



RWE Renewables UK Solar and Storage Limited

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Dear Byers Gill Solar Case Team

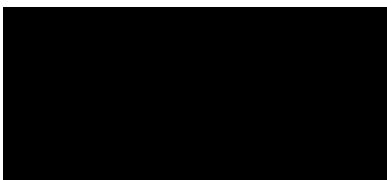
**Development Consent for the Byers Gill Solar scheme: EN010139
Planning Act 2008 (as amended) – Section 89; and The Infrastructure Planning
(Examination Procedure) Rules 2010 (as amended) – Rule 9
Procedural Decision made under Section 89**

On 9 May 2024 the Examining Authority (“ExA”) issued a Rule 9 letter (the “Rule 9 Letter”) which requested RWE Renewables UK Solar and Storage Limited (Registered Company No: 14539260) (the “Applicant”) to submit a separate document setting out in further detail the Applicant’s proposed approach to land included in the Order, particularly in relation to the identification of land required to deliver the proposed on-road cable route option and how that approach would be secured through the draft development consent order (“dDCO”).

This letter encloses the Applicant’s response to this request including in relation to the six issues specifically identified in the Rule 9 Letter.

We trust that the information and documents enclosed are sufficiently clear, however, if we can be of any assistance, please do not hesitate to contact us using the details provided below.

Your sincerely,



Michael Baker

DCO Project Manager, Byers Gill Solar



1 INTRODUCTION

- 1.1 This note has been prepared for RWE Renewables UK Solar and Storage Limited (Registered Company No: 14539260) (the “**Applicant**”) in response to the Examination Authority’s (“**ExA**”) Rule 9 Letter dated 9 May 2024 (“**Rule 9 Letter**”) in relation to the Byers Gill Solar scheme (the “**Proposed Development**”).
- 1.2 The Rule 9 Letter includes a request for the Applicant to provide additional information concerning the Applicant’s proposed approach to land included in the Development Consent Order (“**DCO**”) and particularly in relation to the identification of land required to deliver the proposed on-road cable route option and how that approach would be secured through the draft DCO (“**dDCO**”). This note provides the additional information requested by the ExA including in relation to the six issues specifically identified in the Rule 9 Letter.
- 1.3 The Applicant has organised the information provided in this note as follows:
- (a) An overview of the land required for the Proposed Development and the Applicant’s approach to acquiring the relevant rights and interests in that land.
 - (b) An overview of the Applicant’s approach to seeking compulsory acquisition powers.
 - (c) The Applicant’s strategy to deliver the on-road cable routes.
 - (d) The Applicant’s response to queries concerning the drafting of the dDCO.
 - (e) Commentary on the Land Plans and Street Works, Rights of Way and Access Plans.
 - (f) Commentary on the consistency of the Applicant’s approach to compulsory acquisition for the Proposed Development with other schemes.
 - (g) Summary and Conclusion.
- 1.4 The Applicant understands the focus of the Rule 9 Letter to be whether the dDCO has sufficient powers to deliver the proposed on-road cable route option. After an overview of the land required for the Proposed Development and the Applicant’s approach to land acquisition (including by compulsory acquisition), those on-road cable routes are the focus of this response. It is the Applicant’s view that, for the reasons explained, the powers within the dDCO are sufficient to deliver those on-road cable routes.
- 1.5 To aid navigation and interpretation of this note, Appendix 1 provides paragraph references for where each query included in the Rule 9 Letter is answered in this note.
- 1.6 The Applicant does not require powers of compulsory acquisition to deliver the on-road cable route for the reasons explained in this note.

2 OVERVIEW OF LAND REQUIRED FOR THE PROPOSED DEVELOPMENT

Overview

- 2.1 This section provides an overview of the land required for the Proposed Development and the Applicant’s approach to acquiring the necessary rights and interests in land.
- 2.2 As set out in Environmental Statement (“**ES**”) Chapter 2: The Proposed Development [**Document reference: APP-025**], the Order Limits (as defined in the dDCO) of the Proposed Development cover an area of approximately 490 hectares for solar photovoltaic panels, on-site Battery Energy Storage

Systems (“**BESS**”), and associated infrastructure including underground 33kV cabling between the panel areas and underground 132kV cabling to connect the Proposed Development to the existing National Grid Substation at Norton.

- 2.3 Where the 33kV and 132kV cabling will fall outside of the panel areas, the Order Limits includes both on-road and off-road underground cable route options (paragraphs 2.3.26 and 2.3.33 of ES Chapter 2: The Proposed Development [**Document reference: APP-025**]). Although the off-road option is the Applicant’s preferred approach, both options have been assessed as part of the ES and are included in the Order Limits to ensure that the Proposed Development is deliverable.
- 2.4 The Order Limits are based on the land anticipated to be required temporarily, with permanent rights of access, or permanently for the construction and operation of the Proposed Development and include all land necessary for any works where the Proposed Development interfaces with existing utilities (paragraph 2.2.2 of ES Chapter 2: The Proposed Development [**Document reference: APP-025**]).
- 2.5 The Order Land (as defined in the dDCO) comprises the land over which compulsory acquisition powers are required. The Applicant does not require powers of compulsory acquisition over all land within the Order Limits.

Cable Route Options

Cabling required

- 2.6 The Proposed Development requires underground 33kV cabling to connect the inverters and switchgears and to connect the switchgears to the on-site substation (Work No. 3).
- 2.7 Underground 132kV cabling is required to connect the Proposed Development from the on-site substation to the substation at Norton. The majority of the underground 132kV cable is Work No.5, although Work No. 3 also includes a portion of the 132kV cabling up within the panel areas to connect the onsite substation on Sheet 7 of the Works Plans to the on-road or off-road export corridor on Sheet 9 of the Work Plans [**Document reference: APP-008**].
- 2.8 Where the 33kV and 132kV cabling will fall outside of the panel areas, the Order Limits include both on-road and off-road underground cable route options. These options are shown on ES Figure 2.13 Underground Cable Routes [**Document reference: APP-051**] and the Applicant’s detailed consideration of these alternatives is set out in section 3.9 of ES Chapter 3: Alternatives and Design Iteration [**Document reference: APP-026**].

