

**Application by Aquind Limited for an Order Granting Development Consent for the
Aquind Interconnector (Ref. EN020022)**

**TRANSCRIPT OF SUBMISSIONS TO ISSUE SPECIFIC HEARING 1 - draft
Development Consent Order
PORTSMOUTH CITY COUNCIL
30 NOVEMBER 2020**

1.0 INTRODUCTION

- 1.1 Portsmouth City Council ('PCC') is an Interested Party and Affected Person pursuant to the Planning Act 2008 in relation to AQUIND Limited's ('Aquind' or 'the Applicant') application under the Planning Act 2008 (as amended) for a Development Consent Order (DCO) in respect of the AQUIND interconnector (the 'Project' or 'Proposed Development') : a 2000MW subsea and underground High Voltage Direct Current (HVDC) bi-directional electric power transmission link between Normandy in France and the South Coast of England.
- 1.2 PCC is due to attend the Issue Specific Hearing in respect of the draft DCO programmed for 9th December 2020 and make submissions at that hearing.
- 1.3 The following is provided in order to meet the Examining Authority's ('ExA') requirement for a full transcript of any oral submission PCC intends to make at the said hearing as clarified with the Examining Authority (ExA) in PCC's email of 23 November 2020 to which the ExA responded on 25 November 2020 confirming the proposed approach.

2.0 Commentary on dDCO

- 2.1 PCC has been informed by the applicant, at meetings of 12th and 25th November 2020 that they intend to provide substantive updates to the dDCO to comply with requests that PCC have raised in respect of key matters. While PCC will therefore continue to engage with the applicant in respect of drafting issues within the dDCO to assist the ExA to correct errors and clarify discrepancies with the draft Order PCC will also comment at the hearing on the acceptability, in the view of PCC, of specific articles and requirements based on review of the latest version that will be made available after 30th November and before 9th December 2020.
- 2.2 PCC notes however that a number of questions within the published agenda for ISH1 specifically seek responses from the City Council, or otherwise seek clarification on matters that the City Council believes we can assist the ExA with. These responses are provided below, and are offered without prejudice to any amendments that may have to be made once a further version of the dDCO from the applicant is received.

3.0 ExA's QUESTIONS WITHIN PUBLISHED AGENDA

- 3.1 The following numbering is provided in reference to that used in the published agenda for ISH1, starting at agenda item 3.1 ("Q3.1" and so on) as the first substantive question. All comments in this section are based upon the dDCO submitted at Deadline 3, dated 3 November 2020.
- 3.2 Q3.1 - PCC will note Aquind's comments and reserves the right to comment during the hearing or at a later date.

Part 1

- 3.3 Q3.2 - No comment from PCC.
- 3.4 Q3.3 - PCC would highlight that Art 2 defines "land" and "Order land" differently. Article 20 is concerned with "Order land" in Art 20(1)(a), leading into Art 20(1)(b)'s "any land so acquired...". Consequently, the beginning of Art 20(1)(b) should be read as "Any such Order land so acquired...". An amendment to that effect could clarify this.
- 3.5 Q3.4 - PCC will note Highways England's position.

Part 2

- 3.6 Q3.5 - With regard to HDD locations and their relationship with Art 3 raised in this question, Art 3 of the dDCO grants development consent for the Authorised Development described in Schedule 1, subject to the Requirements of Schedule 2. Other articles inform the powers that Aquind seek to implement and maintain the development.

- 3.7 The description of the Authorised Development in Schedule 1 does not secure particular locations for the HDD sites. PCC regards this detail as fundamental to ensure that impacts of the development are mitigated in sensitive areas. This could be secured by express stipulation within the appropriate Works types in Schedule 1. This should be secured by reference to identifiable areas of land to the maximum extent possible taking account of Aquind's need for a degree of flexibility for detailed design concerning the location of entry and exit points, launch and reception compounds. Presently the drafting is unacceptably loose and does not restrict Aquind from trenchless alternatives to HDD as it would not be clear for enforcement purposes where HDD drilling is required to occur between. These details are an important part of the Applicant's mitigation strategy and yet are not effectively delivered through the dDCO.
- 3.8 In relation to Schedule 2 Requirements, Requirement 6(3) (as one example of detailed design requirements) does not empower the relevant planning authority to require HDD in any particular location(s) by reference to the DCO when considering an application under that requirement.
- 3.9 Schedule 2, Requirement 15 requires a construction environment management plan for each phase in accordance with the onshore outline construction environmental management plan. In the interests of transparency and certainty the parameters for HDD drilling should be stipulated clearly within the definitions of Works and not relegated to a certified document under Schedule 14 such as the onshore outline construction environmental management plan or a phase-specific construction environmental management plan.
- 3.10 In response to Q3.6 the following commentary is provided without prejudice to PCC's fundamental objection to the inclusion of commercial fibre optic cables as purported 'associated development' under the Planning Act 2008 and in any event, as elaborated in Q4.3 below.
- 3.11 The ExA has asked for information regarding Article 7, concerning transfer of the benefit of the Order. Art 7(6)(c) does not refer to a "transferee" as in adjacent sub-clauses, but rather "any person", suggesting an intention to retain the benefit but effectively 'sub-let' spare capacity to a third party with the requisite Ofcom status. It would seem that if granted as part of the development, the Secretary of State would have no control over any commercial user(s) of the commercial fibre optic cable. In practice, Aquind appear to be seeking to take advantage of Article 7 by designing the proposed development to keep key installations for the different infrastructure types separate. For example, we note reference in Aquind's 'Statement in Relation to FOC' (7.7.1, REP1-127) to the separate telecommunications buildings in Lovedean and Aquind's concession that "approximately two thirds of the cabinets within the ORS will be available for commercial use", separately from those that "house key control equipment... to support the primary function... (i.e. control and monitoring)". PCC refers to its detailed objections to the case

