

Cottam Solar Project

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

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Issue Sheet

Report Prepared for: Cottam Solar Project Ltd.
Examination Deadline 5

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

Prepared by:

Name: Aidan Van de Weyer

Title: Senior Planner

Approved by:

Name: Beccy Rejzek

Title: Associate Director

Revision	Date	Prepared by:	Approved by:
original	27 Feb 2024	AV	BR

1 Introduction

This report responds to the Examining Authority's (ExA) proposed schedule of changes to the draft Development Consent Order, issued on 13 February 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.	Article 2 – Interpretation <i>Definition of 'Order land'</i>	<p>"Order land" means the land which is required for, or is required to facilitate, or is incidental to, or is affected by the authorised development shown on the land plans and described in the book of reference;</p>	<p>"Order land" means the land shown coloured pink, blue and yellow on the land plans which is within the limits of land to be acquired or used and described in the book of reference;</p>	<p>The ExA considers the definition as set out in the dDCO is too broad and creates uncertainty.</p> <p>Alternative drafting to that proposed by the ExA will be considered.</p>	<p>The Applicant acknowledges the ExA's comment and notes that there are numerous definitions of "Order land" within DCO precedents. The Applicant does not agree that the drafting is too broad or uncertain as it is tied to the land plans and book of reference. The Applicant is also mindful that the Order should be drafted, so far as possible, in plain English and so it can be understood without excessive cross referencing. The Applicant therefore proposes to retain the clarification that Order land is that land which is required for or to facilitate the authorised</p>

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					<p>development. The Applicant is, however, content to add the further clarification to the reference to the land plans by referring to the colours used to denote the types of land rights sought for each plot.</p> <p>The definition has been amended in Rev G of the draft Development Consent Order [EN010133/EX5/C3.1_G] to read:</p> <p><i>"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, blue or yellow on the land plan and which is within the limits of land to be acquired or used and</i></p>

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					<i>which is described in the book of reference;</i>
2.	<p>Article 2 - Interpretation</p> <p>Various including:</p> <ul style="list-style-type: none"> • 'access plan' • 'crown land plan' • 'important hedgerow plan', • 'public rights of way plan' • 'streets plan' • 'works plan' 	<p>By way of example:</p> <p>"crown land plan" means the plans of that name identified in the table at Schedule 14 (documents and plans to be certified) and which are certified by the Secretary of State as the crown land plan for the purposes of this Order;</p>	<p>Wording should be amended so that it accords with the singular or plural noun.</p> <p>There are also a number of inconsistencies between the references to works plans and works plan contained in the dDCO. These will need to be amended so they accord.</p>	<p>There is an inconsistency between singular and plural which creates ambiguity.</p>	<p>The Applicant has amended each definition of a plan to consistently use the singular noun.</p>
3.	<p>Article 2 – Interpretation</p> <p><i>Definition of 'MMO'</i></p>	<p>"MMO" means the Marine Management Organisation, Lancaster House, Hampshire Court, Newcastle upon Tyne, NE4 7YH;</p>	<p>Removal in its entirety</p>	<p>Consequential amendment flowing from removal of Article 44 and Schedule 9 (see items 8 and 12).</p>	<p>The Applicant does not agree with this proposed change for the reasons set out in Appendix A to the Applicant's Responses to Deadline 3A and Deadline 4 Submissions [EN010133/EX5/C8.1.32].</p>

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4.	Article 15 – Traffic Regulation Measures	15(5)(b)...to make the provision in one or more newspaper....	Amend to 'newspapers'	Typographical error.	This has been amended in Rev G of the dDCO [EN010133/EX5/C3.1_G].
.5.	Article 17 - Removal of Human Remains	Not reproduced due to length	Removal of Article in its entirety	There are no known burial grounds within the Order limits. The ExA is mindful of, and has previously drawn the Applicant's attention to, the approach taken by the SoS in the Longfield Solar Farm Order 2023. While the ExA notes the Applicant's responses to ExQ1.1.8 and oral representations at ISH5, it does not consider that the circumstances are materially different to those in the Longfield application. Furthermore, the ExA considers the possible Anglo Saxon Burial ground referred to by the Applicant can be adequately covered by the WSI secured under	<p>The Applicant is cautious as the definitions of burial ground (albeit none exists in the Burial Act 1857) are drawn very widely, including any 'other ground, whether consecrated or not, which has been at any time set apart for the purpose of interment'.</p> <p>However, the Applicant is also mindful that there likely is a distinction between a burial ground, even a historic, disused one, and remains that are of purely archaeological interest.</p> <p>The Applicant notes that the precedent for this article is section 41 and Schedule 15 of the</p>