Off-road Option and Fixed Off-road Cabling

- 2.9 Where the underground 33kV and 132kV cabling fall outside of the panel areas, the Applicant’s preference is to install the cables along off-road routes using a cable plough, wherever possible (the “**Off-road Option**”). The Applicant uses the term ‘off-road’ to mean land which does not comprise adopted highway maintainable at the public expense.
- 2.10 The Applicant considers off-road installation using a cable plough to be the most efficient and least impactful method of cable installation, causing minimal disruption to the ground, by cutting, installing and back-filling in one operation (paragraphs 2.3.26 to 2.3.27 of ES Chapter 2 The Proposed Development [**Document reference: APP-025**]). A predominantly off-road cable route would also avoid various adverse impacts on the local community which are associated with an on-road route, as explained in paragraph 5.4.4 of the Statement of Reasons [**Document Reference: APP-014**].
- 2.11 Certain sections of the Off-road Option will be off-road in any event, as shown green on ES Figure 2.13 Underground Cable Routes [**Document reference: APP-051**] (the “**Fixed Off-road Cabling**”).

- 2.12 The cable route for the Off-road Option is not exclusively off-road and will in any event involve the Fixed On-road Cabling described in paragraph 2.14 below.

On-road Option and Fixed On-road Cabling

- 2.13 For the underground 33kV and 132kV cabling that falls outside of the panel areas, the Applicant has included alternative cable routes within the Order Limits which follow adopted highways maintainable at the public expense (the “**On-road Option**”). The works for the On-road Option are covered by Work No.3 and Work No. 5.
- 2.14 The final cable route will require at least some cabling works to be carried out in adopted highways maintainable at public expense, even if the preferred Off-road Option is delivered. The Proposed Development will require cabling to cross through adopted highways at several points, and there is one section of 132kV cabling where there is no off-road alternative to laying cabling along an adopted highway. Together, these crossing points and the on-road section may be referred to as the “**Fixed On-road Cabling**” and are shown coloured yellow and marked by orange-grey circles on the plan at Appendix 2 to this note.
- 2.15 The cable route for the On-road Option is not exclusively on-road and will in any event involve the Fixed Off-road Cabling described in paragraph 2.11 above.

Final Cable Route

- 2.16 Both the Off-road and On-road Options have been assessed as part of the ES and remain under consideration by the Applicant. At this stage, the Applicant’s preferred cable route for delivering the Proposed Development remains the Off-Road Option. The On-road Option has therefore been included within the dDCO [**Document reference: APP-012**] to ensure that the Proposed Development remains deliverable by the Applicant in the event that adequate land interests for the off-road option cannot be agreed with the relevant landowners and the Secretary of State is not minded to grant powers for the Applicant to compulsorily acquire any necessary outstanding interests. The Applicant confirms that the final cable route - which would include the Fixed On-road Cabling and the Fixed Off-road Cabling - will be determined at the detailed design stage following grant of development consent and controlled through requirement 3 of the dDCO [**Document reference: APP-012**].

Approach to Acquisition

- 2.17 In broad terms, the land interests required for the Proposed Development can be categorised and considered according to the principal elements of the scheme. This categorisation and the Applicant’s approach to acquiring the relevant land rights and interests in respect of each category, including through compulsory acquisition, is explained below.

(1) Panel Areas

- 2.18 Six areas of land are required to accommodate the ground mounted solar panels (Work No.1), the BESS (Work No. 2), the onsite substation (Work No. 4) and portions of the underground 33kV and 132kV cabling (Work No. 3) (the “**Panel Areas**”). The Panel Areas are lettered A to F on ES Figure 2.1: Panel Areas [**Document reference: APP-039**] and the works listed above are shown on the Works Plans [**Document reference: APP-008**].
- 2.19 The Applicant has obtained options for lease (“**Lease Options**”) over the land comprising the Panel Areas for the development of the solar panels, BESS, onsite substation, cabling and associated infrastructure. The Lease Options provide the Applicant with all necessary rights over those parts of the Order Limits for the purposes of the construction, operation and decommissioning of the Proposed Development (paragraph 3.2.4 of the Statement of Reasons [**Document reference: APP-014**]).

- 2.20 For the avoidance of doubt, the Lease Options over the Panel Areas provide the necessary rights and interests for the sections of 33kV and 132kV cabling which lie within the Panel Areas.
- 2.21 The Applicant does not require compulsory acquisition powers in respect of the Panel Areas to be included in the dDCO [**Document reference: APP-012**].

(2) Off-road Option

- 2.22 The Applicant's approach to securing the necessary land interests for the Off-road Option is detailed in section 3.2 of the Statement of Reasons [**Document reference: APP-014**]. The Applicant has been engaging with the 16 landowners of the Off-road Option land since March 2022 to seek voluntary options for easements ("**Easement Options**"). To date, 2 Easement Options are agreed, 12 landowners are at advanced stages of negotiation to agree Easement Options and the Applicant continues to engage with the outstanding landowners.
- 2.23 In case adequate Easement Options cannot be obtained for the Off-road Option, the Applicant has included compulsory powers in the dDCO [**Document reference: APP-012**] to acquire permanent rights over and temporarily possess parcels of the Off-road Option land. Whilst the Applicant's priority remains to secure adequate easements through voluntary agreements, these powers will ensure that any third-party interest or encumbrances affecting such land, rights and interests may be acquired, overridden or extinguished pursuant to the dDCO and that the Proposed Development may be delivered through the Off-road Option (paragraph 4.2.3 of the Grid Connection Statement [**Document reference: APP-168**]).
- 2.24 For the avoidance of doubt, the land required for the Fixed Cabling will be secured by a combination of Lease Options (where land comprises part of a Panel Area) and Easement Options (which remain subject to ongoing negotiation), with the contingency of compulsory acquisition where adequate Easement Options cannot be obtained.

