

## ISH2 Pt4

0:02

Good afternoon. Time now is 18 minutes past 3:00 PM. Apologies for the delay. We're now resuming session four of issue specific Hearing 2.

0:16

We'll jump straight into agenda item 8.

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When we drafted this agenda, we referred to the draught, ECO and explanatory memorandum in the application documents, which is AP-006 and Dash 007. However, since then we've received updated versions which are PDA-004 and 006. So during this discussion, feel free to refer to the updated versions.

0:47

Matters relating to compulsory acquisition and temporary possession in the Draught Development Consent Order will be covered under first written questions and in later hearings. But if today we do end up venturing into anything that is CA or TP related, we will ensure that that matters repeated and written questions or in the future compulsory Acquisition hearing.

1:08

Just a really quick one. Agenda item 8/1.

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We don't need to dwell on this too much because

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the submission requirements for the draught ECO and Explanatory Memorandum, because this was a procedural decision, we kind of talked about it at the preliminary meeting

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and subsequently I have signposted through the case team the Consolidated Track Changes Track changed Draught Development Consent Order submitted by National Highways for A428 Black Cat to Caxton Gibbett and this is a S-028 in the examination library for a 428.

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So unless there are any questions on that, I'm happy to come to that. Madam Harry Would Philippa on behalf of the applicant, and we're grateful for that signposting. From looking at the examples as our suspicion at this stage, we haven't been able to

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follow that up. I think by confirming with those who prepared it is that the comparison versions that were provided on behalf of national highways were done manually and what one can see that from some of the inconsistencies in terms of formatting and approach. That being the case, we would just welcome the the indication you gave on the first day that the requirement to submit versions which reflect that approach are spaced out throughout the examination

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after being every approach, because it will take quite some resource in order to produce that many and to check that it's reliable before it can be put in. If it's not automatically generated, there's just a more laborious process.

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So just so we don't waste any time, we will take that away when we do the adjournment before we do the hearing actions and try and give you an indication today itself on what deadlines that will be helpful. Thank you.

3:02

But as I indicated yesterday, I think it would be definitely helpful after hearing. So this next one when you provide DC update would we would definitely require, we would we would appreciate a consolidated track change version,

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right. And then the second part of the question is the justification we we are seeking the kind of justification we are seeking with respect to novel drafting in the draught DCO. This again has been referred to in the written questions, but I do want to repeat it. Just, you know, just to be absolutely clear is that when you're doing any kind of novel drafting, the approach that you're explanatory memorandum currently takes is that it sets out precedence first. What we would like is for you to justify

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any novel drafting for this particular project 1st and then refer to precedents. And this is because we need to understand why you're using that kind of drafting and why that's justified for this proposed development

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that that's helpful. Madam, can I, Howard Philpott, on behalf of the applicant, can. Can I just

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explain what we understand by the concept of novel drafting? Because I think that will be important when we come to answer the question and therefore to make sure that what we provide is in alignment with what you're expecting.

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So we understand the concept of novel drafting as being the use of the DCOM in a way that it hasn't been used before. So to take an example just to illustrate it, in the Sizewell C, Development Consent Order

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provisions were added in

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in order to draw within the Development Consent Order itself

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all of those elements of the Town and Country Planning Act 1990, which give effect to section 106 Agreements in order to ensure that they run with the land that can be enforced against successors. Because in that case an issue arose during the examination as to whether a number of things that were included in the Draught Section 106 obligation were properly within section 106.

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That issue having arisen, entirely novel legal provisions were incorporated into them the consent order, so that the agreement did not have to be under section 106. It was simply a simple agreement, but the development consent order and as a piece of legislation,

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gave a fact

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to it as if it had been made under a Section 106 that had never been done before. That was novel drafting, and we spent a considerable amount of time, both in hearings and in writing, during the course of the examination,

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explaining why we thought it worked. Refining it, that's novel. Drafting. Every DCO is unique

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and every DCO will necessarily have to adapt

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well used concepts and formulations to meet its own particular requirements. That is not what we would understand as novel drafting per se. It's simply that we take something which is well worn and we adapt it as necessary to fit the particular facts and and in that sense there's nothing unusual about it.

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And if your point is simply about for any drafting where it's not precisely in the same language as another precedent, you would like the explanation before the reference to precedent. We can provide that.

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But I just wanted it to be clear when we when we consider novel drafting, we're looking for something unusual. We don't believe that we've done anything in the Development Consent order, which is novel in that sense. Whilst recognising of course it's it's not a precise match for any other order

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it's understood and I think that's it's helpful to draw that distinction. But I think when and you're right the way that you've described novel drafting perhaps is slightly different to the way that I have used it. But in written questions we have asked you on several occasions provide a justification. So that should give you an indication of the places where we would like matters justified. And and yeah, so. So I think the point I'm trying to make is that if you're putting anything forward

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with the Draught Development Consent Order, we will need that justification with respect to this proposed development and then supported by other places where there might have been precedents. Thank you that. That's very helpful. And and particularly if as as you have indicated, it will be linked to particular provisions where you feel you need more that that would be extremely helpful. Yeah. Yeah. OK. So, yeah, fine.

8:04

OK. So that's just generally in terms of how we expect to see the DCO, the explanatory memorandum coming forward and future updates. So that's agenda item 81 done.

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With respect to 8 two. The question is self-explanatory I hope, but I'm going to break it up into pieces. So first of all, can you just explain the discharging process for requirements

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and we'll come to the DC drafting on that point a little bit later on. Yes, of course, Madam. The procedure for the discharge of DCO requirements is contained in Schedule 17

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and and that that provides a an approach whereby just looking at some in in broad terms at the moment it identifies

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where that where an application has been made to the relevant authority for any consent agreement or approval which would include

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some of the requirements. It sets out the timing for decision making and so you can see in paragraph two that it identifies how long the authority has to make a decision. So

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including in respect of requirements in schedule two, there there are 42 days starting the day immediately after they receive the application. But because there is provision, as one might expect for further information to be requested, and provision is made for the 42 days to begin immediately after the further information has been supplied or and also for agreement to be reached and by the parties as to any longer period. There's then provision which gives the power of the authority

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to either give or refuse consent or or or make other consent or agreement subject to reasonable conditions. And then there's a requirement to give notice of that and to provide the reasons for it that there's then provision in the absence of determination within the relevant time for them to have been taken to have approved the application. But that is made subject to the safeguards

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in paragraph 4.

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So that if there is a deterrent, if there is a an A failure to determine. But the application is accompanied by a report which says, well, this is a matter that's likely to give rise to any materially new or materially different environmental effects compared to those in the US

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or the authority itself decides that that is the case. Then the application is taken to have been refused rather than granted. And that's obviously to ensure that what you don't end up with is something which falls outside the scope of that which has been assessed

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being approved by default simply because no decision is is made. The local authority has the opportunity, even if it doesn't determine it, to say well actually we think this falls outside. And therefore if we don't make a decision and it is deemed to have been refused

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and you then have in paragraph 3 the provisions for making requests for reasonable and further information. And there are different timelines for the making of such a request depending on whether there is a requirement consultee that has to be engaged. So where there's no requirement consultee and 10 business days after receipt, notification has to be given within that time. However, if a third party requirement consultee is engaged,

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then they must issue, that's the authority must issue the consultation to them within five business days of receipt and then there is a further 20 business days in order to allow a fair opportunity for the consultee to come back. Then paragraph 4 deals with appeals in the usual way. You can appeal if there's a refusal or there's a request for information which you don't think is justified and or if there are

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conditions that you are not content with. So the usual sort of triggers for for an appeal and then an appeal process which involves in summary the Secretary of State appointing a person to determine an appeal and then identifies the steps in the procedure that would lead ultimately to a determination of any dispute arising. So that's by way of an overview of the the process for a determination of approvals.

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Their approval is required

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under the terms of requirements

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now,

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so that's very clear. But everywhere that there is a discharge of requirement,

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the drafting in the DCO states submitted to and approved by the relevant planning authority.

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Does that automatically tie that provision to Schedule 17

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well and Schedule 17 and explains in

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paragraph 2

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that where an application has been made to the relevant authority for any consent agreement or approval required or contemplated by any of the provisions, including consent agreement or approval in respect of a requirement,

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then and so on and so forth. So that links into the requirement where it applies for something to be submitted to and approved by the authority. OK.