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				<p>Requirement 12. The ExA is therefore minded to recommend the removal of this Article.</p>	<p>Crossrail Act 2008, where the provision was included due to the known risk of the tunnelling works affecting plague burial pits from 1665. The definition of 'burial ground' in that Act is the same found in the body of other enactments: "a churchyard, cemetery or other ground, whether consecrated or not, which has at any time been set apart for the purposes of interment".</p> <p>The Applicant is not able to identify the point at which a burial ground will change from one to which the various enactments relating to burial grounds apply, to one of purely archaeological interest.</p>

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					<p>It has therefore retained this provision, but would request any clarity on this point that the Secretary of State may include in any decision letter, so as to provide certainty as to the drafting required for future DCOs.</p> <p>Notwithstanding the Applicant's position set out above, the Applicant agrees that the possible Anglo Saxon Burial ground can be adequately covered by the WSI secured under Requirement 12.</p>
6.	Article 35(4)	(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	Removal of sub-paragraph (4) in its entirety	Consequential amendment flowing from the removal of Article 44 and Schedule 9 (see items 8 and 12).	The Applicant does not agree with this proposed change for the reasons set out in Appendix A to the Applicant's Responses to Deadline 3A and Deadline 4

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		of the deemed marine licence.			Submissions [EN010133/EX5/C8.1.32].
7.	Article 42 – Arbitration	42(2)...secretary of State or the Marine Management Organisation.....	Removal of words in bold	Consequential amendment flowing from the removal of Article 44 and Schedule 9 (see items 8 and 12).	The Applicant does not agree with this proposed change for the reasons set out in Appendix A to the Applicant's Responses to Deadline 3A and Deadline 4 Submissions [EN010133/EX5/C8.1.32].
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	Removal of Article in its entirety.	The ExA notes the MMOs comments in its Deadline 4 submission [REP4-081] where it strongly objects to the inclusion of the DML. The ExA further notes that the Applicant is seeking the inclusion of a DML on a precautionary basis. The ExA is minded to recommend removal of these provisions from the dDCO.	The Applicant does not agree with this proposed change for the reasons set out in Appendix A to the Applicant's Responses to Deadline 3A and Deadline 4 Submissions [EN010133/EX5/C8.1.32].

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		set out in Part 3, of the licence.			
9.	Schedule 2, Requirement 12 (Archaeology)	The authorised development must be implemented in accordance with the written scheme of investigation.	<p>"12.—(1) No part of the authorised development may commence until a written scheme of investigation for that phase has been submitted to and approved by the relevant planning authority or, where the phase falls within the administrative areas of both Lincolnshire County Council and Nottinghamshire County Council, both relevant planning authorities.</p> <p>(2) For the purposes of sub- paragraph (1), "commence" includes any permitted preliminary works.</p> <p>(3) The scheme submitted under sub-</p>	<p>The Applicant's proposed wording was based on the acceptance of a Written Scheme of Investigation, yet this is not agreed with the relevant host authorities, namely Lincolnshire County Council and Nottinghamshire County Council.</p> <p>The wording also contains limited detail in relation to how the written scheme of investigation is to be implemented.</p> <p>The applicant and Host Authorities may wish to consider whether the WSI could become an outline document and the ExAs proposed wording amended to require the</p>	<p>The Written Scheme of Investigation [REP4-026] 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</p>

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			<p>paragraph (1) must include details of the following —</p> <p>(a) the programme and methodology of site investigation and recording;</p> <p>(b) the programme for post investigation assessment;</p> <p>(c) measures to protect, record or preserve any significant archaeological remains that have been found (meaning preservation in situ, preservation by record or a combination of these elements)</p> <p>(d) provision for analysis of the site investigation and recording;</p>	<p>final WSI to substantially accord.</p>	<p>Heritage [APP-048] to avoid impacts to archaeological finds.</p> <p>As set out in paragraph 1.1.6 of the WSI [REP4-026], 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.</p> <p>The Applicant notes that LCC and NCC do not</p>

¹ See the meeting with the Planning Inspectorate, Lincolnshire County Council and the Applicant of 9 June 2022, in Appendix 13.9 [APP-133].