(3) On-road Option

- 2.25 The On-road Option has been included within the dDCO [**Document reference: APP-012**] to ensure that the Proposed Development remains deliverable by the Applicant in the event that adequate Easement Options for the Off-road Option cannot be agreed with the relevant landowners and the Secretary of State is not minded to grant powers for the Applicant to compulsorily acquire any necessary outstanding interests.
- 2.26 The On-road Option can be delivered within land comprising the adopted highways maintainable at the public expense which are listed in Schedule 3 to the dDCO [**Document reference: APP-012**]. For clarity, Schedule 3 lists all of the cabling works to be carried within 'streets' as widely defined within the New Roads and Street Works Act 1991 (the "**1991 Act**") Act – not all of the streets listed relate to the Off-road Option cable route.
- 2.27 The works to install, maintain and decommission the cabling within land comprising adopted highway will be carried out as 'street works' under the 1991 Act regime pursuant to the statutory right contained in Article 9 (Street Works) of the dDCO [**Document reference: APP-012**] which incorporates sections 48 and 51 of the 1991 Act. The Applicant will also benefit from a statutory right to carry out these works pursuant to a generating licence under the Electricity Act 1989.
- 2.28 The effect of Article 9 and the 1991 Act is to authorise the necessary works to deliver the On-road Option (including the Fixed On-road Cabling) without requiring the Applicant to acquire any further rights or interests in the highways land, or subsoils beneath. The Applicant does not therefore require any compulsory acquisition powers in the dDCO in respect of those cables.
- 2.29 The Applicant's rationale to the delivery of the On-road Option is considered in more detail in section 4 of this note.

(4) Norton Substation

- 2.30 To connect the Proposed Development to the national grid, various works to construct electronic infrastructure are required on land at the existing National Grid Substation at Norton (Work No. 6).
- 2.31 As explained at paragraph 2.3.35 of ES Chapter 2: The Proposed Development [**Document reference: APP-025**] and paragraph 4.3.1 of the Grid Connection Statement [**Document reference: APP-168**], National Grid Electricity Transmission owns the freehold land in Norton Substation, part of which is leased to Northern Power Grid (“NPG”) for their operations as the Distribution Network Operator. The necessary works will be carried out by NPG pursuant to NPG’s connection agreement with the Applicant and on the basis of NPG’s leasehold interest in the site. Therefore, RWE does not need to separately acquire interests in the substation to facilitate the works. The Applicant confirms that NPG has all necessary rights to carry out the works comprising Work No.6 to complete the connection of the Proposed Development to the national grid (see also paragraph 5.5 of the Grid Connection Statement [**Document reference: APP-168**]).
- 2.32 On this basis, it is not necessary for the Applicant to seek compulsory acquisition powers over land at Norton Substation.

3 APPLICANT’S APPROACH TO COMPULSORY ACQUISITION

- 3.1 The scope of powers of compulsory acquisition included in the dDCO is set out in Chapter 4 of the Statement of Reasons [**Document Reference: APP-014**]. Powers authorising the compulsory acquisition of land, or interests in, or rights over land, are contained in Articles 21 (compulsory acquisition of land) and 23 (compulsory acquisition of rights) of the dDCO [**Document reference: APP-012**]. The compulsory acquisition powers sought are limited to permanent rights for the Off-road Option. Associated powers of temporary possession are also included. The land plots affected are detailed in Appendix A to the Statement of Reasons [**Document Reference: APP-014**]).
- 3.2 There is no proposed permanent acquisition of land (as compared to rights over land) as part of the Proposed Development.
- 3.3 The dDCO [**Document reference: APP-012**] also contains other powers relating to compulsory acquisition and temporary possession, which are respectively set out in paragraphs 4.3 and 4.4 of the Statement of Reasons [**Document Reference: APP-014**]. These include Article 28, which enables the Applicant to enter on, appropriate and use so much of the subsoil of or air-space over any street within the Order limits as may be required for the purposes of the authorised development and may use the subsoil or air-space for those purposes or any other purpose ancillary to the authorised development. Whilst this is not a power of compulsory acquisition, this Article enables the Applicant to disturb the subsoils beneath a street whilst carrying out streets works within that street.
- 3.4 The Applicant’s approach to the inclusion of the above compulsory acquisition powers in the dDCO is set out in Chapter 3 of the Statement of Reasons [**Document Reference: APP-014**]. The Applicant has explained at Chapter 5 of the Statement of Reasons [**Document Reference: APP-014**] why the powers included in the dDCO satisfy the conditions of section 122 of the Planning Act 2008 and reflected in the Compulsory Acquisition Guidance. The Applicant highlights paragraph 5.4 of the Statement of Reasons [**Document Reference: APP-014**], which explains the compelling case in the public interest for the Proposed Development in-principle, and in particular paragraph 5.4.4, which explains the comparative advantages to the local community of delivering the Proposed Development with the Off-road Option rather than the On-road Option.

- 3.5 The Applicant has also had regard to, and complied with, the Compulsory Acquisition Guidance.¹ In particular, the Applicant has complied with
- (a) paragraph 11 of the Guidance and ensured that the land to be taken is no more than is reasonably necessary for the Proposed Development;
 - (b) paragraph 25 of the Guidance and sought to acquire land within the Order Limits by negotiation wherever practicable; and
 - (c) paragraph 26 of the Guidance and has sought compulsory acquisition powers in respect of the Off-road Option land as a contingency measure at the same time as conducting landowner negotiations, which remain ongoing.
- 3.6 The Applicant understands that the ExA's request for further information is centrally concerned with the need for powers of compulsory acquisition to deliver the On-road Option and, having provided an overview of the Applicant's current approach to land rights and compulsory acquisition, the remainder of this note will address the Applicant's strategy for the On-road Option in more detail.

