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Applicant's Response to Deadline 7 and 7a
Submissions – Appendix A Applicant's
Comments on WCC Response to the dDCO

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**APPLICANT'S RESPONSE TO THE DEADLINE 7 SUBMISSION ON BEHALF OF
WINCHESTER CITY COUNCIL IN RELATION TO THE DRAFT DCO (REP7-093 AND REP7-096)**

1. INTRODUCTION

- 1.1 This note has been produced in response to the submissions made on behalf of Winchester City Council at Deadline 7 in relation to the draft DCO (REP7-093 and REP7-096).
- 1.2 The purpose of this note is to outline the suggested amendments that are agreed to by the Applicant and which it is confirmed will be included in the final draft DCO to be submitted to the Examining Authority ('ExA') at Deadline 8 and the suggested amendments that are not agreed to by the Applicant, and the reasons for this.

2. PART 1

- 2.1 WCC have requested a definition of commissioning is included in the definitions provided for at Article 2. The Applicant notes that the definition of "*operational period*" is already provided for, which states "*means the period of time that the relevant part of the authorised development is in operation after construction and commissioning is complete pursuant to the relevant construction contract or contracts and "operation" and "operational" should be construed accordingly*".
- 2.2 The only references to commissioning in the draft DCO as revised by WCC are the definition itself and a proposed additional requirement at Requirement 2(4) suggested by WCC (discussed further below).
- 2.3 The Applicant's view is that it is not necessary for a definition of "commissioning" to be included as the definition of "operational period" is sufficient to confirm when commissioning will have taken place, and to otherwise address through an additional definition will not add clarity to the DCO.

3. PART 2

- 3.1 Amendments are suggested to Article 9 (defence to proceedings in respect of statutory nuisance). The first amendment made appears to delete reference to "*vehicles, machinery or equipment*" in Article 9(1)(a). The stated reason for this is that the wording is not clear.
- 3.2 The Applicant notes that the wording "*vehicles, machinery or equipment*" specifically mirrors the wording provided for a Section 79(1)(ga) of the Environmental Protection Act 1990. It is the Applicant's view that reflecting the wording used in primary legislation is the most clear way to refer to the matters which that primary legislation relates to. For this reason it is not agreed the wording used is not clear and the amendment will not be accepted.
- 3.3 The Applicant also notes Article 9(1)(c) has been deleted, though this is not referred to in the submission made. For the reasons previously set out, at length, by the Applicant, the Applicant's position is Article 9(1)(c) is appropriate to be included in the DCO and its removal is not agreed to.

4. PART 7

- 4.1 Comments are made in relation to Article 41, the first of which relates to Article 41(1)(b) and the use of the word "using".
- 4.2 The Applicant notes the term "using" is used for the same purpose in like Articles in recently made DCOs (for example Article 42 of the Southampton to London Pipeline Order 2020), where the manner in which the Authorised Development will be used is not dissimilar.

- 4.3 Notwithstanding this, the Applicant would be agreeable to amending the term “*using*” to “*involved in the construction, maintenance and operation of*”. The Applicant expects this matter will be discussed at ISH4 and a position will be confirmed at that time.
- 4.4 WCC also make a comment in relation to replacement trees, requesting a requirement should be included requiring replacements. The Applicant notes that the Articles are authorising powers and requirements are requirements. The two are not to be confused as they serve different purposes.
- 4.5 With regard to the removal of trees and hedgerows, Article 41(1) and (3) provides the power to remove trees and hedgerows. The requirements with regard to the removal and replacement of trees and hedgerows in connection with construction are addressed in the OOCEMP and Requirement 15, which requires the production of Arboriculture Method Statements in relation to any such removals. The Section 106 Agreements with PCC and HCC relate to the replacement of highway trees.
- 4.6 It is not envisaged that it will be necessary to remove trees and hedgerows in connection with maintenance and in the very rare event of any repair. In any event, this will only be where it is necessary to do so in relation to the operation of nationally significant infrastructure.
- 4.7 The Applicant will not be acquiring rights over land where it is not necessary to do so (as it would not be permissible to do so) and it will not be within the gift of the Applicant to replace trees on land over which it does hold rights to do so. For this reason, in the event trees are removed in the future compensation is provided for at Article 41(2) and (6). It will be for the relevant landowner to determine whether such compensation is to be spent on the replacement of any trees or hedgerows removed. This is an entirely appropriate position to address this situation and is reflected by many made DCOs (as evidenced in previous submissions by the Applicant on this Article).
- 4.8 WCC have commented in relation to Article 42 that Section 206(1) of the 1990 Act should apply.
- 4.9 Section 206(1) of the 1990 Act provides that if any tree which is the subject of a Tree Preservation Order is removed it shall be the duty of the owner of the land to plant another tree of an appropriate species or size.
- 4.10 As is explained above, the position with regard to the removal and replacement of trees, including trees subject to tree preservation orders, is to be determined via the agreement of arboriculture method statements. Where this confirms a replacement is to be provided, this will be provided.
- 4.11 Further, Article 42(2) provides that the undertaker must pay compensation to the owner, and therefore the landowner, in relation to any loss or damage of a tree. It will be for the relevant landowner to determine how those monies are spent, for instance whether they are spent on a replacement tree. It is not appropriate to place a duty on a landowner in connection with works undertaken by the undertaker in the manner suggested by WCC.
- 4.12 For these reasons, section 206(1) of the 1990 Act is stated not to be applicable. This is an entirely appropriate position reflected by many made DCOs (as evidenced in previous submissions by the Applicant on this Article and Article 41). Accordingly, the amendment suggested is not agreed to.