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I think one of our concerns is that the language in the requirements themselves is a little bit loose and whether

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it should just mention that the submission and approval should be in writing Every instance that you actually talk about discharging of requirements.

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That's one of the questions that's really. Yeah, everything must be given in writing. It's already in there. It's already in my. My understanding is that that is already incorporated in there. We we know that that's been one of the written questions and if it's possible to provide you with the reference for that now we we will. But my understanding is that that that the need for it to be in writing is not in itself controversial. Just bear with me.

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So do you wanna just have a look say for example two requirements 8. Construction Environmental Management Plan,

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so nice. So I I do, I do apologise because I before we go to the requirement, can I just complete the position in terms of the position in, in, in, in terms of written approval. So it's Article 63 procedure regarding certain approvals et cetera. So once section paragraph one, where an application is made to or request is made of any authority, body, or person pursuant to any of the provisions of this Order for any consent, agreement, or approval,

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which would obviously include then approval pursuant to requirement, it must be given in writing,

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must not be unreasonably withheld or delayed. So every time that you're that every time there's a discharge of requirement, Article 63 applies. Not only does that requirement apply, Article 63 applies and Schedule 17 applies. Indeed, yes.

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Can I just check with Nelk, is that clear to you that process because you're the discharging authority for several requirements? Yes. Thank you, Richard Lemon, Northeastern Council. It is something I've put to our legal team to to have a look and check that that we're happy with. And I think it's a question in the questions. Yeah. So it's something we've sort of put to them to to come back to me on what you have to benefit off right now is the applicants overview of how the process works and where all it sits secured in the draught development consent order.

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So if you can ask your legal team to take that away as well. And and then the question is a two-part question, is it clear to you that it sits in Article 63 as well as scheduled 17 plus the requirement where it is stated. And the second part of the question is,

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umm,

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would it help if every time it states submitted to an approved by there is a requirement for it to be in writing? So if you look at for instance, I'll just give you an example I think and don't quiz me on this right now, but every time you refer to the marine management organisation, I think in the DML's

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they are required to give you approval in writing. But for other requirements in the rest of the DCO, those approvals do not explicitly state that that approval is required. In writing

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Madam Howard Philpot on behalf of the applicant,

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it's important to understand that the purpose of the Development Consent Order, which is a piece of legislation,

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is to make these things clear as a matter of legal effect, for the purposes of understanding,

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mainly by lawyers. It's a piece of legislation. It therefore has to comply with the principles of statutory drafting. It's not in that respect

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a document which is designed to be user friendly in in terms of non lawyers. It is. It's intended as a piece of statute and therefore one of the principles of drafting is that you don't include extraneous words. And so because it will be apparent as it is in trying to think of it as I can't think of a DCA which which adopts an approach which is materially different from the one that that we have here.

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If it's apparent from the article that something has to be in writing,

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and it's apparent that from Schedule 17, that that is engaged

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whenever one has to seek approval pursuant to a requirement,

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if one then sought to repeat those points elsewhere, that would go against that principle of statutory drafting. It might be different if you were providing a user's guide, a guidance note, or or perhaps even an explanatory memorandum and sit along alongside it.

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And the point that I'm reminded of, of course the the distinction with the DML.

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In a sense the clue is in the name. It's a Dean Marine licence and the Marine licence course would normally, absent the planning at regime, be a licence issued by the MO directly. It is not a piece of legislation and therefore it's not prepared in accordance with the same principles of the Development Consent Order. And one of the difficulties that that the approach to drafting legislation is intended to avoid is unintended consequences where you start.

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Adding things in

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in different places, which introduces ambiguity about the effect of provisions which seemingly seem to do the same thing.

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And if you say, well this appears to do that. But if that was the case, why on earth they put that in and then you introduce uncertainty, which unfortunately plays out then

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in in due course in ways which no one's desired or intended. OK. I think I understand most of what you're saying. What would be important for us would be to understand how discharging authorities feel about this. So I'll probably put questions. I've put a question to to to Northeast Lincolnshire Council, but probably will put this question to others.



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Secondly, the distinction between the DML&DCOI appreciate is made well so, but just to understand that point, I understand that it's a deemed marine licence, it's a licence, it's not legislation as such as the DCO and kind of if consent is granted it kind of almost unpacks from the DC and becomes a a thing on its own right. So does that mean that Schedule 17 does not apply to Schedule 3?

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We'll we'll just check that. We'll just check that point. And one of the other factors are practical consideration here is that

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because of the the role and the practise of the marine management organisation in issuing marine licences. And as you'd expect, and as this happened and this happening, in this case taking a very active role in the drafting of the de Marine licence, the general approach is that unless there's some particular reason we have for resisting A drafting approach that the MO prefers, if it's not a point of substance but disappointed drafting they like in their AD Marine licences,

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they tend not to get into a dispute understood with them because that's you know that that it doesn't. In a sense it doesn't hurt us to agree to their drafting preference. But when it comes to the DCOM then a different approach arises. Excuse me.

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So my understanding is that schedule 17 does apply to the Dean Marine licence. OK, I I believe there may be an issue that the MMO has raised, which I think may be coming up under tomorrow's gender, but certainly in the Draught Development Consent order. My understanding is that Schedule 17 embraces and conditions under the demanding licence.

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So I think the other point perhaps just to take away is this point that Mister Philpotts made about not including extraneous words. And I think you know the Examining Authority appreciates that you would as well, just to avoid conflict and potential, you know,

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duplication. So when you get feedback from your legal team, it would be really helpful to

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almost remind them of of that condition of DC drafting in a in a way.

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But yeah so just to summarise, is it clear to them that this requirement that this has to be in writing or the robustness of the process sits in two places Scheduled 17 and Schedule 633 Article 63 and is not repeated each time a requirement discharge. You know a requirement needs to be discharged and but if they feel that it would be helpful to have that specified with requirements then

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are they convinced or can they justify the examining authority that these aren't extraneous words in the DC which have been mentioned elsewhere

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Richard Lemon NE links Council Yes yeah we can we can do that and it might be that our legal team liaise directly with the applicants legal team to to in these bits out. Sure. But we will need a response to that. Yeah. OK And what we'll do in the hearing action is that not just address that question to Nelk but actually to address it to all discharging authorities. I can have a look through the CEO and see what other authorities those are.

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OK. Can we just go to requirement 14

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and I've got, I've got both requirement 14

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in the DCO as well as in the explanatory memorandum.

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And I think our concern with requirement 14

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is

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we don't see who the discharging authority would be.

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I'm not entirely clear. So let me just hand that over to you. Yes, Mary Harry would fill, but on on behalf of the applicant that the reason that that it's not apparent who the discharging authority is is because this is not something which seeks or requires an approval.

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This is a a a notification

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provision. So if I just walk through the way that requirement 14 works, the the starting point of course is that this is a prohibition on the bringing into operation of the Air Products facility. So work #7. No part of work #7 May be brought into operation operational use until and. So this is effectively an if you bringing work #7 into operation before you've done these things,

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then you are committing a criminal offence

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and just

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stepping back. So the purpose of the notification I'll run through what has to be done is to provide formal confirmation to the planning authority that the necessary steps have been taken

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before that has happened.

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Is not seeking their approval of these things because as I'll explain that that that is not an apt

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way of characterising and that the requirements or or or or an appropriate step

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when one looks at what is required. So the the first part, under 1A

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the Undertaker must have entered on and taken possession of all of those properties.

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So if the undertaker has not done that, but brings work #7 into operation, it commits a criminal offence.

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Secondly,

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the use of all of those properties for residential purposes must have ceased. So if there's any residential use going on when it's brought into operation, criminal offence is committed.

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Thirdly, notice must be given and served to the relevant planning authority that confirms both of those elements. So essentially that there was nothing for the local authority to approve

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because either we have entered on and taken possession or we haven't. The residential use has ceased, or it hasn't.

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But then one also needs to look at Sub paragraph 2, because from the date of the notice, no part of those properties may be used for residential purposes so long as any part of work #7 is in operational use.

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So the requirement to ensure that the residential use does not resume is ongoing

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and therefore not only is there nothing for the authority to approve,

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but it first of all has the benefit of being told that these steps have been undertaken,

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which helps in terms of enforcement.

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But secondly, it knows that if at any stage, as a result of inspection or complaint, it finds that residential use has resumed,

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it can enforce and and criminal offences committed. So this is not a situation akin to the discharge of a plan that where there's an element of judgement involved as to whether it's appropriate or whether it might be improved. You've either done it or you haven't. And the notice is to say we have done it

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and therefore that this is not something where an approval comes into play at all.