4 APPLICANT'S STRATEGY TO DELIVER THE ON-ROAD OPTION

- 4.1 The On-road Option is primarily a contingency to ensure the Proposed Development may be delivered by the Applicant in the event that adequate land interests for the Off-road Option cannot be obtained through the landowner negotiation and / or compulsory acquisition. However, the Applicant's approach to delivering cabling in land comprising adopted highway remains relevant in any case, as the final cable route will include the Fixed On-road Cabling and could include such other sections of the On-road Option if the Off-road Option cannot be fully delivered using Easement Options and / or compulsory acquisition powers granted by the Secretary of State.
- 4.2 The Applicant intends to deliver the On-road Option through Article 9 of the dDCO [**Document reference: APP-012**] and sections 48 and 51 of the 1991 Act, which together authorise the Applicant to carry out street works to install, maintain and decommission the necessary cabling in land comprising streets as defined in that Act. Where such streets are adopted highways and vested in the local highway authority, no separate proprietary rights are required in respect of that land. No further land rights are required to deliver the On-road Option.
- 4.3 The remainder of this section sets out the legal basis for this position.

Legal basis for laying cables in adopted highway

Street Works under the 1991 Act

- 4.4 The Applicant's intends to carry out the cabling works for the On-road Option in land comprising adopted highway maintainable at public expense as 'street works' regulated by the 1991 Act.
- 4.5 Section 48(3) of the 1991 Act defines 'street works' as follows:

"In this Part "street works" means works of any of the following kinds (other than works for road purposes) executed in a street in pursuance of a statutory right or a street works licence -

(a) placing apparatus, or

(b) inspecting, maintaining, adjusting, repairing, altering or renewing apparatus, changing the position of apparatus or removing it,

¹ Department for Communities and Local Government, *Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land* (September 2013)

or works required for or incidental to any such works (including, in particular, breaking up or opening the street, or any sewer, drain or tunnel under it, or tunnelling or boring under the street)."

4.6 Section 51 of the 1991 Act goes on to prohibit any unauthorised street works:

"It is an offence for a person other than the street authority—

(a) to place apparatus in a street, or

(b) to break up or open a street, or a sewer, drain or tunnel under it, or to tunnel or bore under a street, for the purpose of placing, inspecting, maintaining, adjusting, repairing, altering or renewing apparatus, or of changing the position of apparatus or removing it,

otherwise than in pursuance of a statutory right or a street works licence."

4.7 In consequence of sections 48 and 51, street works must be carried out either:

- (a) by a street authority; or
- (b) pursuant to a statutory right; or
- (c) pursuant to a street works licence.

4.8 The Applicant would obtain a statutory right on grant of the DCO by virtue of Article 9. Article 9(1) of the dDCO [**Document reference: APP-012**] which authorises the undertaker for the purpose of the authorised development to enter onto the streets listed in Schedule 3 (streets subject to street works) to the extent that they are within the Order Limits in order to carry out various works, including to place and keep apparatus under the street and to maintain apparatus in the street, change its position or remove it. Article 9(2) expressly confirms that Article 9(1) is a statutory right for the purpose of sections 48 and 51 of the 1991 Act.

4.9 The Applicant will also obtain a statutory right by virtue of holding an electricity generation licence under the Electricity Act 1989 (the "**1989 Act**"). Section 10 of the 1989 Act provides that a generation licence may provide for the licence holder to benefit from the statutory rights in Schedule 4 to that Act, which include rights to carry out street works for purposes connected with the activities authorised by the generation licence. The Applicant has made an application to the Office of Gas and Electricity Markets (Ofgem) for a generating licence under the Electricity Act 1989 and expects to confirm grant of this application before the start of examination.

4.10 As a further alternative statutory right, section 50(1) of the 1991 Act provides that street authorities (i.e. highways authorities in the case of adopted highways) may issue licenses permitting a person to undertake street works.

4.11 It is industry-standard practice for utility undertakers to carry out works to install, maintain, replace and remove apparatus within streets which are adopted highways without separately acquiring any interests or permissions in respect of land comprising that street. That is the case where the undertaker has a statutory right, or where they rely on the benefit of a licence under section 50 of the 1991 Act.

4.12 Where authorised by the 1991 Act regime, there is no need for the Applicant to acquire any proprietary rights, interests or permissions in relation to the land comprising the relevant street.

4.13 In summary - the Applicant would be authorised by Article 9 of the dDCO to place apparatus within the streets listed in Schedule 3 to the dDCO [**Document reference: APP-012**] and then may maintain, replace and remove such apparatus and execute incidental works such as breaking open the surface of the street. For the completeness of this explanation, Article 10 of the dDCO [**Document reference: APP-012**] then applies various other provisions of the 1991 Act and any regulations or code of practice

issued under those provisions to works carried out under Article 9. An alternative statutory right would also accrue on the grant of a generating licence by Ofgem.

Extent of a Street or Highway

4.14 This sub-section considers the extent of land which may comprise a 'street' for the purpose of the 1991 Act and therefore comprises land in which apparatus may be placed, maintained and removed.

4.15 Section 48 of the 1991 Act provides the definition of a "street":

"In this Part a "street" means the whole or any part of any of the following, irrespective of whether it is a thoroughfare—

(a) any highway, road, lane, footway, alley or passage,

(b) any square or court, and

(c) any land laid out as a way whether it is for the time being formed as a way or not.

Where a street passes over a bridge or through a tunnel, references in this Part to the street include that bridge or tunnel."

4.16 The streets required to deliver the On-road Option are all adopted highways maintainable at the public expense and fall within limb (a) of the above definition. This position is consistent with the Applicant's investigations and highway searches with the relevant local highways authorities.