5. **SCHEDULE 2**

- 5.1 A new paragraph (4) is proposed in respect of Requirement 2 requiring the confirmation of when the Authorised Development has been commissioned. As stated above the Applicant considers the term “operational period” is sufficient for confirming once commissioning has occurred so is not agreeable to an additional definition which covers the same matters.
- 5.2 The Applicant is however agreeable to the following being added as paragraph (4) to the Requirement 2:
- 5.2.1 *The undertaker must provide to each relevant planning authority written notice of the Authorised Development becoming operational within not more than 14 days*

following the date on which the Authorised Development first becomes operational.

- 5.3 A “no start until whole scheme is approved” condition has been proposed which seeks to require that the Authorised Development cannot be commenced until all consents required for the Project in France have been obtained.
- 5.4 The Applicant does not agree that this is a necessary requirement or that such a requirement would be sufficiently clear/would not lead to unintended consequences. This is for the following reasons:
- 5.4.1 A DCO requirement relating to the need for French consents to have been obtained would be a crude mechanism that would likely give rise to unintended consequences, given this is a matter which relates to French law and regulation.
- 5.4.2 As an example, in France where an environmental authorisation subject to public enquiry is required, the building permit would be submitted after the public enquiry has taken place. As such, a building permit follows the environmental authorisation, with the content of the building permit reflecting the findings of the environmental authorisation and the conclusions of the public enquiry. It would be unnecessary to prevent the Authorised Development commencing until the Building Permit in France is obtained.
- 5.4.3 The Applicant has confirmed to fully secure funding for the construction of the Project necessary regulatory approvals and consents in France and in the UK must first be obtained.
- 5.4.4 A requirement for security/guarantee for CPO costs is now included at Requirement 26 of the draft DCO to provide assurances that the powers of compulsory acquisition will not be capable of exercise until it has been evidenced that the funds required for compensation are satisfactorily secured. Such funds are to be derived from the funding for the Project, and therefore the CPO powers in the DCO will not be capable of exercise until funding is secured. Whilst in theory a guarantee could be provided earlier than full funding being secured, there would be no rational basis for an undertaker to exercise CPO powers and incur the costs of doing so until all necessary regulatory approvals and consents in France and in the UK are obtained.
- 5.4.5 As such, the works will in any event not be implemented until the necessary consents for the French elements of the Project for funding to be secured are also secured.
- 5.4.6 That regulatory approvals and French consents must be obtained in connection with the Project, there is a reasonable prospect of all such approvals and consents being obtained and therefore the need for these to be obtained cannot be properly said to be an impediment to the delivery of the Authorised Development.
- 5.5 An amendment is proposed to Requirement 3 to require phases to be undertaken in accordance with a sequence set out when the phases are confirmed.
- 5.6 This amendment shows a misunderstanding of the Requirement by WCC, which is used to divide the works such that the ‘phases’ can be discharged in an appropriately manageable manner.
- 5.7 To explain the misunderstanding with a practical example, the works on the highway will be reactive to programme and constraints in the FTMS. It will not be realistic to confirm a phasing sequence for all such phases forming part of Work No.4.
- 5.8 In addition, there is no necessity for this provision to be included. None is offered by WCC in their comments.
- 5.9 Whilst the Applicant appreciates WCC are concerned with the requirements in so far as they will be the relevant discharging authority for them, the comments made do not take

into account the remainder of the Authorised Development which the Requirements apply to.