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			<p>(e) provision for publication and dissemination of the analysis and records of the site investigation;</p> <p>(f) provision for archive deposition of the analysis and records of the site investigation; and</p> <p>(g) nomination of a competent person, persons or organisation to undertake the works set out within the written scheme of investigation.</p> <p>(4) Any archaeological works or watching brief must be carried out in accordance with the approved scheme.</p> <p>(5) In the event that site investigation is required, the site investigation and post investigation assessment must be completed in accordance</p>		<p>agree with the Applicant's approach. Further details are set out in the Statements of Common Ground [EN010133/EX5/C8.3.1_B] and [EN010133/EX5/C8.3.2_D].</p> <p>The Applicant has requested LCC's and NCC's comments on the WSI on a without prejudice basis so that these may be considered and taken into account. The Applicant received comments from LCC's archaeology officers on 23 February 2024 and these are being considered. However, from an initial review the Applicant notes that there are a number of points on which it has not been possible to reach agreement.</p>

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			<p>with the programme set out in the written scheme of investigation and provision made for analysis, publication and dissemination of results and archive deposition".</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.</p> <p>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 authority to issue a refusal to discharge the</p>

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					<p>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.</p> <p>Accordingly, the Applicant has not revised Requirement 12 in the draft DCO [EN010133/EX5/C3.1_G], but is continuing to engage with LCC (on behalf of all host authorities) to identify what changes are being sought to the WSI.</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>In addition, the Applicant has submitted a without prejudice version of the WSI</p> <p>[EN010133/EX5/C8.2.14] 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>

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10.	Schedule 2, Requirement 22 (Long term flood risk mitigation)	Not reproduced due to length	Delete	<p>The ExA is concerned that this requirement is not consistent with the need for the Secretary of State to consider the effects of the Proposed Development over its lifetime, including the worst case scenario as regards flood risk.</p> <p>The ExA does not consider this is a matter which can be deferred for future consideration. The Applicant has stated that the purpose of this requirement is long term flood risk mitigation, yet it cannot be known whether there would be appropriate mitigation after 40 years because the Applicant has not considered the flood risk between 40 and 60 years.</p>	<p>The Applicant does not agree with the assessment of the ExA that it cannot be known whether there would be appropriate mitigation after 40 years as in the worst case scenario the mitigation would be the decommissioning of the relevant parts of the Scheme at year 40.</p> <p>The Applicant has undertaken further engagement with the Environment Agency on this matter. It is understood that further data for the Tidal Trent is available from the Environment Agency which includes appropriate climate change allowances up to the 2080's epoch. However, the Environment Agency is</p>

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				<p>The ExA is minded to delete this requirement.</p>	<p>not able to provide the data to the Applicant prior to the close of the Examination. Once this data has been received the Applicant will update the Flood Risk Assessment [APP-090] and its Annexes D, E and F [APP-093, APP-094 and APP-095] accordingly.</p> <p>It was agreed with the Environment Agency on a call on 21 February 2024 that the updated flood risk assessment should be submitted for approval prior to construction (rather than prior to year 40 as originally proposed by the Applicant) as this will ensure that appropriate mitigation is in place taking into account climate change</p>

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					<p>allowances up to the 2080s epoch.</p> <p>Requirement 22 in Schedule 2 to the draft DCO submitted at Deadline 5 has therefore been amended to require the Applicant to submit the updated flood risk assessment to the Environment Agency prior to commencement of the authorised development and has been agreed with the Environment Agency as set out in the Statement of Common Ground [EN010133/EX5/C8.3.8_A].</p> <p>The Applicant is confident that the Secretary of State may include such a requirement, as it would fall within the scope of s120(2)(a) of the Planning</p>