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I understand that an approval may not come into play, but

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you're giving that notification to the relevant planning authority.

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Is the relevant planning authority able to hold you to account if,

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for instance, not all properties have?

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Residential purposes have not seized, for instance, by observation, or

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do not remain in vacant possession for the entirety of the use of work. Number seven, yes, Madam Howard, Phil, Palm, half of the applicant, because that would be a criminal offence. So if if the notice, let's say the notice, is untrue, we would be committing a criminal offence

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and it because it would be readily apparent or would be capable of being discovered without a great

deal of difficulty, one would simply have to go down there and see that residential uses either continued or resumed, we would be guilty of a criminal offence.

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We wouldn't have the council.

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The the the other point, I'm reminded is that

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because the enforcement mechanism for breach of the terms of the DCA, which would include breach of the terms of the requirement, is in the primary legislation itself which makes this a criminal offence,

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the local authority will be aware of that as lawyers will be aware of that it will they they will therefore be aware of their enforcement options in those circumstances and those include the ability to serve notices to discover more about what is going on. I mean there are various enforcement mechanisms available before you decide to go for criminal sanction but it is it is less flexible than the Town and Country Planning Act. It it, it does ultimately rest in a criminal offence if you are

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in breach, and the local authorities, lawyers would be a well aware of that, but B as I've indicated, there would be mechanisms by which they could quite readily find out whether a breach has occurred. The point of the notice

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is for a clear step to have to be taken alerting the authority to the fact that we we've done this operation is due to start. So if they have any reason to believe that that might not be the case or if they wish to check they're alerted. This is the point in time where we we say that we've done it.

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OK, that's really clear. I suppose the question for NE Lincolnshire Council is

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do you need advice from any other statutory body on this matter?

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Thank you, Richard Limit NE Lincs Council. It, it raises A slight question and I'm not sure if now is the right time with it and how it ties into the hazardous substance consent process

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and whether the HSC would have a requirement that those properties are taken out of residential use prior to the has the substance consent being granted

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or whether it would be a condition of the hazardous substance consent.

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Whether now is the right time to raise that question or not, I'm not sure. I think now is absolutely the right time. I think it would be really helpful to have your view so because one of the things that I'm trying to understand is the distinction between notification and approval. And I do understand the distinction between the, the 2 words. But we're yet to be convinced that this is a case where that should apply. For instance, you know whether in fact you should,

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whether it should almost be inspected and you be given an approval. The applicant, the undertaker be given an approval in writing to say, yeah, we agree these properties are not in use. You can go ahead and commence work #7

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and if that were the case then you know do HSC need to be a consultee on the matter or a you know, et cetera Madam Harry would fill put on behalf of the applicant. There are a number of matters which have arisen through that exchange and our our seek to deal with them in order. And first of all we we obviously don't have the benefit of the HSC here to explain

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their approach and and we can

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take that away and see if we can clean anything from discussion with them. But

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my understanding of what we were told earlier is that if those properties remain in residential use,

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then the expectation based on the work which has been carried out on behalf of their products is that they would advise against consent being granted

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because there's residential properties would fall within the inner zone. That is what I'm really sorry. Could you just repeat that once again for my benefit? Apologies. Yeah, the the, the information that we were given earlier when we were dealing with the major accidents and disasters and the hazardous substances issue

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was that

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the expectation is that because those properties would fall within the inner zone,

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the HSE would be expected to advise against

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the grant of consent

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if they remain in residential use.

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That gives rise as as you have, as you'll be well aware, to the application for compulsory acquisition powers

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in order

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to then allow us to, most other things, discharge this requirement.

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That would, as we understand it, enable the HSE then to be content that it does not need to advise against whether the HSC would make its position conditional on those being vacated. I'll have to take that away. I don't. I don't have immediate instructions on that.

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And. But then coming back to the two points Madam, which you raised as to whether there needs to be an approval in relation to this and an inspection. And secondly whether the HRC needs to be involved

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taking those in reverse order. As I've sought to explain that the nature of the exercise

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that is in

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parent within requirement 14 is not one that requires the exercise of judgement, planning and judgement. Nor does it require the expertise of the HSE to confirm whether or not residential use has ceased. It's a simple matter of fact which one can discern on inspection as anyone living there.

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And the second point is that I I emphasised in my earlier remarks the importance of paragraph two. Paragraph 2

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comes into play from the date of the notice

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and so that one of the reasons why an approval under paragraph one would really be Oros is because that of course simply reflects the position at a point in time.

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And once the notice has been given,

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the ongoing obligation to ensure that the properties are not used for residential purposes kicks in.

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And so if we had approval

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in a sense, So what because thereafter when the operation starts, Paragraph 2 kicks in. So the approval only gets us,

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we're doesn't get us any further than the notice because at the point of the notice we've identified, we say we have complied with this. Thereafter any inspection would not, wouldn't it wouldn't matter whether we had approval because Part 2 would kick in and there's no approval needed because it's it, it is an absolute ongoing obligation. And so as I said, if this is not a situation where approval really has a proper role to play and we've either given the notice or we haven't. If we have given the notice and we've done so

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in a way which is untruthful, then we won't have complied with part one and we'll be operating in breach of the DCO. If after the date of the notice, residential use either continues or resumes, we're in breach of Part 2,

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whether there's been an approval or not. Excuse me, one.

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And and the the final point I'm reminded is of course if we don't give the notice, that too is a criminal offence.

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I think I've unpacked 2 parts to this. One is notification or whatever it is,

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some

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you telling somebody

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and whether that should just be the local authority or whether there is a role for a consultee like HSE and you. I think there's a question that you took away there, which is

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that

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the fact that they can refuse the, you know, the the fact that these properties fall within the inner zone, that they can refuse permission.

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Whether that role extends a little bit further, I think that would be really helpful to get clarification on. So that's one thing, whether it's just the local authority or whether there's a role for a consultee like HC.

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And if the position is that it's the latter, that there is in fact a role for HSE in this matter, then whether it should be an approval versus notification. So I just wanted to clarify that rather than this now just being a question of whether or not there should be an approvals process in here. It's unpacked into two lines of questions for me, for us and I I don't. I think besides the fact that you giving us clarity about what the role of HSE is going to be with respect to the Queen's Road properties, There isn't a second hearing action, but it's something.

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For us to take away and potentially come up with some more nuanced questions on it

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is that it is not the the only thing I just take instruction in the moment to make sure there's nothing else. But the only thing that occurs to me to say is that of course if the HSE is advising now because I understand says the decision maker against in circumstances where the residential uses continuing, then we won't get the consent

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and therefore therefore the HSC involvement is is potentially secured through. That means that they will advise against unless they're satisfied that we have overcome that obstacle. If you can just excuse me while I just check and see if there's anything else at this stage.

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Thank you Madam, there's nothing else I need to add. We will, we will see if we can get any further assistance through engagement with HSC as to how they see their their their part in this as adviser to Nelk and and and whether the the, the way in which they're recommendation might be framed in those circumstances to see if we can provide

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any further assistance to you in the absence of HSE and coming back to you directly, I think that will be very helpful. So I will note that as a hearing action,

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there's a fourth point that I've just thought about, which is that if at the end of this entire conversation, discussion back and forth, we decide that the drafting of 14 is fine as it is, would you consider whether further explanation in the explanatory memorandum? And let me just pull that up. Yeah, which is really brief where where the further explanation in the explanatory memorandum might in fact

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be helpful.

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Simply to tie in this process that almost

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preempts the entire notification process, which is HSE's own approval process,

42:21  
Madame Harry would focus on behalf of the applicant. The the fact that you suggested indicates that the expansion round memorandum will be more effective if it went further than it did. So we'll we'll take that away and see if we can improve on the explanation. Because amongst other things obviously we want the expansion memorandum to serve its purpose so far as the panel is concerned. But also more generally to make it clear and why the drafting is as it is. Thank you very much. And I just want to clarify something which my colleagues just advised me is that

42:54  
HSBC is not giving approval, there are statutory consultee. So I'm just going to correct myself here,

43:01  
OK. I think I'm happy with eight two unless anybody else has any questions. No.

43:11  
OK. All right,

43:14  
I'm happy to move on to 8/3,

43:18  
right. So 8/3 is about activities that are currently excluded in the definition of commence.