for the inclusion of the commercial fibre optic cables as part of the DCO and their impact under Q4.3 below.

- 3.12 Q.3.7 In addition to the matters raised by the ExA as to decommissioning, PCC wishes to raise the issue of how Aquind intends to approach decommissioning of the distinct energy and data elements sought as this is not clear in PCC's view.
- 3.13 PCC notes that the applicant in the Preesall DCO as set out in *R (on the application of Halite Energy Group Ltd) v The Secretary of State For Energy & Climate Change* [2014] EWHC 17 (Admin) included a "decommissioning fund provided for in the s106 agreement... to protect [the local authority] in case the operator went into liquidation during construction."
- 3.14 PCC considers Aquind should provide such security in this case.

Part 3

- 3.15 Q3.8 With regard to the first question concerning NRSWA 1991 powers, the current draft DCO gives authority to make, alter, impose and enforce Temporary Traffic Regulation Orders. Such powers are not ordinarily available to statutory undertakers rather those are made by the Local Highway Authority ("LHA") to facilitate works on the highway. This allows the LHA to manage the impact of works on the highway as is required by the statutory network management duty placed on the LHA.
- 3.16 In part, the current draft DCO does not seem to make provision for the following sections from the NRSWA:
- Section 56 – Power to give direction to the timing of streetworks
 - Section 58 – Restriction on works following substantial highway works
 - Section 64 – Traffic-sensitive streets
 - Section 66 – Avoidance of unnecessary delay or obstruction (by undertakers)
 - Section 74 – Charge for occupation of the highway where works are unreasonably prolonged
 - Section 75 – Inspection fees
 - Section 78 – Contributions to costs of making good long term damage

These provisions are important to allow operational control of network by the LHA and should not be disregarded.

- 3.17 The current draft DCO seeks to disapply the PCC permit scheme for the management of streetworks. If managed through the permit scheme, for which an agile response process has been established, the LHA is confident that permissions can be granted in a timely manner. The creation of a bespoke management system as is proposed would undermine the effectiveness of the permit scheme and could introduce consenting delays.

- 3.18 The applicant is preparing a revised draft DCO for submission by deadline 5 and PCC is unclear how that will be varied although it is understood that will provide for management of street works through the PCC permit scheme.
- 3.19 Turning to the second question asked by the ExA at Q3.8 concerning any need to acquire the subsoil, the highway extends to the land beneath the surface to the extent that is necessary to support / drain the highway. The LHA powers in NRSWA extend to that depth although the physical depth is not absolute and will vary depending on specific ground conditions. This will typically be in the order of a 2 - 6m depth to accommodate drainage although may extend significantly deeper to provide support. There is therefore no need to seek to acquire subsoil to a highway or easement rights in order to facilitate the laying of the onshore cable at a depth of 750mm as shown in the applicant's typical cross section.
- 3.20 Q3.9 With regard to limits on highway rights which is raised in this question, PCC notes Aquind's update to the Book of Reference [APP-024] dated 17 November 2020 that inserted a caveat "(Excluding all interests of the highway authority vested in them in that capacity)" into various description of land. This makes it clear that New Connection Works Rights do not apply to the highway, meaning that New Connection Works Rights powers such as "(b) to remove any structures, buildings, material deposits, items or hazards on the land" are (properly) rendered moot where the surface of the land is highway.
- 3.21 Q3.10 PCC understands through correspondence that Aquind has conceded that it is not necessary or desirable to exclude the Permit Schemes of HCC and PCC. PCC looks forward to reviewing the detail of an updated dDCO that reflects this.
- 3.22 Q3.11 PCC reads the observations offered in relation to para 4.1.2(A) of REP1-131 'Highway Subsoil Acquisition Position Statement' as a concession by Aquind that the statutory process could be used by *ad medium filum* owners of subsoil to seek compensation. However, when read with paras 3.14-3.15 of the same document, instead of actively seeking to engage such landowners in private treaty negotiations or offer a fixed sum of compensation, it appears Aquind has calculated that very few, if any, of the "circa 3,000" adjacent landowners will make such an application.
- 3.23 PCC challenges this approach which is consistent with the issues which have arisen in relation to the Eastney and Milton allotment land and the assumptions seemingly made by Aquind about those perhaps with a 'lesser' interest in land than a freehold title holder. PCC considers, at the very least, Aquind should agree to a fixed level of compensation for the acquisition of subsoil lawfully presumed vested in adjacent landowners.
- 3.24 Q3.12 Art's 10 (layout of streets) & 11 (street works) seriously undermine the position of PCC as the sole competent street authority under primary legislation and there is no justification for such a power in a DCO outside the

Order limits, even with the status that made DCOs attain as statutory instruments. The robustness of the DCO can only be assured by adopting a 'deemed refusal' approach to Art's 10(4) & 11(4), ensuring that PCC street authority status is not usurped.