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					<p>Act 2008 which provides that the Secretary of State may impose Requirements corresponding to conditions that could have been imposed as part of a planning permission under the Town and Country Planning Act 1990 (TCPA).</p> <p>Section 72 (conditional grant of planning permission) of the TCPA expressly states that a condition may be "(a) for regulating the development or use of any land under the control of the applicant [...] or requiring the carrying out of works on that land, so far as appears to the [Secretary of State] to be expedient for the purposes of or in connection with the</p>

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					<p>development authorised by the permission".</p> <p>The Applicant submits that it would be expedient to include Requirement 22 within the Order to ensure appropriate mitigation is in place for the operational life of the Scheme.</p> <p>In the alternative, Requirement 22 would fall within the scope of s120(2)(b) of the Planning Act 2008, being a "requirement to obtain the approval of the Secretary of State or any other person, so far as not within paragraph (a)".</p>
11.	Schedule 2, Requirement 23 (Electromagnetic Field Monitoring Strategy)	New requirement	Addition to requirements: 23.--(1) No part of the electrical cables permitted under Work	The ExA notes the Environment Agency's (EA) request for [REP4-077] such a requirement because there is limited	Since Deadline 4, further engagement between the Applicant and the Environment Agency has taken place in respect of

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			<p>No. 6B shall become operational until a written electromagnetic field monitoring strategy for the River Trent has been submitted to and approved by the Environment Agency.</p> <p>(2) The electromagnetic field monitoring strategy must include, but not be limited to -</p> <p>(a) an appropriate mechanism for surveying any behavioural responses from migratory fish species passing through the area of the cable crossing under the River Trent;</p> <p>(b) a mechanism for relaying the results of the surveys to the Environment Agency on a regular basis; and</p>	<p>research before it over the risk to the fish population. In addition, the Humber Estuary Special Area of Conservation designation includes the River Lamprey and Sea Lamprey which the EA have stated lay their eggs in suitable gravels upstream of the proposed cable corridor. As such, the ExA is minded to recommend inclusion of such a requirement in the recommended DCO.</p>	<p>the programme of monitoring requested by the Environment Agency.</p> <p>The Applicant has included provisions in the Outline OEMP [EN010133/EX5/C7.16_D] to ensure the programme of monitoring is undertaken by the Applicant or funded by the Applicant. This approach has been agreed with the Environment Agency as set out in the Statement of Common Ground [EN010133/EX5/C8.3.8_A].</p> <p>The Applicant considers that the proposed requirement is no longer necessary as the measures are secured via the OOEMP which is</p>

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			(c) proposed periods and timings during which surveys will be undertaken to coincide with the main migratory periods for species such as salmon and lamprey. (3) The monitoring strategy must be implemented as approved.		secured via Requirement 14.
12.	Schedule 9 – Deemed Marine Licence	Not reproduced due to length	Removal of Schedule in its entirety	See Article 44 above.	The Applicant does not agree with this proposed change for the reasons set out in Appendix A to the Applicant's Responses to Deadline 3A and Deadline 4 Submissions [EN010133/EX5/C8.1.32].
13.	Schedule 16, Part 13, Paragraph 170(6)	170(6) '....from complying with the protective provisions in this Part of this Schedule or any condition contained in Schedule 2	Removal of words in bold	Consequential amendment flowing from removal of Article 44 and Schedule 9 (see items 8 and 12).	The Applicant does not agree with this proposed change for the reasons set out in Appendix A to the Applicant's Responses to Deadline

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		(requirements) or Part 2 of Schedule 9 (Deemed marine licence under the 2009 Act). '			3A and Deadline 4 Submissions [EN010133/EX5/C8.1.32].
14.	Schedule 16, Part 13, Paragraph 173(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). '	Removal of words in bold	Consequential amendment flowing from removal of Article 44 and Schedule 9 (see items 8	The Applicant does not agree with this proposed change for the reasons set out in Appendix A to the Applicant's Responses to Deadline 3A and Deadline 4 Submissions [EN010133/EX5/C8.1.32].