- 5.10 For these reasons, the suggested amendment to Requirement 3 is not accepted by the Applicant.
- 5.11 WCC propose an addition to Requirement 4 in relation to the compound option for HDD-5. As it has now been confirmed the southern option is selected it is not considered necessary to comment on this suggested addition further.
- 5.12 In relation to Requirement 6(1), WCC have suggested reference to “foundation design” is included. At Deadline 7, the Applicant’s draft DCO included reference to “proposed piling”. It is considered these additions cover the same matter and therefore appropriate provision has been made. It is also relevant that Requirement 15 will require the submission and approval of a piling works risk assessment, which will be a risk assessment of the “proposed piling”. Noting this, the controls included in relation to piling are appropriate.
- 5.13 In relation to Requirement 6(1)(i) WCC have queried why access is referred to, taking into account Requirement 10. The Applicant updated the draft DCO at Deadline 7 to remove reference to the vehicular access on the basis this is to be addressed through a Section 278 Agreement with Hampshire County Council. This matter is therefore considered to have been addressed.
- 5.14 The Applicant also notes that WCC are not the relevant planning authority for the area where the access junction is located, East Hampshire District Council perform that function.
- 5.15 A new Requirement 6(10) is proposed to confirm additional lighting masts cannot be installed beyond those approved. Requirement 6(6) already confirms Work No.2 must be carried out in accordance with the approved details. It would be unlawful to do otherwise. As such, Requirement 6(10) as suggested is not necessary and therefore will not be accepted and included in the draft DCO.
- 5.16 A comment is made in relation Requirement 6(11). The Applicant confirms the Works Plans show one compound in this location, and therefore despite the comments of WCC not being agreed with this matter has been addressed.
- 5.17 The comments in relation to Requirement 7 are noted but not agreed with. Put simply, it is appropriate to confirm the management, maintenance and monitoring plans and prescriptions and management responsibilities for the landscaping to be provided at the time the landscaping proposals which such plans, prescriptions and responsibilities relate to are approved.
- 5.18 It is not agreed Requirement 9 is more appropriate for this, as this would split such plans, prescriptions and responsibilities for the landscaping from the requirement approving the landscaping, and into a separate plan which has a primary focus on fauna and associated habitat. In the view of the Applicant this would be confusing and a detrimental amendment.
- 5.19 The Applicant confirms ground level details are not approved pursuant to Requirement 7, they are approved pursuant to Requirement 6(1)(c) (Work No.2 existing and proposed site levels).
- 5.20 The comment on biodiversity enhancements are noted. These are in effect works of landscaping to enhance biodiversity, the detail of which is confirmed in the OLBS. It is therefore considered appropriate to refer to landscaping and for this to need to be in compliance with the OLBS therefore ensuring all necessary measures are delivered. Nonetheless, the Applicant is content to refer to enhancement works also and will include this in the DCO submitted at Deadline 8.
- 5.21 The comment regarding embedded mitigation and enhancement works being more specifically referred to is noted. The embedded mitigation and enhancements are in effect the landscaping works so it is appropriate to refer to landscaping works (and as stated above the enhancement works), particularly where compliance with the OLBS which details their delivery is secured. It is not agreed that by not expressly referring to embedded

mitigation and enhancement works in the requirement compliance with these elements of the OLBS is negated.

- 5.22 The comment is made that it is still not known what Requirement 9 relates to.
- 5.23 The Applicant confirms Requirement 9 relates to the measures to be put in place during the works to protect existing ecological features, confirm the scheme for reinstatement of land used as a temporary compound and any replacement planting to replace removed sections of hedgerows or removed trees, and how those measures will be implemented and managed and maintained. This is different to the landscaping scheme, because the landscaping is new planting, whereas the biodiversity measures are protection, reinstatement and replacement of existing biodiversity features.
- 5.24 Save for the need to produce arboriculture method statements, all information in relation to biodiversity management is included in Requirement 9. Given a CEMP and Biodiversity Management Plan need to be approved before works commence, this does not create any issues of inconsistency.
- 5.25 It is noted that Requirement 9(4)(a) relates to measures to protect existing scrub and trees that are to be retained. It is also noted that Requirement 9(3) very clearly states "*no part of the onshore site preparation works may commence until a written biodiversity management plan (which accords with the outline landscape and biodiversity strategy in so far as relevant and the relevant recommendations of appropriate British Standards) relating to those works has been submitted to and approved by the relevant local planning authority in consultation with the relevant statutory nature conservation bodies*". It is clearly not correct that onshore site preparation works are not covered by Requirement 9.
- 5.26 The comments in relation to Section 1.8.4 of the OLBS are noted. The Applicant confirms that paragraph 1.8.4.1 states "*The areas under landscape management shall be inspected at least every five years and the management plan updated as necessary to reflect the outcome of the inspections*". This clearly refers to the landscaping scheme, not the biodiversity management plan, the areas subject to which are not subject to "*landscape management*".
- 5.27 Paragraph 1.8.4.4. states "*The detailed landscaping scheme and written biodiversity management plan and associated management, maintenance and monitoring plans shall be reviewed annually and appropriate amendments made to the detailed landscaping scheme and written biodiversity management plan or associated plans*".
- 5.28 The review of the detailed landscaping scheme and the written biodiversity management plans is not the same as the inspection of the "areas subject to landscape management". The review of the schemes/plans shall be annually for their duration, and following inspection of the areas under landscape management the management plan shall be updated also. This ensures a robust and reactive process for the management, and inspection of landscaping areas at appropriate intervals (noting the landscaping schemes extend for the duration of operation of Work No. 2 and 5).
- 5.29 The Applicant does not agree it is necessary to specifically refer to Denmead Meadows in the Requirement. This is very clearly addressed in the OLBS and works at Denmead Meadows may not commence until the written biodiversity management plan for those works are approved.
- 5.30 There is also not a need for the biodiversity management plan, noting the extent of its content, to apply for the operational period of the Converter Station. The landscaping scheme applies for this purpose and ensures management of the biodiversity enhancements (which as explained above are in effect landscaping).
- 5.31 It is not agreed that Requirement 9(4)(b) is the same as Requirement 22. Article 9(4)(b) is constrained to land used as temporary compounds during construction and any replacement planting to replace removed sections of hedgerow or removed trees. Requirement 22 relates to any land within the Order limits landwards of MLWS which is used temporarily for construction of the authorised development (i.e. this has a wider application). WCC comments do not take into account the wider scheme and the need for