- 3.25 Art 41 - PCC believes that all trees should be identified as part of the DCO, even if some of these are outside the Order limits. The vague drafting of the Art 41 power to fell trees overhanging Order limits is the result of Aquind being unwilling to commit to a route, compounded by an unwillingness to undertake a comprehensive tree survey along and adjacent to the routes it is seeking to reserve itself within the Order limits. Presently, Aquind appears unable to identify affected and potentially affected trees with any precision.
- 3.26 In the absence of such information an important aspect of understanding the nature and impact of the development proposal is missing to inform the design process.
- 3.27 BS 5837:2012 'Trees relation to design, demolition and construction' is relevant. In the Recommendations section:

"4.4.1 Timing

4.4.1.1 A tree survey should be undertaken by an arboriculturist to record information about the trees on or adjacent to a site. The results of the tree survey, including material constraints arising from existing trees that merit retention, should be used (along with any other relevant baseline data) to inform feasibility studies and design options. For this reason, the tree survey should be completed and made available to designers prior to and/or independently of any specific proposals for development.

4.4.1.2 Tree surveys undertaken after a detailed design has been prepared can identify significant conflicts: in such cases, the nature of and need for the proposed development should be set against the quality and values of affected trees. The extent to which the design can be modified to accommodate those trees meriting retention (see Clause 5) should be carefully considered.

4.4.1.3 Where proposed development is subject to planning control, a tree survey should be regarded as an important part of the evidence base underpinning the design and access statement. Accordingly, local planning authorities should not rely on planning conditions to secure a tree survey (see Annex B), as by this stage in the formal planning process its findings might not be capable of influencing design, potentially resulting in uncontrolled arboricultural impacts.

- 3.28 NOTE: The risk of project delay due to material constraints being identified only at a late stage is avoided by the early procurement of a tree survey.

4.0 **GENERAL**

- 4.1 The constraints imposed by trees, both above and below ground should inform the site layout design, although it is recognized that the competing needs of development mean that trees are only one factor requiring consideration. Certain trees are of such importance and sensitivity as to be major constraints on development or to justify its substantial modification. However, care should be taken to avoid misplaced tree retention; attempts to retain too many or unsuitable trees on a site can result in excessive pressure on the trees during demolition or construction work, or post-completion demands for their removal.
- 4.2 As trees can affect and be affected by many aspects of site operations, during the conception and design process the project arboriculturist should be involved in ongoing review of layout, architectural, engineering and landscape drawings. All members of the design team should be made aware of the requirements for the successful retention of the retained trees and should make provision for these throughout the development process.
- 4.3 The following factors should also be taken into account during the design process:
- a) the presence of tree preservation orders, conservation areas or other regulatory protection;
 - b) potential incompatibilities between the layout and trees proposed for retention;
 - c) the working and access space needed for the construction of the proposed development;
NOTE This might involve access facilitation pruning, or the use of a height restriction bar to prohibit tall vehicles accessing a site containing trees with low canopies.
 - d) the effect that construction requirements might have on the amenity value of trees, both on and near the site, including the effects of pruning to facilitate access and working space;
 - e) the requirement to protect the overhanging canopies of trees where they could be damaged by machinery, vehicles, barriers or scaffolding, where it will be necessary to increase the extent of the tree protection barriers to contain the canopy;
 - f) infrastructure requirements in relation to trees, e.g. easements for underground or above-ground apparatus; highway safety and visibility splays; and other infrastructural provisions, such as substations, refuse stores, lighting, signage, solar collectors, satellite dishes and CCTV sightlines;
 - g) the proposed end use of the space adjacent to retained trees;
 - h) the potential for new planting to provide mitigation for any losses.

4.4 Proximity of structures to trees

The default position should be that structures (see 3.10) are located outside the RPAs of trees to be retained. However, where there is an overriding justification for construction within the RPA, technical solutions might be available that prevent damage to the tree(s) (see Clause 7). If operations within the RPA are proposed, the project arboriculturist should:

- a) demonstrate that the tree(s) can remain viable and that the area lost to encroachment can be compensated for elsewhere, contiguous with its RPA;
- b) propose a series of mitigation measures to improve the soil environment that is used by the tree for growth.

4.5 PCC would particularly note that there is a clear risk as well of project delay due to material constraints associated with important trees being identified only at a late stage which could have been avoided by the early procurement of a tree survey. This choice by the applicant creates uncertainty regarding the development timetable.

4.6 Q3.13 As detailed in Q3.12, PCC objects to the purported use of powers which grant rights outside the Order limits and which seek to supplant the role of local authorities under primary legislation. PCC asks the ExA to test the justification for these powers.