43:28  
And commence has been defined only in schedule 2. So schedule 2 is where the requirements set

43:36  
and paragraph one and there's several activities that have been excluded, a few that stand out for me. And this isn't the totality of that, but that stand up for us. Our demolition works,

43:48  
archaeological investigations, remedial work in respect to any contamination

43:54

and this one, particularly the receipt and erection of construction plant and equipment,

43:59

erection of temporary contractor and site welfare activities.

44:04

Of some concern also is the diversion and laying of connection of services, although I do understand that this does very often fall outside the definition of commence,

44:16

just just just so that we're all on the same page. Can you explain what that means? Excluding these works from the definition of COMMENCE, what does that mean? For instance, does it mean that you could, the applicant could potentially do these excluded works even before you get consent?

44:35

Madam, The way that the the definition operates, it's defined in the interpretation section, but it finds its life and its consequences in relation to three particular requirements,

44:51

and those are requirement 6-7 and 12. And it might help if I just

44:56

work through there is to show yeah, why it's why it's defined in the way it is. So if one takes requirement 6, this is the Construction Environmental Management Plan

45:12

and this says that no works forming part of work. Number one. So looking at the first paragraph outside of the UK marine area may be commenced until the construction environmental management plan for that part of the works has been submitted to and approved and and so on. And then paragraph two has essentially the same formulation for those other works that are identified there. And then certain other things we don't need to concern ourselves with which are consequential. But essentially therefore

45:45

what that is saying is that

45:48

none of those works can commence until you've got that plan approved and then you have to operate in accordance with it. Similar approach arises in relation to requirement 7. And so those works and may none of those works may be commenced until the construction traffic management plan has been submitted to and approved and then you have to comply with it. And similarly, if one looks at requirement 12,

46:21

the surface water drainage, similar constraints apply until the drain is strategy for that part has been

submitted to and approved by the relevant planning authority. So the effect of defining commence in a way so as to exclude certain works is to take those works and only those works

46:44

outside the prohibition that is created by those three requirements.

46:49

So it would mean that if you are an exclusion, excluded piece of work could be undertaken and without infringing, say, requirement 6.

47:05

Because to take a a, a, the first example in the and the definition if you were undertaking works of site clearance, except of course clearance trees and vegetation from long strips. So if you were clearing some

47:26

other impediments from the site, you would not have to have your construction environmental management plan approved in order to do those works and therefore you wouldn't have to undertake those works in accordance with the plan. I take that as an example that illustrates, I hope, the principle

47:44

and the intention and the purpose of those exclusions in the usual way, and this is a very familiar approach in principle, is to identify those works which, because they're not anticipated, not assessed as being likely to give rise to light, significant environmental effects

48:08

are, are not ones that have to be prevented from occurring

48:14

before they are made subject to those controls. And I'll run through the individual elements in turn in a moment to explain why that view has been

48:25

reached. And therefore, because of the nature of those works and their limited potential effects, the necessity that otherwise gives rise to the requirement to undertake works in accordance with the relevant plan

48:44

is missing. And therefore the, the, the the applicant can, once it's got it's DCO, can get on with minor preliminary works of that sort

48:55

without having to go through that step. Now there are, there are certain things which I want to make clear at the beginning before I go through the individual elements of the work. Mr Football, can I just interrupt you there? Because there's two things that we've covered. You've talked about

49:14

what this provision enables the undertaker to do, but you're also now talking about the environmental effects. I just want to unpack those two things. Let's just focus on the first one first. What you said is that

49:28

excluding those activities from requirement, it's basically excluding those activities from requirements 6-7 and 12. And I'll come to the requirement a bit later, but the definition itself have commence as is drafted in the DC Co says means beginning to carry out any material operations as defined in section 155. And section 155 of course defines

49:52

you know, the start of the start of the project, forming part of the authorised project other than operations consisting of and then it lists all of those activities. So

50:03

so it's the definition itself is basically enabling you to do any material operation

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before you start any material operation. You can do all of these works. It's not just requirements 6-7 and 12,

50:22

although requirements 6-7 and twelve are quite loaded. Requirements 6 is the camp and seven is the CTMP, which means that you potentially have no controls in place before you can do what you have currently described as minor environment. You know, activities that have minor environmental effects and we'll get into that in a second. But

50:47

I think the definition is defined. The definition is suggesting that you could potentially start a do these activities before you have any controls in place anywhere you can just allow me a moment to take instructions.

51:42

Thank you Madam Harwood filtered on behalf of the applicant. That the the point that I just wanted to check my understanding and and my understanding I'm told it is correct

51:52

the the definition only has life and legal effect in relation to those three specific requirements. So to take just to explain,

52:05

if you begin a material operation pursuant to the DCO

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then the anything else in the DCO which affects such works comes into effect. The definition of commence here

52:22

only arises and has legal effect where it's used in the in those three requirements. So it's not that everything else in the DCA is switched off, it's simply for for those particular works

52:38

you don't need to comply with those three requirements, whereas otherwise

52:47

you are commence where it's used. A carries the the meaning of carrying out any material operation. So any material operation forming part of the authorised project other than

53:05

constitutes commands. So if you have a an activity which is not within that list, you can't

53:13

carry out that activity lawfully under the DCO until you've complied with those requirements which have to be complied with before you commence.

53:25

One minute.

53:30

Got it.

53:32

So I'm hopefully provided with a an example to illustrate the point. If one looks at requirement 9 construction hours,

53:42

Construction hours are

53:46

constrained by requirement 9 but can. But requirement 9 is not subject to the point about comments. So requirement 9 bytes as soon as you undertake any material operation. So if you were undertaking, let's say a site clearance,

54:08

your site clearance has to be in compliance with requirement 9.

54:13

That's the significance of the point I was making at the beginning, that the definition doesn't prevent the DCO from having been implemented. And so as soon as you start works,

54:25

including those works which are excluded from the definition of commence other than those three particular requirements are identified, all other constraints apply.

54:37

So it is that that that's why in order to understand the way that it affect, the way that it has been approached and the justification for those exclusions, 1 needs to understand the rationale for the list.

54:53

And so the identification of those items that are included on the list and the correctness or otherwise of that list. Having regard to the rationale behind it, I I would submit is the appropriate focus. Are there items on that list which ought to be subject say to the construction environmental management plan have in regard to their potential significant effects And if if not then they're appropriately included in the exclusions.

55:25

If they might give rise to effects which have not properly regulated by the the chimp,

55:32

then they would then they wouldn't be justified. And that that I I suggest is the

55:39

the, the essential question that arises when you're seeking to understand whether the definition of commence in that way has been appropriately drafted or not.

55:49

I hope that helps articulate the the thinking. So I think there's it's very one thing is very clear which is that for those particular,

56:02

for those particular words, for those particular works, you don't need those requirements which are 6-7 and 12:00. So that's one thing you said which helped clarify things. I'm not saying I agree with it yet. I'm just saying that I understand what you're saying and the the example that you gave of requirement 9, that is also very helpful.

56:23

But, and I also see your point that then it becomes very important for us to understand what the environmental effects of all these specific works are with respect to those requirements, particularly to make sure that we are not, nothing's falling through the cracks in terms of environmental effects which are not being controlled.

56:45

And we'll come to that in a second. But before we do that,

56:49

bear with me.

57:14

Sorry, we're just starting a conflict between ourselves.

57:18

It's really just a point of clarification that that hopefully you can sort of help with. And and the comments and the discussion that we've had.

57:25

It takes us to requirement 2 which says the authorised project must be begun. So we've got the word begun and we got the word commence. We don't have a definition for begun and it just be to understand what is meant by the term begun, how it differs from commence and whether we need to be defining begin, begun whatever the the correct sort of pronunciation or ways. So I understand the point, but Harry would philpot on behalf of the applicant. If one looks at requirement 2, Requirement 2

57:57

says that the authorised project must be begun and then in parenthesis which has the meaning given in section 155 when development begins of the 2008 Act. And so

58:16

section 155 under the heading Wind Development begins says For the purposes of this Act, development is taken to begin on the earliest date on which any material operation comprised in or carried out for the purposes of the development begins to be carried out. And then subsection 2 material operation means any operation except an operation of a prescribed description. I I don't at the my fingertips have the prescribed

58:48

description, but the essential point is that

58:52

are requirement 2

58:55

is your standard, as it were commencement

59:01

provision. I'd say the commencement in in its loose sense here, not the defined sense in that you have to get on with it and undertake a material operation within five years. The reason for using commence and defining that is to avoid confusion with the concept of begun which is used in the acts in a very particular way. And that distinction is emphasised by the approach taken in the drafting of requirement 2, which brings within the DCO

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the meaning given within section 155.

