submitted a without prejudice version of the WSI [REP5-033] should the Secretary of State be minded to agree that additional trial trenching is required prior to commencement of the authorised development. However, the Applicant's position in respect of the without prejudice WSI is the same and no amendments to Requirement 12 are proposed (i.e. that there would be a risk to delivery if there was a requirement to seek further approval from the relevant planning authority on this document).</p>
11	Schedule 9 - Deemed Marine Licence	<i>Removal of this Schedule in its entirety</i>		The ExA has noted the comments from the MMO at Deadline 3 [REP3-047] which sets out the problems associated with	Please refer to the Applicant's response to item no. 8.

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				<p>the inclusion of a DML in the dDCO. The Applicant understands that the Applicant has included this provision in the dDCO on a precautionary basis. The ExA is minded to recommend the removal of these provisions from the dDCO. Check update from Issue Specific Hearing 2.</p>	
12	Schedule 16, Part 13, Paragraph 169(7)	(7) The consent of the Canal & River Trust pursuant to sub-paragraphs (1) to (6) must not be unreasonably withheld or delayed but may be given subject to reasonable terms and conditions provided that it will not be reasonable for the Canal & River Trust to withhold or delay consent or impose terms and conditions that would prevent the undertaker from complying with the protective provisions in this	(7) The consent of the Canal & River Trust pursuant to sub-paragraphs (1) to (6) must not be unreasonably withheld or delayed but may be given subject to reasonable terms and conditions provided that it will not be reasonable for the Canal & River Trust to withhold or delay consent or impose terms and conditions that would prevent the undertaker from complying with the protective provisions in this Part of this Schedule or	Consequential amendment arising from removal of Article 44 and Schedule 9 (see items 8 and 11).	Please refer to the Applicant's response to item no. 8.

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		Part of this Schedule or any condition contained in Schedule 2 (requirements) or Part 2 of Schedule 9 (Deemed marine licence under the 2009 Act).	any condition contained in Schedule 2 (requirements).		
13	Schedule 16, Part 13, Paragraph 172(5)	(5) The withholding of an approval of the engineer under this paragraph will be deemed to be unreasonable if it would prevent the undertaker from complying with any condition contained in Schedule 2 (requirements) or Part 2 of Schedule 9 (Deemed marine licence under the 2009 Act).	(5) The withholding of an approval of the engineer under this paragraph will be deemed to be unreasonable if it would prevent the undertaker from complying with any condition contained in Schedule 2 (requirements).	Consequential amendment arising from removal of Article 44 and Schedule 9 (see items 8 and 11).	Please refer to the Applicant's response to item no. 8.