Part 4

4.7 Q3.15 PCC notes that the ExA may raise issues in connection with Part 4 in the lead up to ISH1 so proposes to await any queries.

Part 5

4.8 Q3.16 PCC opposes the 7-year time limit for the exercise of CA powers as opposed to the standard 5 years. PCC considers that a lack of certainty concerning finance and the progress of consent for the project from the French authorities motivated Aquind seeking this exceptional extent of time. There is certainly no compelling case to blight land for a further 2 years and to be clear the absence of funding and uncertainty over the European part of the project are reasons to refuse the grant of this DCO as failing to meet the requisite CA tests. PCC notes that the recent Esso Pipeline DCO, that Hampshire County Council was concerned with, applied a 5 year limit. This is a clear and relevant precedent for a linear scheme of some 95km.

4.9 Q3.17 Given Aquind's position on the commercial FOC, PCC is concerned that the power to assert right or restrictions "required for the construction, operation or maintenance of the authorised development or to facilitate it, or as is incidental to it, by creating [rights or restrictions]" under Art 23 could lead to Order land being used for unforeseen development relating to the FOC for commercial purposes. The same concerns are found in the similarly broad wording of Art 20(1). The New Connection Works Rights, class (a) which

allow, for example, the undertaker to "alter" or "upgrade" the FOC in perpetuity means this possibility requires careful consideration. PCC reiterates its view that this DCO is drafted unlawfully to include a second, separate commercial telecommunications project which is clearly neither an NSIP nor associated development pursuant to the Planning Act 2008.

- 4.10 Q3.18 With regard to Art 30 & 31 PCC considers that "carrying out" could be construed more broadly than "construction", so "construction" is preferable.
- 4.11 Q3.19 The substantive, operative parts of Art's 30 and 32 (as opposed to the titles of the articles) refer only to "temporary possession", connoting the exclusion of any other interest holder for the duration of that possession. By contrast, "use" which is how the articles are entitled (as a noun or verb) connotes occupation on the basis of a licence, i.e. that occupation is not exclusive to a particular party but in fact shared.
- 4.12 Q3.20 The ExA is correct in noting the extent of Article 32. In PCC's view it is draconian in terms of its physical extent; its open-ended duration for possession; the consequent duration of blight by reference to the 5 year maintenance period in Art 32(12); and the short notice period (if any is to be given at all where the undertaker forms its own view on "safety" grounds).
- 4.13 Q3.21 As outlined in Q3.20, Art 32(12) defines the maintenance period as 5 years after the project becomes operational, during which period temporary possession may be taken.
- 4.14 Q3.22 The implication of the wording of the Explanatory Memorandum at 9.31 and the SoR is that temporary possession of land may be taken at any time during the operational period rather than during a set maintenance period. This needs to be clarified as if it is intended that the power is available at any point once the project is operational then it would not in reality be temporary possession at all but a permanent right.
- 4.15 Q3.23 PCC notes the ExA's request in this question for elaboration on references in CA1.3.38 to classes (h), (f) & (c) of different types of rights defined in the Book of Reference. PCC reserves the right to comment once this has been provided.
- 4.16 Q3.24 PCC is concerned about the length of time the powers sought by Aquind could be used against a backdrop of the absence of a commitment to a particular works timetable from Aquind, due to this being deferred until contractors are appointed. PCC notes the suggestion by Aquind that subsoil rights alone are to be acquired in special category land (and the allotments) however that is not what the DCO and the BOR limits Aquind's powers to do.
- 4.17 In addition, even if Aquind can somehow be bound only to interfere significantly with surface rights during construction, the continuing right to enter onto the land means the interference is not "finite" as suggested by Aquind and quoted by the ExA in this question.

- 4.18 Q3.25 - How Aquind answer this question is relevant to PCC's concerns with respect to the breadth of the Order limits sought outside highways.
- 4.19 Q3.26 - PCC understands that these matters may be addressed in a forthcoming further draft of the DCO and will review the impact of any revision and provide comment at that point.
- 4.20 Q3.27 PCC is asked to explain its position with regard to 'New Connection Rights' as set out in its LIR.
- 4.21 At the time of writing and with regard to the latest version of the Book of Reference produced by Aquind on 17 November 2020, amendments have not been made to the definition of 'New Connection Works Rights' within the Book of Reference – these are wide ranging rights i.e. "New Connection Works Rights Classes (a), (b), (c), (d), (e), (f), (g) and (h)".
- 4.22 PCC therefore remains concerned as stated in the LIR (REP1-173), para 3.6.3, that the allotments could be subject to the various invasive activities that the exercise of New Connection Works Rights entail as described in the BoR (ref 4.3), despite Aquind's stated aspiration or intention to undertake HDD drilling only under plot 10-14. PCC understands that Aquind intends to draft a new sub-class of rights over the surface of plot 10-14 that would be limited to visual inspections on foot only during the maintenance period, but these have not yet been produced. Appropriate subsoil rights will also need to be drafted to reflect the area to be occupied by the conduits containing the cables during construction and maintenance.
- 4.23 In addition to the excessive breadth of the legal rights sought, PCC considers Aquind has failed to provide any or any adequate explanation or justification which could support a compelling justification for the whole physical extent of Plot 10-14 (45,830 square metres), given that the Order limits are significantly narrower elsewhere where flexibility is also sought (such as Milton Common).
- 4.24 Q3.28 PCC notes the ExA's question as to an explanation by Aquind of the relevant mechanism for progress of options it refers to by reference to the Hinkley DCO. PCC reserves its position to comment upon this when it too has seen the explanation.
- 4.25 Q3.31 The ExA asks PCC and Aquind to explain their current positions on 'Thanet' matters. PCC understands this to mean the suggestion that requirements akin to requirement 12 and/or Article 19 of the Thanet DCO (ie the Vattenfall Thanet Extension Offshore Wind Farm DCO) might address concerns about lack of determination of HDD trenching as an option at various stages along the route (Req 12) and lack of clarity as to the precise route of the cabling at various points.
- 4.26 As set out in PCC's response to the ExA's First series of questions at Deadline 1 (Appx A) Q ref CA1.3.108 the City Council considers that the circumstances presented for this project do not compare well with those at Thanet. Requirement 12 of the draft Thanet DCO prohibited commencement until the relevant planning authority has been notified of the 2 selected landfall