59:45

So as as I'm as I'm reminded the the effect of that is essentially to align

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with the statute the way in which the DCO stipulates when you must have begun, when you must have



undertaken the material operation in order to preserve the benefit of the Development Consent Order.

1:00:06

And that's why commences

1:00:09

defined differently.

1:00:15

So then shall we move on to the second part that you were starting to get? Indeed, and and the the point that there are a number of points I wanted to make before I go through the list by way of context. And the the first point is that amongst the other requirements which is important to have in mind when one is considering the list is requirement 15

1:00:38

which is dealing with contaminated land. And what requirement 15 provides is that no below ground works comprised in any part of. And then it lists the relevant works may be undertaken until a written remediation strategy applicable to that part to deal with any contamination of that part which is likely to cause significant harm to persons or pollution or controlled waters and so on and so forth has been submitted to

1:01:10

the relevant planning authority following consultation with the EA. And And that means that whenever you when you're looking at the list of items that are included within the definition of commence and you see underground works, one has to bear in mind that they're they're subject to that separate

1:01:33

specific requirement to obtain approval. So as I've said there are certain requirements such as ours of work and so on which will cover all of these others which are specific to certain examples. And so one of the points that is included in in the list is investigations for the purposes of assessing ground and geological conditions, remedial work and respect of any contamination or other adverse ground conditions. So I take that

1:02:06

one needs to understand the scope for such works occurring before the SEMP has been approved and and has effect in the light of the operation of requirement 15.

1:02:19

So that that. That's one important point.

1:02:23

Are there other similar instances where certain works that are currently excluded from the definition of Commence will be caught under other requirements? I don't have a complete list of my. If it would help you, we can deal with that as part of the note

1:02:39

that the second important point is that the list currently includes archaeological investigations and

Madam, that was one of the examples you highlighted is something that gave rise to particular concern. I'm told those have now in fact been completed and so those are proposed to be removed from the list of excluded works because there's no longer any need to include those, they've they've been undertaken already.

1:03:03

And I just pause and and make the point

1:03:07

that that's also a a good example of the underlying principle, because no planning mission is needed for archaeological works.

1:03:17

Just go on and do the works. And so when one asked myself the question, is it necessary

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to have archaeological works? Although that as I said, that's now become a theoretical example but I use it

1:03:33

partly because of that subject to the construction Environmental Management Plan. The answer I would submit is obviously no, because you don't need Planning Commission for them. And similarly when when one looks then at the the the other items, site clearance activities, those have been deliberately framed so as to exclude the clearance of trees and other vegetation from long strip recognising that that is in itself something which has significant effects. So they've been excluded,

1:04:06

but the clearance of vegetation doesn't require Planning Commission.

1:04:11

So if my clients go on and they remove vegetation not subject to any tree protection order or or or anything of that sort

1:04:19

and that they can do that without any approval is. And when you say it does not require any approval you mean under TCP A yes. They just it's not the planning system does not regulate OK gardening or or or the OR that that sort of work. The the other point to to bear in mind there by by way of illustrating how this sits in the wider context where for example there are there may be nesting birds

1:04:46

on the site in the vegetation. The restrictions which operate on the disturbance of nesting birds operate independently. So insofar as that might be a cause of environmental effect of site clearance that that's dealt with under other legislation. Now the the next example is demolition work and again this is 1 Madam you identified as one that that that might be of concern. Now typically one might expect demolition works to have the the escape for like significant effects.

1:05:19

But my understanding of the position is that in practise the only demolition that is required is a small

prefabricated building in work #5 which is very limited deconstruction works, so no likely significant effects as a result of effectively removing that small prefab building. And

1:05:46

in those in those circumstances, the demolition work is really very limited indeed and that's why that again wasn't thought necessary to be subject to those plans and approvals before that happened and environmental surveys and monitoring that's ongoing across the order limits now. And and

1:06:06

it in relation to groundwater and surface water, it's using existing monitoring points. This is not intrusive work and therefore again not something that needs to be made subject to those controls. Similarly, investigations for the purposes of assessing ground and geological conditions, that's typically boreholes, trial pits, not significant works and remedial work in respect of any contamination. That's that's the point that I commented on earlier where requirement 15 is engaged

1:06:40

the receipt and erection of construction plant and equipment and the erection of temporary contractor and and site welfare facilities. And it is as I understand it proposed to exclude work #9 from that that's not currently in the in the drafting. But that that drafting I understand will change to exclude work #9 because there are controls in the outline camp that affect that area. So although you don't currently have that exclusion there,

1:07:12

I I'm told that will come in the next draught. But otherwise

1:07:18

the the simple delivery to site of these sorts of plants and equipment, putting up temporary and contractor and welfare facilities are not thought to be matters that are like to give rise to significant effects.

1:07:36

And then finally the erection of temporary means of enclosure, temporary display of site notices or advertisements. I'll take the last two as red, unless particular questions about it, but the erection of temporary means of enclosure in this case that's only small amounts of local excavation to install fence posts and is not therefore particularly intrusive,

1:08:08

are not thought likely to give rise to any significant effects. And so those are the reasons why those matters have been included. As I said, there are certain changes that will be made in the next version to reflect the points that I have made, but that that's why those matters are drafted in the way they are subject to those points to come.

1:08:34

That seems that's really helpful that that was actually that did clarify quite a bit and I'm just going to summarise a couple of things and I have some related questions to them. So

1:08:46

broadly the reasons that you've given me about these items being excluded either because the scope is very small,

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such as the demolition work or it's been done and so we'll be excluded. It's not covered by any other regime, so gardening?

1:09:05

Umm,

1:09:09

then

1:09:10

work #9, putting up plant and equipment. You said there's some drafting edits that are coming because of work #9. That makes sense, but I have a question on that, so bear with me. I'll come back. And remedial Works, which engages requirement 15. Now if remedial works is engaged by requirement 15, why have it there at all? So that's my first question.

1:09:35

The second question is plant and equipment. What kind of plant and equipment because is this just construction plant and equipment? The reason I asked this question is because one of the things that's become quite clear from the drone footage that you've sent us is that our understanding of scale needs some adjustment.

1:09:58

So what kind of plant equipment? So when you say it's not intrusive, I'm not convinced yet.

1:10:06

So there's two questions I think. Sorry, bear with me one second.

1:10:17

Yes. So

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whilst these things in isolation might be insignificant,

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what about the possible cumulative effects of these things happening

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together? What we know you know

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a specific area, concentrated area. Have you considered those

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sort of those things? Thank you. Thank you. If I may, Sir, on that final point, because I'm not here to give the expert evidence on the effects themselves. I can describe the underlying concepts. And unless either Mr. Lewis or anyone else is able to assist with that, when I've finished dealing with the other two points, I might have to take that away. And we can deal with that in writing. But to take the two points,

1:11:06

Madam, that you've asked about so far as the type of plant and equipment, if one looks at the definition of commence, it is the receipt and erection of construction plant and equipment. So it can only be construction plant and equipment that's embedded within the definition. The second point in relation to requirement 15, and if I may so say so, it works rather than the other way around because the effect of requirement 15 is to address what might otherwise be the risks

1:11:39

of the underground work taking place without it being made subject to those other plans. So, so far as requirement 15 is concerned, it's a fact is important in understanding why it's acceptable to have those within the list. Of course if you took them out of the list, not only would they be subject to requirement 15, but you wouldn't be able to undertake those works until you have those other documents approved. And and we would say that that would be an unnecessary constraint

1:12:12

on getting on with works which actually would be benign in, in that sense. And there wouldn't be any public interest in slowing down the delivery of something which is needed in the public interest.

1:12:27

OK. I understand the point about requirement 15. The thing about it can only be construction plant and equipment. That is also helpful

1:12:36

cumulative you're going to take away, which I think is a very important question.