4.17 Where highways are adopted and maintainable at the public expense, the highway vests in the local highway authority by virtue of section 263 of the Highways Act 1980 (the "**1980 Act**"). The legislation does not define what the physical extent of the highway will be. Instead, this concept has been developed through case law.

4.18 The principle emerging from case law is that a highway or street is as wide and deep as the width and depth required for the highway authority to be able to carry out its duties with respect to that street or highway. Expositions of this principle are set out below:

(a) In *Coverdale v Charlton*² Lord Justice Bramwell states that the extent of a street is a:

"surface of such a thickness as the local board may require for the purpose of doing to the street that which is necessary for it as a street, and also of doing those things which commonly are done in or under streets".

(b) In the same judgment, Lord Justice Brett added that:

"It comprises a depth which enables the urban authority to do that which is done in every street, namely, to raise the street and to lay down sewers: for, at the present day, there can be no street in a town without sewers, and also for the purpose of laying down gas and water pipes. 'Street,' therefore, in my opinion, includes the surface and so much of the depth as may be not unfairly used as streets are used. It does not include such a depth as would carry with it the right to mines, neither would 'street' include any buildings which happen to be built over the land, because that is not a part of the street within the meaning of such an Act as this."

(c) In *Tunbridge Wells Corporation v Baird*³, Lord Halsbury stated that:

² (1878) 4 Q.B.D. 104

³ (1896) A.C. 434

“It is intelligible enough that Parliament should have vested the street quâ street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street.”

In other words, the soil necessary for ‘preserving and maintaining and using it as a street’, is itself legally considered to be within the physical extent of a street.

- 4.19 It follows from these authorities and section 263 of the 1980 Act that where apparatus is placed within the physical depth required by a highway authority to perform their duties in relation to it (such as for the installation of sewers), the apparatus will be placed in the highway. Providing that such apparatus is installed pursuant to a statutory right and regulated by the 1991 Act regime, the right-holder will not require any proprietary interest in the highway on the basis that the land comprising the highway has been dedicated for public use by virtue of its vestiture in the local highway authority.
- 4.20 In contrast, where apparatus is installed in the subsoils beneath the land comprising the highway, those subsoils will not be vested in the local highway authority and may instead be owned by third parties (such as the freehold owner of the neighbouring land). In this situation, a proprietary right in the highway subsoils may be required.
- 4.21 The works required for the Fixed On-road Cabling and any other elements of the On-road Option will be carried out at an appropriate depth within the adopted highways listed in Schedule 3 to the dDCO **[Document reference: APP-012]**. No apparatus is intended to be laid within highway subsoils. Where the works to install cabling within the adopted highways disturb or otherwise require the Applicant to enter onto the subsoils beneath the highway, the Applicant may rely on the powers included in Article 28 of the dDCO **[Document reference: APP-012]**, as set out at paragraph 3.3 above.
- 4.22 On this basis, the Applicant does not require any further rights or interests within the adopted highways or within the subsoils beneath to deliver out the Proposed Development. For this reason, the Applicant is not seeking compulsory acquisition powers over these interests in compliance the requirement of section 122 of the Planning Act 2008 and paragraph 11 of the Compulsory Acquisition Guidance to ensure that the land to be taken is no more than is reasonably necessary.

5 DRAFTING OF THE DCO

- 5.1 The ExA has requested clarification of the meanings of the term “highway” and the phrase “width of the highway” as suggested to be used respectively in Schedule 3 and Article 9 of the dDCO **[Document reference: APP-012]**.
- 5.2 The term “highway” is defined by Article 2 of the dDCO **[Document reference: APP-012]** to have the meaning given to that term in the 1980 Act. Section 328(1) of that Act provides that *“In this Act, except where the context otherwise requires, “highway” means the whole or a part of a highway other than a ferry or waterway”*.
- 5.3 The Applicant notes that the term “highway” is not used in Article 9 of the dDCO **[Document reference: APP-012]**, which does however refer extensively to “streets”. The term “street” is defined in Article 2 of the dDCO **[Document reference: APP-012]** to mean *“a street within the meaning of section 48 of the 1991 Act, together with land on the verge of a street or between two carriageways, and includes any footpath or part of a street”*. The definition under section 48 of the 1991 Act has already been considered.
- 5.4 The phrase “width of the highway” is used only within Schedule 3 to the dDCO **[Document reference: APP-012]** which sets out the streets in respect of which the statutory right to carry out street works contained in Article 9 may be exercised by the Applicant. This phrase has its literal meaning (i.e. ‘the lateral extent of the highway’) and is intended to enable the Applicant to carry out cabling works pursuant to Article 9 in any part of the width of the highways listed.

5.5 The Applicant acknowledges the contrasting references to “streets” in Article 9 and to the width of “highway” in the description of works in Schedule 3. This apparent discrepancy arises because highways are classified as streets under the 1991 Act, as previously considered in this note. The Applicant would be willing to amend the Schedule 3 formulation to “width of the street” to avoid any confusion, if the ExA thinks that prudent.

6 LAND PLANS AND STREET WORKS, RIGHTS OF WAY AND ACCESS PLANS

6.1 The ExA have requested clarification of how any distinction in meaning between references to “highway” and to “width of the highway”, respectively in Article 9 and Schedule 3 of the dDCO [**Document reference: APP-012**], is reflected on the Land Plans [**Document Reference: APP-010**] and the Street Works, Rights of Way and Access Plans (the “**SWRWA Plans**”) [**Document Reference: AS-002**]; and how both plans clearly demonstrate the exact boundaries of the “width of highway”. Again, the Applicant assumes that the ExA intended to refer to the term “street”, as it appears in Article 9.

6.2 As noted above, although there is a technical distinction in the terms “street” and “highway”, there is no intended distinction in the substance of these terms for the purpose of Article 9 and Schedule 3 of the dDCO [**Document reference: APP-012**]. “Width of highway” can be read as “width of street”.