works options (i.e. HDD vs. trenching). The issue here however is that trenching is not an acceptable option and that there are a number of different points where the issue arises i.e. not a single defined juncture and part of the route as with Thanet.

- 4.27 With regard to the use of an Art 19(5) Thanet DCO approach, this grants the undertaker the right to identify finally which of a series of routes and plots of land and extents before exercising any CA rights and to notify the SofS.
- 4.28 PCC can see such an approach might have merit where there is a limited number of alternate routes reserved under the dDCO within a refined Order limit. This is not the case for Aquind in PCC's view. In this case there are in fact a very wide variety of variables to be identified which makes this approach unworkable and unreasonable.
- 4.29 Aquind in such circumstances should be required to surrender any rights over land that is surplus to requirements at the earliest opportunity, which should be feasible once a detailed design is completed prior to commencement.
- 4.30 PCC acknowledges Aquind's intention in section 5 of its 'Position Statement in relation to the refinement of the Order Limits' (7.7.4/REP1-133) to provide drafting of an equivalent to the Thanet Requirement 12 and looks forward to reviewing it.
- 4.31 With regard to the general approach which Aquind wishes to see deployed in this case of CA powers i.e. it remains a matter of choice for the undertaker of the works not as a matter of proving land is actually required, PCC does not consider this to be acceptable or indeed in accordance with the relevant legal tests for compulsory acquisition which Aquind must meet and the Secretary of State be satisfied of.
- 4.32 If such a choice is given to Aquind, in PCC's view then there would need to be an express restriction within the DCO upon Aquind acquiring rights over any of the Order land until it has completed its detailed design (using, for example, its Article 19 rights to survey Order land) and committed to a route. The difficulty with the drafting of Arts 20 and 23 of the Aquind DCO is that they would grant Aquind potentially extensive rights to acquire wide areas of land and leave the fundamental issue of the final extent of land to be taken as a matter for them to decide once further detailed design has occurred and a route committed to and entirely at their own discretion.
- 4.33 PCC does not consider that such an approach is appropriate and justified in light of the need to satisfy all the relevant legal tests for compulsory acquisition. In other words such powers would grant a non-public body with the power to acquire large plots of land and then the right to decide how much or how little of that land that it will take in the way that Aquind suggests in section 5 of the Position Statement (7.7.4/REP1-133).
- 4.34 PCC considers to avoid such an unacceptable position arising a potential solution could be that the exercise of compulsory acquisition powers be made contingent on approval of a detailed-design informed route by the Secretary of

State, similar to how Art 17(3) of the Thanet DCO makes such powers contingent on the applicant securing an interest in the seabed.

Part 6

4.35 Q3.32 PCC notes the ExA's position on this item.

Part 7

4.36 Q3.33 - PCC notes the ExA asks what sequential approach will be taken 'for determining the location of replacement trees if no land is available 'within 5 metres' of the onshore cable route'. PCC is unaware that any sequential approach has been identified and secured in the dDCO and reserves its position on whether one is necessary.

4.37 Q3.34 Whilst this question has been directed at the applicant, PCC's position in respect of impact on and control of trees is as follows:

Local planning authorities may make Orders in relation to land that they own. However trees on Local Authority land are generally considered to be under good arboricultural management and are less likely to be under pressure from development as their retention and management is undertaken to improve the amenity value of public open space for the populace.

Trees have an intrinsic appeal as landscape and cultural features. They also have a high biological and heritage value.

Under the Natural Environment and Rural Communities Act 2006 (NERC Act), Local Authorities have a duty to conserve biodiversity and every public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity. The considerate management of trees plays an important role in delivering this duty.

4.38 PCC only carry out essential management work to the local authority tree stock. The council consider the following reasons as essential management of trees:

- To manage risk to people and property
- Where trees are seen to be damaging built infrastructure
- Where trees are reducing the safe access and egress of a public right of way

4.39 PCC recognise this potential risk and their responsibility to assess trees for safety and may from time to time carry out maintenance work to manage risk. Where tree management work is necessary, this is completed in the most sympathetic manner to maintain the health of the tree and its contribution as a natural asset, while ensuring that individual trees do not pose a physical risk to people or property.