1:12:41

And I guess that just leaves me with one point. Um,

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you referenced a note that you will submit with potentially identifying these

1:12:51

environmental effects. So going through this list and, you know, almost providing a justification of why they can be excluded and related drafting amendments,

1:13:02

My question again is

1:13:05

I wonder why this is not in the explanatory memorandum,

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if it would Madam Howard Philpot, on behalf of the applicant, if it would help to supplement the explanation given in the explanatory memorandum so as to make this clearer, we would be happy to do that. And for the same reasons I said earlier, it's in all our interests if it's properly explained.

1:13:34

The reason why I think it might be helpful in the explanatory memorandum and is because the way COMMENCE has been defined in some other DC years that I have seen is different to this.

1:13:48

Your explanation was absolutely essential for me to understand that this is. This applies only to those requirements and in fact is caught by a few other requirements though or those activities are controlled by a few other requirements.

1:14:03

So,

1:14:04

so I I, you know, if it was new to me, it's probably new to a few other people. So I think for that reason it might be helpful to have that justification and that explanation in the explanatory memorandum. But equally, let's see what the note says, because I definitely want to understand from the local authority whether they identify any identified environmental effects, possibly even from some statutory statutory bodies. If they identify any environmental effects that they feel need to be controlled, which are currently not being

1:14:36

controlled but potentially once we've heard from them, then what the status of that note should be is something that we can consider later on.

1:15:01

Madam, the point which has been made to me, which we can capture in the the note, perhaps by reference to some precedence

1:15:10

actually the difference in the way that we've approached it in this case, that that is the definition of commence. It is because we're really only seeking to carve out a very limited part of the work for a very, if I may say so, rather sort of limited set of purposes by reference to those three requirements.

1:15:31

There are other

1:15:34

there are other CEO's, some of which I'm aware of, but will I won't sort of draw on them now. We'll draw on them in the note where the exclusion is much wider. And that may be because, for example, payments of significant sums of money may be triggered by works which commence the DC work by by means which the DCO has been implemented. And so there are certain DCO's where a deliberate decision is taken to carve

1:16:06

things out, but for a different reason. But we'll we'll look at that as part of the explanation because that may help to illuminate and clarify the limited purpose in this case.

1:16:20

Yeah, I think that will really help. And I'm just thinking about this note. When you were giving your presentation right now, your explanation, you talked about two, three things.

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One is how this is how the environmental effect is in fact

1:16:37

are not significant

1:16:42

and where the environmental signal, where the environmental effect might have the potential to be significant, how it is in fact controlled. So I think if your note covers both of these points, that will be helpful and then of course that overarching point will be really good as well.

1:16:58

1:17:28

So I was going to come to North East Lincolnshire Council basically with the question about if there were any adverse effects that you feel were not being controlled and should be controlled. I think that question still applies, but and feel free to answer it right now, but I think I would value your response to their note more. But do you have any comments to make of the discussion you've just heard?

1:17:56

Thank you, Richard Lemon, NE Lincs Council. As far as I'm aware from our ecologists involvement, they haven't expressed any concerns over the those initial sort of works as has just been described. But I think it would be useful to review the note as you sort of say and then come back with those comments if that's if that's OK, that's fine. But again, I think it would be helpful if you and your car colleagues could see this recording just to understand the scope of the exclusion with respect to the scope of the exclusion

1:18:28

with respect to potentially other DC's made DC's where commence excludes pre commencement works, if if I can call it that. And just to see if that you're clear on that matter. And then if the environmental effects you're happy are not really controlled in any way,

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whether you have any concerns on that?

1:18:52

Yes, thank you. Well,

1:18:57

Madam, Howard Phillip, on behalf of the applicant, just just to tie up a loose end, and I I raised the

question as to whether or not Mr. Lewis might be able to assist in the hearing in relation to that final matter that was raised. I understand he has in fact left the building, He's gone back to the hotel. So before anyone holds their breath any longer, that will have to come in writing, I'm afraid.

1:19:22

That's fine.

1:19:23

Umm.

1:19:25

1:19:26

Just.

1:19:28

1:20:09

I'm sorry, I had a question on schedule 15 which was regarding contaminated land. The wording which I've momentarily lost, but it refers to works #1 outside the UK marine area,

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which would be restricted.

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Does that mean that works in that works one within UK marine area would not be restricted by schedule 15,

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requirement 15 qualities.

1:20:55

But I'm sorry but the the reason I was slightly thrown is I was looking at schedule 15 which is the documents and plans to be certified and I was temporarily thrown by I wrote down requirements schedule 15. It was requirement the the, the the purpose of that part of the early part of requirement 15 and it is to distinguish

1:21:19

those works which are covered by the dead marine licence.

1:21:22

So understand it.

1:21:34

So it is the it's the point at which the dead marine licence and its conditions take over from the



1:21:43

the the, the development consent and the requirements.

1:21:48

That's the that that's what I understand that wording reflects

1:22:02

just for clarification, we we're not aware that any works are occurring outside of the UK marine area. Is that correct?

1:22:19

It the distinction is that the main high watermark,

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so the mean high watermark you leave the UK marine area.

1:22:31

Sorry

1:22:48

I I I think what I was saying was correct and that effectively where where you get to the mean high watermark and you're moving out seaward from there, you're in the UK marine area. So where you have any below ground works comprised in part of work number one,

1:23:10

which come above the mean high watermark, those are subject to requirement 15. Where they sit below the mean high watermark, they're subject to the Dean Marine licence.

1:23:23

Yeah, I I'm, I'm glad I'm I had understood it correctly. I hope that helps. Thank you. It does. I'm just looking at the definition of the UK Marine area which is in

1:23:36

UMM

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Section 42 of the Marine and Coastal Access Areas Act, and that says for the purposes of this Act, the UK marine area consists of the following. The area of sea within the seaward limits of the territorial sea adjacent to the United Kingdom. Any area of sea within the limits of the exclusive economic zone, and any area of the sea within the limits of the UK sector of the continental shelf

1:24:07

so far as not falling within the area mentioned in paragraph B. And that doesn't seem to mention anything about mean high water, that that that, that is that is correct. That is consistent with what I've said, but the point at which the C ends is the mean high water

1:24:26

that point and and and that definition of the UK marine area is explicitly brought within the DCO within the preliminary parts. That's Article 2 interpretation. So UK marine area has the meaning given to it in Section 42, the UK marine area of the 2009 Act. So we are talking about the same thing. It's simply that the definition

1:24:54

that effectively takes you to the mean high water spring

1:25:04

and and I'm I'm reminded the MO were quite content with where the boundary had been drawn in their comments on the draught development consent order. Thank you. I've found the definition that mentions the mean high water at spring tide. So yes we're we're clear on that one now. Thank you.

1:25:58

OK. I'm happy to close that discussion down.

1:26:03

Is there anything additional from what you raised for the action? Hearing action? No, no, no. OK, all right,

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next one is 8/4 and I must apologise that this was a very high level question so it doesn't give much away.

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But

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the question here is we've had, we have some idea of the design process so far from the ES and also from the design evolution document which is AP-233.

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And any questions that we have on the process so far, we will cover that in writing, not today, but for the hearing today. I would like to understand what the design related, design, outcome, related commitments or principles that the applicant would follow or could be held accountable to

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should consent be granted

1:26:59

and and we expect that you'll make reference to requirement for. We've referred to it in our written questions as well draught written questions, But

1:27:08

what we were really hoping when you talk about your design related commitments or print design outcome related commitments and principles, if you could make reference to management plans or any controlled documents where it truly secures those commitments.

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And and also in responding to this question, if you could

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refer to relevant paragraphs in Section 4.1 of the NPS and Section 183 of the Planning Act.

1:27:37

Thank you Madam, I Harry would thought but on behalf of the applicant I don't know whether the response that I prepared will necessarily touch on all of those matters and it may be we have to take some of these points away. I'm afraid I've prepared as best I could on the basis of the that the agenda item, but if I if I can provide the my overall understanding of the position and I want to start with

1:28:03

at this point we will of course be responding in more detail to the written questions. So what I provide today will give a full taste of that

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the starting with the end zip and then I'll move on to the associated development. So, so the end zip, as you'll have appreciated from the documentation,

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is developed to a different stage of design to the associated development. It's more tightly constrained and defined in terms of its parameters and and that those parameters are secured in various places of within the both the DCO and the Dean Marine Licence. And so for example, the vertical parameters of those parts of the works

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a of work number one that are within the UK marine area and details including, for example, maximum pile numbers and size. Those are secured by way of the Construction Environmental Management Plan that has to be submitted to and approved in accordance with paragraph eight of the deemed marine licence which is in Schedule 3 to the to the Development consent Order. So condition

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eight no, no licenced activities may be commenced into a Construction Environmental Management plan for them has been submitted to and approved by the MMO following consultation with the relevant planning authority. The Environment Agency and Natural England on matters related to their function and the submitted Construction Environmental Management Plan must be in accordance to the outline Construction Environmental Management Plan unless otherwise approved by the MMO and and so that there are certain elements which sit within the

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marine area where the details fall to be approved under the marine licence and and particularly pursuant to paragraph 8. Mr Philpot, can I just interrupt you there?