6.3 The Book of Reference [**Document reference: APP-015**] clearly explains in the “Extent, Description and Situation of Land” column of Part 1 where any particular land plot shown on the Land Plans [**Document Reference: APP-010**] is public highway. As noted above, any public highway will be classed as a street under the 1991 Act and the lateral limits of such highway / street will be unchanged by either classification. There is therefore no distinction in meaning to be reflected by the Land Plans [**Document Reference: APP-010**] and the SWRWA Plans [**Document Reference: AS-002**].

6.4 With respect to the demarcation of the “width of the highway” (also the “width of the street”) on the Land Plans and the Street Works, Rights of Way and Access Plans, it is important to distinguish two categories of streets listed in Schedule 3:

(a) The first category of streets are the adopted highways maintainable at public expense which have been specifically included within the Order Limits in order to facilitate the On-road Option, including the Fixed On-road Cabling Works. For these works, the Applicant will rely – as explained above – on Article 9 of the dDCO [**Document reference: APP-012**] and sections 48 and 51 of the 1991 Act in order to carry out cabling works pursuant to the statutory right granted by those provisions. The land within which those rights would be exercised is highway land which is vested in the highways authority. The “width of the highway” is clearly demarcated in the Land Plans [**Document Reference: APP-010**], with reference to the plots which are identified in the Book of Reference [**Document reference: APP-015**] as being public highway.

(b) The second category of streets are footpaths, bridleways and non-adopted roads. These streets are within the Panel Areas over which the Applicant has acquired all necessary rights and interests to carry out the cabling works through the Lease Options. As these highways (or streets) are not publicly adopted and maintained, there is no distinction in the land ownership of those highways (or streets) and the wider area of land over which the Applicant has rights and interest. It is not necessary for Schedule 3 or the supporting applications to demarcate the “width of highway” (or street) for the purposes of identifying the land over which the statutory right provided by Article 9 would be exercised. The route of the highway (street) in question is clearly shown on the SWRWA Plans [**Document Reference: AS-002**], for the purposes of authorising the breaking open of the street under the 1991 Act regime.

7 CONSISTENCY WITH OTHER SCHEMES

7.1 The ExA have requested clarification as to whether other schemes have adopted a similar approach to compulsory acquisition whilst also relying on a development consent order article substantially in the form of Article 9 of the dDCO [**Document reference: APP-012**].

7.2 The Applicant is aware that a large number of solar DCOs have been submitted and which remain under examination, or pending a decision, have included powers of compulsory acquisition in respect of subsoil land to highway. The ExA has referred to the Longfield scheme, for which a DCO has been made.

Longfield Solar

7.3 The Applicant's Article 9 is substantially in the form of the street works article in the Longfield DCO (Article 8 of that DCO). There is no substantial difference in approach on that Article between the schemes.

7.4 Where the Longfield scheme differs is that powers of compulsory acquisition have been included in respect of highway subsoil.

7.5 It is the Applicant's position that, for the reasons outlined in this note, those powers are not strictly necessary to enable the delivery of the scheme. The Applicant is not aware of the extent to which the issue was examined in detail, nor whether submissions were made on that need for such highway subsoil powers. The approach used for the Longfield scheme is a conservative one to guarantee delivery of the scheme.

HyNet Carbon Dioxide Pipeline Order 2024

7.6 The issue of subsoil interests beneath an adopted highway and the application of the 1991 Act regime was recently considered during the examination of the HyNet Carbon Dioxide Pipeline Order 2024 (the "**HyNet Project**"). Although the circumstances of the Hynet Project are different to the Proposed Development, the submissions of the applicant for that scheme and National Highways usefully inform and are consistent with the Applicant's approach in the present case.

7.7 On the HyNet Project, the applicant proposed to install a pipeline underneath a highway forming part of the Strategic Road Network ("**SRN**") for which National Highways are the highway authority. The pipeline was proposed to be installed by means of horizontal directional drilling ("**HDD**") at a minimum depth at all times of 4 meters beneath the underside of the highway. One of the issues disputed by the parties was whether the works to install the pipeline would properly be 'street works' regulated by the 1991 Act regime. The applicant did not consider that such works could properly be regarded as 'street works' because they would be constructed in the substrata beneath the SRN, for which the Applicant would acquire subsoil interests by compulsory acquisition. National Highways' position was that the pipeline works would comprise street works for the purpose of the 1991 Act (see paragraphs 8 to 14 of King's Counsel Opinion on National Highway Submissions, September 2023 - **HyNet Examination Library Reference: REP8-038**).

7.8 The works being considered in the Hynet Project are therefore different to those being considered in this note in that they were carried out:

- (a) at a significant depth below the underside of the carriageway, and therefore deep in the highway's sub-soil; and
- (b) without a need for there to be access through the highway strata above. The works were to be delivered via HDD from adjoining land, and not down through the surface of the highway.

7.9 The Secretary of State, and the Hynet Examining Authority, accepted the arguments of the Applicant that:

- (a) The works did not involve breaking the surface of the highway and did not therefore require regulation under the equivalent “street works” article in the Hynet DCO; and
- (b) As the works were within the sub-soil of the highway, it was appropriate (and necessary) to provide the applicant with powers of compulsory acquisition over those sub-soil interests to enable delivery of the scheme.