- 4.40 It is important to state that any pruning work has the potential to provide the opportunity for pathogens to enter via wounds. Pruning can also promote vigorous re-growth leading to the need for future cyclical management at significant and ongoing cost. Therefore, pruning will only be carried out where this is necessary for the reason given above.
- 4.41 Q3.35 - PCC notes this question and wishes to reserve its position once it has considered Aquind's response.
- 4.42 Q 3.36 - PCC notes Art 48 on removal of human remains and wishes to reserve its position once it has considered Aquind's response.

5.0 Schedule 1, the Authorised Development

- 5.1 Q.4.1 PCC notes the ExA's concern raised in this question as to the adequacy of the Mitigation Schedule and ensuring that all necessary mitigation measures that are relied upon in the EIA will be readily auditable at the discharge of Requirements. The ExA has asked whether any parties aware of instances where this may not be the case.
- 5.2 PCC wishes to reserve its position on this matter in light of what may transpire from the latest draft of the DCO and also Aquind's response to this question.
- 5.3 Q4.2 - PCC has had regard to para 2.4 of PINS Advice Note 9 on the Rochdale Envelope and in particular:
- the DCO application documents should explain the need for and the timescales associated with the flexibility sought and this should be established within clearly defined parameters;
 - the clearly defined parameters established for the Proposed Development must be sufficiently detailed to enable a proper assessment of the likely significant environmental effects and to allow for the identification of necessary mitigation, if necessary within a range of possibilities;
 - the assessments in the ES should be consistent with the clearly defined parameters and ensure a robust assessment of the likely significant effects;
 - the DCO must not permit the Proposed Development to extend beyond the 'clearly defined parameters' which have been requested and assessed. The Secretary of State may choose to impose requirements to ensure that the Proposed Development is constrained in this way;
 - the more detailed the DCO application is, the easier it will be to ensure compliance with the Regulations.
- 5.4 In addition the advice note emphasises that it is essential to have engaged properly with all those affected by a project and explain the approach prior to an application being made (especially in explaining the reasons for absence of final detail) and that *"implementation of the Rochdale Envelope assessment approach should only be used where it is necessary and should not be treated*

as a blanket opportunity to allow for insufficient detail in the assessment. Applicants should make every effort to finalise details applicable to the Proposed Development prior to submission of their DCO application. Indeed, as explained earlier in this advice note, it will be in all parties' interests for the Applicant to provide as much information as possible to inform the Pre-application consultation process." [AN 9 para 5.2]

- 5.5 PCC accepts that the parameters are set out in Document Ref: 7.7.5 (REP1-134) and would appear to cover all aspects of the proposed development (including, the disputed development of FOC's for commercial purposes and infrastructure related to that development) other than in respect of rights it seeks to alter or affect roads outside the Order limit noted below and earlier.
- 5.6 Nonetheless, PCC considers Aquind has fallen well short of the clear advice in AN9 noted above and has failed to show that it is necessary to use the Rochdale Envelope and is doing precisely what the advice note suggests should not be done i.e. it has treated it "as a blanket opportunity to allow for insufficient detail in the assessment" due, it would appear, to a rush to get this application in before the project was properly worked out.
- 5.7 Aquind has therefore clearly not made every effort to finalise details applicable to the Proposed Development prior to submission of their DCO application.
- 5.8 There is a clear conflict between relying upon the Rochdale Envelope and meeting the stringent legal tests to justify compulsory acquisition of the land identified in the Order. In particular PCC considers that the Order limits remain unjustifiably too wide, particularly (but not exclusively) in relation to the Eastney and Milton Allotments and Farlington playing fields.
- 5.9 The ExA has already identified the point that Aquind is seeking powers relating to trees and street closures outside the Order limits and PCC believes that these powers should be rejected from the Order or at least made subject to the usual local authority controls.
- 5.10 Q4.3 PCC notes the ExA's question which raised with PCC the issue of the justification for the inclusion of the commercial FOCs and infrastructure or more specifically the use by the commercial FOCs of surplus capacity (within the interconnector) especially in light of the s35 Direction from the Secretary of State.
- 5.11 First, it is clear that the s.35 Direction is not and cannot be conclusive as to any status of the commercial fibre optic cables ("FOC") as lawfully included within the DCO and that they amount to associated development within the meaning of the Planning Act 2008. There is no provision or power within the 2008 Act to make development that would otherwise not be associated development such. In addition the s35 Direction did not make the commercial FOC development an NSIP in its own right. The s35 Direction evidently relates to the principal project i.e. the electricity cables interconnector.