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Right. So it seems to me like you're about to list a number of parameters, what you consider to be design related parameters and how these are secured through either the draught DML and the DRAUGHT DCO.

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And I think there might be a slight disconnect here in terms of what you're considering design parameters and what I consider or what we the examining authority is talking about when we refer to design related principles or design outcomes. So

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to make sure that we've bridged that gap, I wonder if you just list the parameters rather than telling me where they're secured. And I will then clarify whether our understanding, whether we have a common understanding on that man. If I can put it this way in a in an attempt to use time efficiently and in order to work through where all of these parameters are to be found and one would need to go between various parts of the DC O. What I would propose is that as part of the material we put in a deadline one

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we provide you with a perhaps a table which identifies where all all of these are to be found. It it is already in the written documentation, but we can draw it together in a helpful way. And the reason I say that rather than going through them all now is because the simple point that I'm starting with and I'm and I do understand. I I think the concept that underlies the agenda item is that when you're looking at the end zip that the scope for the design to evolve is really quite constrained

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and it it is fixed in terms of its parameters really quite tightly.

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And that the reason for that or one of the principal reasons for that is because of the need at this stage to have minimised the impact on intertidal habitats. That's one of the principal drivers of that. So there there's really not much wriggle room left in terms of the parameters, which is different when we come to look at the associated development.

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There is of course further detailed design that will be undergone, but that is essentially to do with engineering considerations

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and the the scope for that to give rise to changes which might have different environmental effects is is constrained by those type parameters

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and that the reason for going through it in that order is to get to the point of explaining that. Beyond that, so far as the jetty itself is concerned that the combination of those factors and the clear

functional constraints that it has to operate under and the safety constraints and matters of that sort is that the effective room for aesthetic considerations to influence the final design is really minimal.

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And if it exists, it, it is a an essentially from this point it's an essentially functional engineering object.

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But that that's that. That's why I started with those parameters because it what one needs to understand that the amount which is still at large and the extent to which that is capable of being influenced by aesthetic design considerations.

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That position is is different

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to some degree when one comes on to the hydrogen production facility

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that that comprises a complex series of buildings, structures, equipment and and and apparatus

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and

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achieving the safe and effective functioning of that facility through the safe and effective functioning of each of its individual parts is a paramount consideration in terms of good design. Here

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good design obviously a wide concept but in in the in the context of a facility of this sort, safe and effective functioning is the paramount design consideration

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and that's of course

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heavily influenced. And the approach to

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the parameters and the approach to the degree of design control that is left over in the DC O beyond the parameters is heavily influenced by the separate system of regulation.

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Because our products will need to satisfy Health and Safety Executive and the Environment Agency that the ultimate design that it comes forward with is safe and effective in order to be permitted to operate under the Cayman regulations and under the necessary environmental permit.

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And because of that, they need a considerable amount of flexibility in the final design to be able to meet what they're told they have to meet

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that. That again necessarily constrains the degree to which some elements of the design can be made subject to a separate system which might throw up inconsistent and requirements.

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And there are a number of different types of infrastructure where there's some separate system of regulation which has that sort of effect. And and and this is not unique in that respect.

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What the what the DCO seeks to do for the associated development is

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partly to secure the layout of the facility through schedule one, which identifies the key components and the work numbers to which they relate and then the work plans which set the boundaries for each of those work numbers. And then there are vertical design parameters which are secured in requirements. So the maximum height of permanent built elements of works within work numbers 235 and seven is in the table at requirement 4.

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The other elements of requirement for I'm going to come to, but that's where we'll find those parameters that where one finds those parameters set out and that includes also minimum heights for the hydrogen production stacks. So that those parameters are important for the purposes of the environmental impact assessment. And the as you have seen, they have been used as a Rochdale envelope within the environmental impact assessment

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to ensure that the assessment reflects A realistic worst case taking account of those parameters.

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So there are, despite those constraints, where there are elements of the design which can safely be

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subject to external approval by the relevant planning authority under the DCOM without giving rise to the risk of conflict with those that separate those separate regimes. Those are addressed within requirement 4. So requirement for paragraph one and provides for detailed approval of the external materials

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of certain key buildings so that any security building within work #2, any control building within work #5, any control room, workshop building security and visitor building contractor building warehouse within work number seven. So the the, the external materials that are to be used in the construction of those buildings are considered to be matters that will not be critical in the safety regime and but may have

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a design effect in terms of the overall appearance. And so those are for approval.

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Now when it comes to subparagraph 2 in the ammonia storage tank within work number 3A, this is one of the largest structures on the site. That's why it's treated separately in this way. But as you might anticipate,

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the design of the ammonia storage tank will need to be carefully controlled because of the engineering constraints and in particular consideration of best available techniques. For the purpose of the environmental permit, there's a limit to how aesthetic design considerations

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can be allowed to constrain what will otherwise be the essential determining factor, which is the operational health and safety considerations which dictate the design of that piece of equipment. But external paint finish. We doubt that will be critical, but it may have a significant make a significant difference to its overall appearance and therefore that has been singled out as something that can appropriately be approved by the authority.

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Then requirement 8, if I can go on to and requirement 8, which also relates to associated development, the design and layout of any permanent access or alteration to the access that has to be submitted and the details of the design and layout have to be submitted to and approved by the relevant planning authority. So to the extent that design considerations arise there, those are subject to appropriate.

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Patrol requirements 16

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deals with external lighting and so again that allows for the proposed operational external lighting to be regulated by means of approval by the planning authority of that scheme. And then finally, and one goes back to requirement 10,

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this is the Landscape and ecology management plan that this allows for the detailed landscape and ecology measures to be worked up and approved by NELK and that includes landscaping as part of the hydrogen production facility as set out in this submitted outline Landscape and Ecology management plan. So that deals with the proposed areas of amenity, grassland species, rich grassland, native species

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that rich hedgerows, native trees, shrubs, ornamental trees. And that, again, is part of the design intended to soften the appearance of the project integrated into the landscape and provide biodiversity benefits. That again, is subject to external

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approval. So those are the means by which the Development Consent Order allows for

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the

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design to be subject to external approval outside of the more functional safety and regulatory contexts. And and that was what I was proposing to say on on that. But if there are particular matters that you would like us to address in more detail when we provide our written responses, then obviously you know, very keen to hear what those might be.

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So I think listing these requirements is actually quite is very helpful. I remain unconvinced if requirement 8 necessarily falls in this list, but we'll take that away and we will think about it. The fact that they require outside approval or further consideration, all of that is understood. But I think one thing that's become clear from whatever you've just told me is that our understanding of what the NPS requires you to do as an applicant

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in terms of design outcomes, our understanding and your understanding on that matter slightly different. And I think we need to find a way to have that common understanding and I'm going to have to rely quite heavily on NE Lincolnshire Council on that

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I well, I need and and this is in the written questions,

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is section 4.1 sets out

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policy. I would call them policy positions on what design outcomes are expected from applicants. And it would be really helpful to understand

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if you think that what you currently have in the DCO in the, I'm not going to say the environmental statement because that is not really a controlled document, but the other controlled documents and management plans, whether that is enough for you to say that those policy positions in section 4.1 of the NPS are being met.

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And while I completely understand what the applicant has said about the constraints,

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I think there's lack of appreciation at the moment. From from what I've heard so far, there's lack of appreciation of the scale of this development. One of the things that we've noted at the USI



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where we went to the other side of the harbour is the sheer scale of the the existing development and what the scale of this might be. This is going to become clearer to us on Friday. And as I said that your drone footage was extremely revealing and trying you know helping us understand that.

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And so if the scale is that significant often infrastructure the NPS particularly identifies that given the scale of this of infrastructure projects they need to be and and and actually that's in the planning act,

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the visual effects, you've called it aesthetic.