7.10 It was expressly identified in submissions that the delivery of works within the highway strata (i.e. above the sub-soil) would not require the grant of proprietary rights in cases where a statutory right was available under the 1991 Act. For example, paragraph 9 of the Kings Counsel opinion re: Regulation of Street Works in Strategic Road Network submitted by National Highways at Deadline 5 (**HyNet Examination Library Reference: REP5-051**) usefully summarised the position as (emphasis added):

*“Hence, statutory undertakers have such express statutory rights contained in legislation applicable to their undertaking. By way of example, there are powers for undertakers to lay their apparatus in, under or over a highway contained in s.158 of the Water Industry Act 1991, Schedule 4 to the Electricity Act 1989, Schedule 4 to the Gas Act 1986, and Schedule 3A to the Communications Act 2003. Nonetheless, although statutory undertakers have such statutory rights, the physical works involved in exercising those powers are then regulated by the street authority pursuant to NRSWA. **That “statutory right” means that no acquisition of the land in which such apparatus is to be laid is required by those undertakers.** It also means that they do not require a street works licence. However, it does not result in the regulation set out in NRSWA not applying. On the contrary, NRSWA’s very objective is to enable the street authority to properly control and regulate all such street works.”*

7.11 Whilst the issues in the HyNet Project are not determinative of the issue which is the subject of this note – as they involved works to lay a pipeline in highway subsoil – the submissions of the parties and the findings of the Secretary of State in that case are entirely consistent with the position being outlined by the Applicant in this note.

8 SUMMARY AND CONCLUSION

8.1 This note has set out the Applicant’s approach to including land within the Order Limits for the principal elements of the Proposed Development and explained the Applicant’s approach to acquiring the relevant land interests including through the use of compulsory acquisition powers over Order Land.

8.2 In particular, the Order Limits include land for two alternative routes for the 33kV and 132kV cable routes which fall outside of the Panel Areas: the Off-road Option and the On-road Option. At this stage, the Applicant’s preferred cable route for delivering the Proposed Development remains the Off-Road Option. The final cable route - which would include the Fixed On-road Cabling and the Fixed Off-road Cabling - will be determined at the detailed design stage following grant of development consent and controlled through requirement 3 of the dDCO [**Document reference: APP-012**].

8.3 The Applicant intends to secure adequate Easement Options for the Off-road Option. In case this is not possible, compulsory acquisition powers have been included in the dDCO [**Document reference: APP-012**] to acquire permanent rights over and temporarily possess parcels of the Off-road Option land. The On-road Option is primarily a contingency to ensure the Proposed Development may be delivered if adequate land interests for the Off-road Option cannot be obtained through the landowner negotiation and / or compulsory acquisition.

8.4 The On-road Option would be delivered pursuant to Article 9 of the dDCO [**Document reference: APP-012**] and sections 48 and 51 of the 1991 Act, which together authorise the Applicant to carry out street works to install, maintain and decommission the necessary cabling in land comprising streets as defined in that Act. The streets comprising the On-road Option are adopted highways maintainable at the public expense and by operation of section 263 of the 1980 Act the highway land is vested in the local highway authority. The Applicant does not require any separate proprietary rights the highways land.

- 8.5 Although the subsoils beneath adopted highways may be owned by third parties, the Applicant only intends to install cabling within the stratum of highway land. Where the works to install cabling within the adopted highways disturb or otherwise require the Applicant to enter onto the subsoils beneath the highway, the Applicant may rely on the powers included in Article 28 of the dDCO [**Document reference: APP-012**]. On this basis, the Applicant does not require any further land rights to deliver the On-road Option.
- 8.6 It is acknowledged that a large number of solar DCOs have been submitted and which remain under examination, or pending a decision, have included powers of compulsory acquisition in respect of subsoil land to highway. The Applicant's position is that this is a conservative approach to guarantee delivery of the scheme and that such powers are not strictly necessary to enable the delivery of cabling in land comprising adopted highway. The Applicant submits that the submissions of the parties and the findings of the Secretary of State in relation to the HyNet Scheme are entirely consistent with this position.
- 8.7 The Applicant's strategy for delivering the On-road Option (if it is required, as a contingency) seeks to ensure that the land to be taken is no more than is reasonably necessary. However, this strategy is not essential to the delivery of the Proposed Development. If the ExA considers that the deliverability of the On-road Option may only be guaranteed through the acquisition of subsoil interests, the Applicant is willing to prepare a change request to include powers of compulsory acquisition over these interests in the dDCO.