- 5.12 It would plainly be premature for the Secretary of State to have decided somehow, at such a preliminary stage, that the commercial FOC development was properly associated development.
- 5.13 PCC maintains that the boilerplate statement from the s.35 Direction does nothing more than confirm that the proposed Development and "any" development associated properly so called and defined may proceed to examination under the DCO regime. The point, of course, is that the commercial FOC development is wholly different to the energy transmission development and cannot be conflated with the Development for the interconnector. This is only emphasised by the fact that 'use' or introduction of the commercial FOC into the project necessitates material additions to the electricity interconnector scheme (such as the ORS building at Eastney and the telecommunications buildings in Lovedean) which, but for the commercial FOC purpose, would not be included in this scheme.
- 5.14 At para 4.6 of the 'Statement in Relation to FOC' (7.7.1, REP1-127), Aquind quotes PINS Advice Note Thirteen at para 2.9: "*associated development is subordinate to the NSIP, but necessary for the development to operate effectively to its design capacity*". By its nature, the commercial FOC is patently not necessary for the operation of the NSIP (although PCC notes Aquind appear to want to argue that the interconnector is not an NSIP). The issue nevertheless must be by reference to the project in question which is an electricity interconnector, not an electricity interconnector and commercial FOC project. The commercial FOC is not subordinate to the development, but concerned with a totally different industry (and certainly not contemplated by NPS EN-1).
- 5.15 The limited number of references to FOC in the Request to the Secretary of State do not mean that the commercial application of the FOC is a foregone conclusion. It is not reasonable to expect the Secretary of State to enter into the level of detailed correspondence that would be required to assess the appropriateness of commercial use of the FOC at the Request stage, which can only be expected through the examination period. The applicant cannot reasonably say that the Secretary of State had full knowledge at the Request stage, and this legitimately precludes the ExA from revisiting the issue as part of the inquisitorial, evidence gathering of examination.
- 5.16 The last sentence of para 4.6 of 7.7.1, REP1-127 is, in PCC's submission, an error of law. Section 31 Planning Act 2008 is a relatively straightforward provision:
- "Consent under this Act ("development consent") is required for development to the extent that the development is or forms part of a nationally significant infrastructure project."
- 5.17 Aquind seek development consent because the s.35 Direction confirmed that it is a nationally significant infrastructure project. That is the *raison d'être* of development consent.

- 5.18 Further, even if the inclusion of the FOC in the DCO were somehow lawful, Aquind's approach in section 3 of the 'Statement in Relation to FOC' (7.7.1, REP1-127) apparently seeks to preclude the ExA and the Secretary of State from their role under s.115(5) Planning Act 2008 in determining "the extent" (if at all) that development consent might be granted for associated development. It is untenable that the s.35 Direction determined the Development in any sense. Indeed, para 3.6 of the 'Statement in Relation to FOC' (7.7.1, REP1-127) carries with it the implication that regardless of whether "such development is to be treated as development for which development consent is required (rather than for which development consent may be granted) [emphases added]", the decision remains open for the Secretary of State to decline to grant such infrastructure.
- 5.19 Even if inclusion of the FOC were somehow lawful, it would not follow that the ExA (or the Secretary of State) is legally barred from deciding during the course of the examination whether the commercial use of the FOC (and the attendant buildings that it necessitates) is part of the "development for which development consent is required" (i.e. the NSIP project) or alternatively "associated development", by reference to the "ancillary" and "necessary" definitions contained in the relevant guidance.
- 5.20 PCC notes the implication in the ExA's question that the commercial FOC's are simply using surplus capacity within the electricity cabling. PCC does not accept this proposition for a number of reasons. The first is that Aquind have yet to provide evidence that such surplus capacity inevitably arises as a consequence of the electricity cabling. It has been noted a number of times that no other similar electricity cabling scheme has added such separate telecoms related cables and Aquind needs to explain that in PCC's submission. The second reasons is that to suggest the commercial FOC development only takes up surplus capacity is a misnomer. If surplus capacity does somehow inevitably arise the consequence of Aquind wanting to avail itself of that for a separate commercial telecomms use is to go well beyond simply using the surplus capacity and on to the creation of separate independent infrastructure.
- 5.21 Q4.4 PCC consider it to be not only an oversight but also misleading that the laying of the FOCs is omitted from the specified Works whereas the length of the HVDC cables is specified. It is also in PCC's view further proof that the Applicant has failed properly to address and comprehend the implications of trying to add this new and separate development to this project.
- 5.22 Q3.4.5 - PCC notes this as a question on Work No. 3 affecting Winchester City Council.
- 5.23 Q4.6 - PCC is keen to see and understand further detail on the distribution of joint bays, links boxes and link pillars assuming the maximum upper limit. It therefore wishes to reserve its position until it has seen the Applicant's answer to this question.