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I think that's a limiting word. You know it. It needs to be broader than that.

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Um,

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I'm

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I think I think that given, um,

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given how brief this agenda item was, which I've apologised for already.

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It might be helpful for us

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to perhaps rely on your response to the written question, which we will see if it will benefit from fleshing out further. But our question is quite detailed on design matters, so

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let's see how you respond to that. And we will probably need to make this a substantive item either at a hearing or in further written questions.

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One thing that I do want to highlight is something that I said yesterday is that for EIA purposes, it's actually very helpful for the examining authority to know what kind of expertise you've employed in order to do the assessment. Our design is no different and we've asked a question on that matter and

written question. So do take that seriously. Tell us what the expertise you've had with respect to design and how you

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proposed to engage them. Because I think I've drawn one thing that I have done today is drawn that distinction between what you've done so far and what happens from this point onwards. What's what's, who can hold you to account and what can they hold you to account on.

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So it would be helpful to know what design expertise you've had so far and what it is going to be later on. In saying that, I think it's really important to understand that we fully appreciate that this is there is technical requirements. Functional requirements in this project are paramount to the NPS recognises that as well. So

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when we say design and design expertise, those expertise are just as relevant. And it's not just about the aesthetic, the paint finishes and so on and so forth. So it would be helpful to understand that

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it.

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I think the best way to conclude on this point is that whatever you've said so far has been helpful. But I think we will rely on your response to the written question to take this discussion further. Madam Harry, we've focused on behalf of the applicant and if I may say something I hope it's really that you find this reassuring that the way that you've just articulated the what the written question seeks is the way that we had understood it. And so there's no difference between us

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if this is reassuring in terms of what you're seeking through the written question and when you refer to section 4.1 of the MPSID, you mean Section 4.10 criteria for good design for port infrastructure And and that's what we're intending to deal with as part of our response and

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and and what one of the things that we will be doing in that response is providing the

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a greater explanation of the process that has led us to where we are. Because as you've rightly identified this is not some good design. It's not simply about aesthetics and in this case it's not even primarily about aesthetics. Now, in terms of the use of the word aesthetics are used. That in the sense that I understood it to be used in paragraph 4.10.3 of the MPs

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where about halfway down it says in. In so doing, the decision makers should satisfy itself that the applicant has taken into account both functionality including fitness for purpose and sustainability, and aesthetics, including its contribution to the quality of the area in which it would be located as far as possible. So I just wanted to understand. I noted the concern that my use of the word aesthetic considerations gave rise,

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and I just want to be. I just want to understand

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when I use that phrase, I use it having regard to the word that's chosen by the government to put into the policy and and I don't seek to

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be limiting in terms of what is good design. I simply recognise that aesthetics is part of that and that's why I sought to allude to those elements of the requirements

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which allow for those aesthetic considerations to be taken into account. So I I hope

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that helps to to explain that. I don't believe that there's a difference in terms of how we're understanding the policy

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or the concept of aesthetics within that and and that we have understood the nature of what you're seeking in the written question. What I've sought to do today is to respond to the particular agenda item, not seeking to sideline those other factors. And I didn't want you to go away thinking that we had a different understanding of what you were after in the written question. I don't discern from what you've said that there's any disparity in our understanding of that point. It's simply the approach we have taken to the agenda

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item, which may have reflected a misunderstanding on our part as to what was required. So that's absolutely fine. I think that definition of the word aesthetic is exactly as we understand it. And if you go a little bit further, it just says that there may be opportunities for the applicant to demonstrate good design relative relevant to existing landscape, character, landform and vegetation, which just further elaborates on what's within brackets next to aesthetics.

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So that's absolutely understood. I think

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one of the reasons I decided to speak about scale and about our observations, both the USI and from the drone footage and how that's going to evolve on Friday is just because for us the scale of this development is something that we think should be a major consideration in any kind of design outcome. You know what what you think you might be able to influence and take into account when thinking about

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the contribution to the quality of the area in which it would be located. So, So if that's that's a common understanding between us, then I think that's a really good step forward.

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Umm,

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alright. I always go into this agenda item thinking that I'm gonna finish it sooner and it never happens.

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What I'm going to suggest we do? Bear with me.

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So what I'm going to suggest unless anybody in the room and particularly the applicant, if you've got a different view,

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Agenda item 8586,

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they're kind of straying into CA territory 86 particularly we've asked

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several nuanced questions about this both in the CA section and in the DC section in the written questions and this was one of our key, is one of our key areas of concern. But I'm just we definitely don't have time for it today.

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I'm wondering if in fact written response to that those sets of questions might be of benefit before we delve into the you know into hearing format.

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Unless the applicant feels that they can provide some kind of a strategic

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response to particularly agenda item 8/6

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which will give us clarity which can then be supported by a detailed response. I'm proposing that five and six we just leave for today, Madam, on behalf of the applicant hopeful, but on behalf of the applicant we're we're very content with that. It's also helpful to understand

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that lying behind those two agenda items is a concern related to the compulsory acquisition powers in particular because that allows us to then focus our attention in providing with a written response on those elements of the provisions. Because whilst it's

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item 5 is relatively focused in terms of the the articles that it engages, Article 46, the benefit of the order,

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covers a quite a range of provisions including transfer and so on. But if it's in particular the compulsory powers part, that is a concern that allows us to know where you'd find it most helpful if we focus our attention in the answer,

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then just let me specify a little bit more 85 I think it's the powers that you're seeking and what it would enable you to do outside of the order limits. That's one thing, and the reason why the CA aspect of it is concerning to us is because.

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It's who it could affect. So with respect to people inside the order limits, you've been consulting with them because you have to with people, land owners outside the order limits, you've not consulted with them. So they will be surprised when you knock at their door and say that I'm coming to do this work on your land. So the CIA aspect is from that, that that's the perspective when it comes to the powers that you're seeking outside the order limits. And I appreciate that. This is,

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I think I have identified 3 instances in the draught Co where you're seeking powers outside the order limits that that is right that those are on our list, Articles 919 and 20. That's it. Yeah. Well, also 46,

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well, I'll ask Article 46 is to do with the benefits of provisions within the order. And so it,

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as I was going to say, Article 6 in that sense is parasitic. It doesn't give rise to new powers. It just identifies who can use the powers in the rest of the Development Consent Order. So insofar as the Development Consent order allows things to be done outside the order limits, that will be reflected in who can use those in Article 46. But it doesn't generate free standing powers in that sense. OK. So then I think with respect to 85, what I suggest is there are

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related questions and written questions. Let's focus on that. And if you think that there's something that falls out, let's just go through this with them.

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Yeah, I think this has been covered in written questions, so let's focus on that. And let's not, I'm not requesting a hearing action point on 8/5

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with eight six. I think I will do the same, the CIA aspect. So with respect to Article 46, I have we've looked at the concerns that we have with respect to the DC drafting

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and that's been covered under the DPCO questions and the concerns that we have with respect to the compulsory acquisition that's covered in compulsory acquisition section. So it's not just related to compulsory acquisition. It is about the transfer of benefits as a whole and just us getting our heads around what with what seems to be rather a complicated provision.

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So again, I don't think I'm gonna request anything additional except those nuanced responses to written questions for now. So there's no hearing action there

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and we have partly in a couple of places today covered off 87 as well.

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But I think with eight, seven it would be helpful to have a written response. I think it's specified quite clearly steps taken to mitigate any risks that surveys, findings and conclusions in the environmental statement might be out of date and therefore unreliable given the length of the construction. So if you could give us a written response in your or summary of your oral submission that we really we will, we will do that Madam. One of the things we will incorporate within that response is how the environmental impact

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assessment regulations need to be read alongside what's within the development consent order and particularly those parts that relate to subsequent applications under the EIA regulations. And one of the things we'll do is we'll explain how that then it is engaged when one is dealing with approvals

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for under requirements under Schedule 2 as subsequent applications because one needs to look at those two things together, not just Article 63, but we'll we'll explain that in the written name. OK, that's fine.

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Right. Just turning to my colleagues. Any questions?

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Turning to the room

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and the virtual room,

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OK,

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umm, So what I'm proposed we do is we take a really brief 15 minute adjournment when we can go through our hearing actions, we will come back.

2:00:05

I see, very ambitiously at 5:30. No. Yeah. We'll come back at 5:30 and with an aim to finish by 5:45.

2:00:15

Yeah. Thank you.