APPENDIX 1

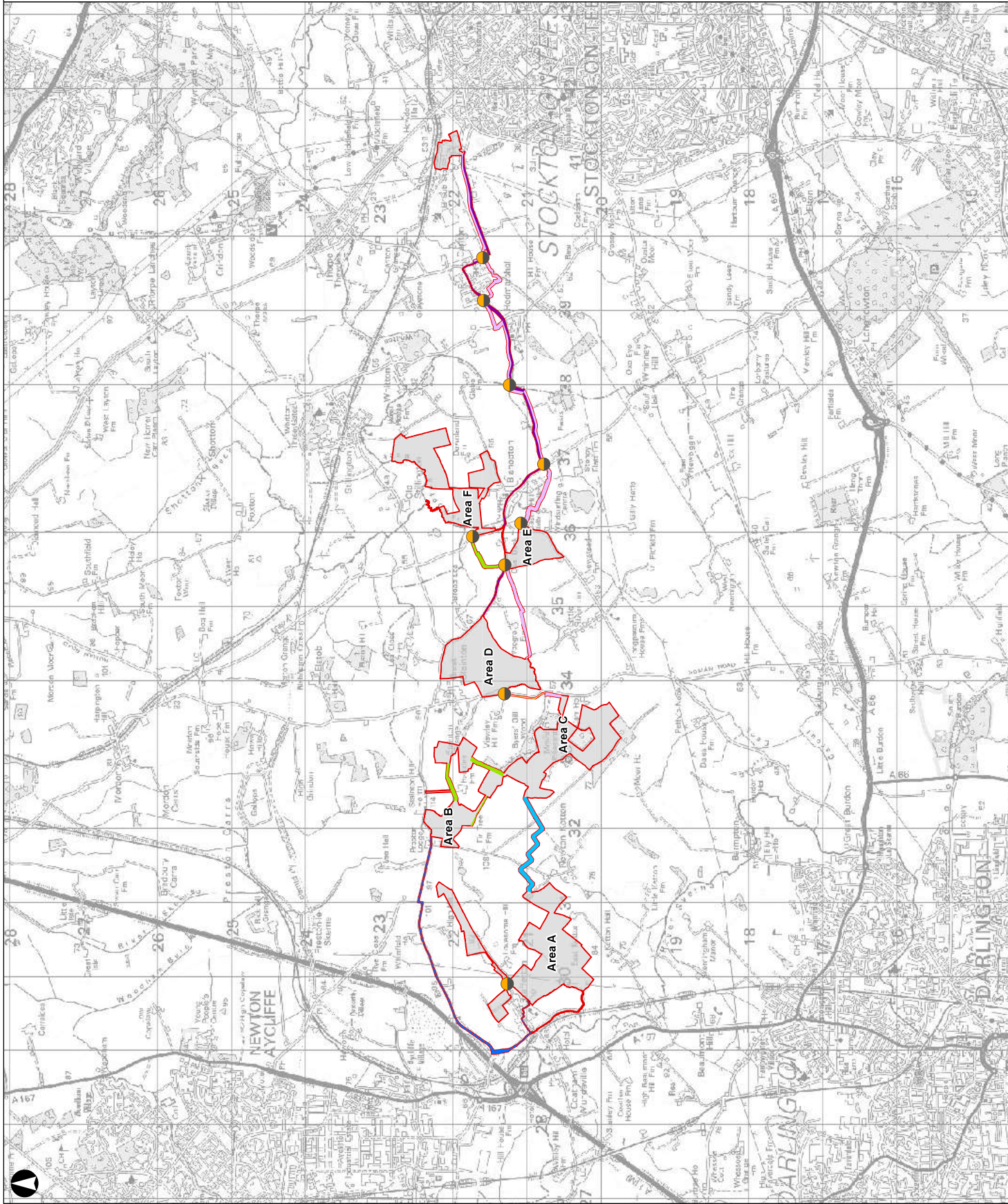
SUMMARY OF APPLICANT'S RESPONSE

Information Requested	Applicant Response
<p>Provide further reasoning for the Applicant's current approach to land rights, how and why the Applicant has determined what rights they would require (including CA) to deliver the proposed on-road cable route, particularly in relation to subsoil rights of plots which appears to be vested in third parties rather than in the Highways Authority.</p>	<p>The Applicant overviews the land required for the Proposed Development, including for the off-road and on-road cable route options, in paragraphs 2.1 to 2.16.</p> <p>The Applicant explains its approach to the acquisition of land rights for the principal elements of the Proposed Development in paragraphs 2.17 to 2.32.</p> <p>The Applicant overviews its approach to seeking powers of compulsory acquisition in section 3.</p> <p>The Applicant explains its strategy for delivering the on-road cable route in section 4 and confirms its approach to sub-soil rights in paragraphs 4.32 and 4.35.</p>
<p>Provide further information and reasoning on its approach in relation to Art 9 and Sch. 3 of the dDCO and why it believes that no further rights than those included are required to carry out the proposed works particularly considering that sub-soil rights, to at least some of the plots (or part), appears to be vested in third parties rather than in the Highways Authority.</p>	<p>The Applicant explains its strategy for delivering the on-road cable route in section 4 and confirms its approach to sub-soil rights in paragraphs 4.32 and 4.35.</p>
<p>Provide further explanation on how these are accurately and clearly reflected in the current Land Plans [APP-010] and the Street Works, Rights of Way and Access Plans [AS-002];</p>	<p>The Applicant's considers the interpretation of the Land Plans and Street Works, Rights of Way and Access Plans in section 6.</p>
<p>Provide further understanding and clearly set out the definition of the phrase "width of highway" used in Sch. 3, "highway" as defined within Art. 9 and how these differ from each other (if applicable);</p>	<p>The Applicant provides clarification of the use of these phrases in paragraphs 6.1 to 6.3.</p>
<p>If the definition of "width of highway" in Sch. 3 and "highway" in Art. 9 do differ, then the Applicant is asked to clarify how this distinction has been reflected in the Land Plans [APP-010] and the Street Works, Rights of Way and Access Plans [AS-002] and how both plans clearly demonstrate the exact boundaries of the "width of highway";</p>	<p>The Applicant explains its approach to showing the boundaries of the "width of highway" on the Land Plans and Street Works, Rights of Way and Access Plans in paragraphs 6.4 to 6.6.</p>

Information Requested	Applicant Response
<p>Further to this, in the Explanatory Memorandum [APP-013] and in relation to Art. 9 (Street Works), the Applicant states that the article is substantially found as Art. 8 of the Longfield Solar Farm Order, amongst others. However, the CA and Order Land approach taken at Longfield Solar Farm Order appears to be significantly different from that proposed by the Applicant in relation to Byers Gill. It is therefore requested that the Applicant clarifies which other Development Consent Orders, if any, have adopted a similar approach to CA while also relying on an article such as that substantially found in Art. 9 (Street Works) of dDCO [APP-012] to secure similar powers as those needed to deliver the on-road cable route.</p>	<p>The Applicant provides commentary on the consistency of its approach with other schemes to seeking compulsory acquisition powers in relation to subsoil interests in section 7.</p>

APPENDIX 2

PLAN SHOWING FIXED ON-ROAD CABLING



- Legend**
- Order Limits
 - 33KV Underground Cabling
 - Off-road route option *
 - On-road route option
 - Off-road route (fixed)
 - 132KV Underground Cabling
 - On-road route
 - Off-road route *
 - On-road route (fixed)
 - Preferred cable route option
 - Cable road crossing locations

Coordinate System: British National Grid
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Rev	Date	By	Chkd	Appd	Audtd
P01	30/01/2024	JE	LM	TS	DB



Byers Gill Solar

Rule 9 Cable Route - May 2024

Scale at A3	1:50,000
Rev	
Issue	
Subsidiary	
Cable Routes	
Project Number	286386-00
Revision	P01
Drawing Number	BGS-CR01-00001