the requirements to apply to the whole, not just the WCC based elements, of the Authorised Development.

- 5.32 The written biodiversity management plans will include monitoring and maintenance over a 5 year period (in year 1, 3 and 5). The Undertaker will benefit from rights to temporarily use land for maintenance for a period of 5 years in accordance with Article 32. This ensures planting can be replaced if it dies. 5 years is a common standard accepted for confirming whether replacement planting has become established and at which point aftercare provisions may properly cease.
- 5.33 The Applicant notes WCC's comments in relation to Requirement 10 (highway accesses). The Applicant does not agree with them. All discussions relating to highway access have been with HCC for the area which WCC are local planning authority. Further, the accesses will be delivered pursuant to minor works agreements with WCC. It is therefore entirely appropriate the relevant planning authority are consulted and do not approve in the circumstances.
- 5.34 Also, given the relevant planning authority has no highway function, it is not understood on what basis they would approve matters such as siting, design, layout and visibility splays, which are all matters relevant to highways safety. It also not understood what the 'range of issues that could arise' referred to are in relation to temporary highway accesses are, or further how such matters are not otherwise to be addressed by the relevant planning authority. The Applicant looks forward to WCC explaining these issues at ISH4 and also confirming WCC's skill and competency to approve highway safety related matters.
- 5.35 The Applicant notes the comments on Requirement 15. It does not agree with them. All plans required to be approved as part of a CEMP are detailed and careful thought has been applied to drafting. It is also not agreed the CEMP's go beyond construction matters as suggested.
- 5.36 At Requirement 16 WCC query whether "*operational period*" is clearly defined. The Applicant refers WCC to the definition in Article 2 of "*operational period*". This is very clearly defined.
- 5.37 The Applicant notes the comments in relation to Requirement 22. The Applicant does not agree to the wholesale amendment suggested, but does consider the following amendment (shown underlined and emboldened) would be appropriate to address the point raised regarding reinstatement being undertaken in an appropriate timescale following the completion of works:
- 5.37.1 *The undertaker must confirm to the relevant planning authorities the date of the completion of the construction of **any phase of** the authorised development and any land within the Order limits landwards of MLWS which is used temporarily for construction of **a relevant phase of** authorised development **and which is not required for such use in connection with any other phase of the authorised development** must be reinstated to its former condition, or such condition as the relevant local planning authority may approve but which may not be to a standard which is higher than its former condition, within not more than twelve months of the date of the completion of the construction of the **relevant phase of** authorised development.*
- 5.38 The Applicant anticipates the above amendments will be discussed at ISH4.
- 5.39 The comments in relation to Requirement 24 are noted. They are not agreed with. The Applicant has explained the form of the Article in previous submissions and how it aligns with precedent requirements in DCOs for similar. It is for the Undertaker to confirm when operation of nationally significant energy infrastructure has ceased, not the local planning authority, and the time periods of non-operation suggested by the local planning authority would not indicate the operation has permanently ceased.
- 5.40 It is noted that it is acknowledged Requirement 27 (Employment and Skills Plan) is new. No further comment is provided by WCC in their submissions.

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