- 5.24 Q4.7 - PCC would also like to understand the difference between HDD and trenchless crossing as raised in this question. In line with other submissions, PCC would like to see precision about the particular boundaries where these methods must be used within the Order.
- 5.25 Q4.8 - PCC agrees that the full extent of the Part 2(k) Works must be questioned as Aquind is effectively seeking permission for 2 unrelated infrastructure projects under the guise of a single electricity interconnector project. PCC addresses the ExA's duty to decide the "extent" of any lawful Associated Development above in answer to Q4.3.
- 5.26 With reference to Q3.6, there would appear to be scope for Aquind to undertake such Part 2(k) Works at the request of any chosen telecoms nominee(s) under Art 7(6)(c).
- 5.27 Q5.1 - PCC wishes to reserve its position on the background to individual requirements in response to this question once it has had an opportunity to consider the applicant's response to this question.
- 5.28 Q5.2 – PCC considers that the issues raised by the ExA in this question about the approach to leaving so much that is important to the impact of the this project loose and undetermined and indeed taken forward by future contractors who have not taken part in the examination result in an unsatisfactory outcome. The 'live' status described in this question would not be compatible with the need to approve such documents. Any approach to amend documents such as the Outline Onshore CEMP (or 'Onshore outline construction environmental management plan' per Sch 14 dDCO) after the examination has ended could be fraught with contradictory and opportunistic drafting that would make monitoring of the development against a certain standard virtually impossible. As the ExA identifies, the number of contractors presents scope for confusing and inconsistent management plans. This is not in accordance with the 'front-loaded' ethos of the DCO regime.
- 5.29 Q5.3 - PCC wishes to reserve its position and await the applicant's answer to this question regarding commencement and pre-commencement. The benefits of having certain works being deemed not to fall within the definition of 'commencement' in PCC's view appear to be weighted in Aquind's favour for commercial reasons rather than any particular public benefit.
- 5.30 Q5.4 - PCC notes Aquind's amendment to "finished floor level".
- 5.31 Q5.5 - PCC has explained that where trenching is carried out in the carriageway a full lane width reinstatement will be required. In addition PCC also require an indemnity should the cables need to be moved at any point in the future to allow highway works / road improvement.
- 5.32 This is consistent with the HCC position, although in the absence of an indemnity they are seeking installation to be at a depth of 1.2m to minimise risk of diversion being required. PCC could be equally comfortable with that option.

- 5.33 Q5.6 - PCC notes this question directed to Winchester City Council regarding an Employment and Skills Plan and may wish to comment at the hearing.
- 5.34 Q6.1 - PCC notes 40 working days to respond to discharge requests under the dDCO at 3 November 2020. PCC may wish to comment on Aquind's rationale at the hearing.
- 5.35 Q6.2 - PCC wishes to reserve its position once it has seen Aquind's answer concerning PCC's role as a local planning authority.
- 5.36 Q7.1 – With regard to Schedule 9 Compulsory acquisition and compensation provisions PCC wishes to reserve its position at this stage but will confirm any issues at the hearing.
- 5.37 Q8.1 - PCC wishes to reserve its position with regard to Aquind's update on protective provision wording and likelihood of resolution in light of its recently communicated shift to inclusion of the permitting scheme.
- 5.38 Q9.1 - PCC has addressed concerns with certified documents 3.5 and Q5.2.
- 5.39 Q10.1-10.4 - PCC has no comments on these items relating to the Deemed Marine Licence
- 5.40 Q11.1 – PCC considers that a Community Fund provided by Aquind could help mitigate the significant disruption that will be caused to sport, public health and wellbeing in the city in order to support activity and use of open space and attract members back to affected clubs once the construction has been completed. This is in the absence of being able to avoid the disruption.
- 5.41 PCC also considers that a s.106 agreement containing covenants covering costs of discharging requirements and enforcement monitoring, owing to the exceptional burden that grant of the DCO would place on its resources for an extended period of time.
- 5.42 PCC also note, as at item 3.7, that in the Pressall DCO, the subject of *R (on the application of Halite Energy Group Ltd) v The Secretary of State For Energy & Climate Change* [2014] EWHC 17 (Admin), a bond was secured through the s.106 agreement in the event that the applicant suffered financial difficulties leading it to abandon the project part-way through construction. Given Aquind's similar status to the applicant in that case as a private developer, combined with the numerous concerns PCC has in relation to Aquind's financial standing and prospects of achieving French consents, PCC considers such a bond should be required for this scheme.
- 5.43 Q11.2 - PCC notes this question regarding Hampshire County Council's LIR position on s.278 agreements.
- 5.44 Q11.3 - PCC is finalising details of costs incurred in anticipation of entering a PPA for work in the pre-examination period and during the examination.
- 5.45 With regard to Aquind's proposal for a PPA to deal with monitoring and discharge of requirements, PCC considers that a s.106 agreement would be

the better and more appropriate mechanism. This avoids any difficulties that Aquind has suggested occur under PPAs, owing to their views on s.93 Local Government Act 2003, concerning a somewhat convoluted (and ultimately flawed) distinction between discretionary and non-discretionary services at different periods in the DCO process, which they have set out to PCC in meetings between the parties. For the avoidance of doubt, PCC does not consider that its role as a discharging authority (mandated by the DCO) and enforcing authority (specified by Part 8 of the Planning Act 2008) can be termed 'discretionary'. The most legally robust method to secure payment for the exceptional burden placed on local planning authorities by this development is a s.106 planning obligation.

- 5.46 Q12.1 – with regard to any further issues raised PCC will endeavour to assist the ExA where it can.
- 5.47 Q12.2 - PCC reserves the right to make any final comments.

6.0 CONCLUSION

- 6.1 As noted above these comments are provided without prejudice to the need to review the intended further amendments that the applicant has advised they intend to submit at DL5 on the 30th November.