



The Sizewell C Project

9.30 Comments on Responses to the ExA's First Written Questions (ExQ1) - Volume 2 - Appendices

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1 INTRODUCTION

- 1.1.1 This report provides SZC Co.'s responses to the responses by the RSPB and Suffolk Wildlife Trust, and by the National Trust, to ExQ1 AR.1.12 submitted at Deadline 2.
- 1.1.2 The RSPB and Suffolk Wildlife Trust submitted a joint response to ExQ1 AR.1.12 [\[REP2-507\]](#), and their response is the same as their joint Written Representation on amenity and recreation submitted at Deadline 2 [\[REP2-506\]](#). SZC Co.'s response to the RSPB and Suffolk Wildlife Trust's response to ExQ1 AR.1.12 and their Written Representation is included in this report and is not repeated in SZC Co.'s response to their Written Representation.
- 1.1.3 The National Trust's response to ExQ1 AR.1.12 [\[REP2-149\]](#) repeats some of their response in their Written Representation submitted Deadline 2 [\[REP2-150\]](#). SZC Co.'s response to the National Trust's Written Representation refers to this report where relevant and does not repeat the detail in this report.

2 RESPONSE FROM THE RSPB AND SUFFOLK WILDLIFE TRUST

RSPB and Suffolk Wildlife Trust comment

- 2.1.1 "(i)
- 2.1.2 *1. Our full comments on the Applicant's displacement calculations are provided in the report by Footprint Ecology "Review of Sizewell C application documents and evidence in relation to recreation impacts" (Liley and Saunders, 2020), which forms part of our Written Representations and can be found in the second report in Appendix 2 to that submission. The following points summarise the content of the section on "Predictions of changes in visitor use – Displaced visitors".*

SZC Co's response

- 2.1.3 The RSPB and SWT raise a number of issues relating to the potential impact of increased recreational pressure, supported by reports prepared by Footprint Ecology contained within Appendix 2 to the written representation [\[REP2-506\]](#). The following paragraphs respond to the points raised in section 5 of the second report in Appendix 2 to the written representation, titled *Review of Sizewell C application documents and evidence in relation to recreation impacts*.

a) Errors in the calculations of visitor numbers and discrepancies between reports

2.1.4 A small number of errors have been addressed in SZC Co's response to ExQ1 AR.1.12, Appendix 6A [REP2-108], and in the **Shadow HRA Second Addendum** [REP2-032], submitted at Deadline 2. SZC Co's **Shadow HRA Second Addendum** concluded that conclusions drawn in the **Shadow HRA Report** [APP-145] remain unchanged.

b) Lack of detail on assessment of ecological impacts

2.1.5 The RSPB and Suffolk Wildlife Trust make a general comment regarding lack of detail on ecological impacts and suggest an alternative approach to assessing potential changes in visitor flows and numbers. SZC Co. considers the approach it has taken to the assessment and the monitoring and management of potential impacts (discussed further below) to be robust.

c) Further information is required concerning the coast path diversion

2.1.6 Further detailed design work included in the change request application in January 2021, as detailed in **Volume 1, Chapter 2** of the **ES Addendum** [AS-181], has identified the Coast Path would be kept open at all times except potentially for short periods in rare circumstances where it is considered unsafe to do so.

d) Mitigation and monitoring

2.1.7 The RSPB and Suffolk Wildlife Trust refer to a lack of mitigation to resolve recreation impacts, their expectations with regard to mitigation commitments and a comprehensive monitoring programme.

2.1.8 SZC Co. has undertaken consultation with the RSPB and Suffolk Wildlife Trust (amongst others) to discuss the proposed approach to monitoring and mitigation. SZC Co. is developing two monitoring and mitigation plans to cover relevant European sites, as follows:

- **Monitoring and Mitigation Plan for Minsmere - Walberswick European Sites and Sandlings (North) European Site.** Drafts have been consulted on, and the latest draft was submitted at Deadline 2 [REP2-118]; and
- **Monitoring and Mitigation Plan for Sandlings (Central) and Alde, Ore and Butley Estuaries European Sites** A draft has not yet been

consulted on but will be in due course, and the intention is that it will be submitted at Deadline 5.

- 2.1.9 SZC Co. has responded to the RSPB and Suffolk Wildlife Trust's points set out in their response to ExQ1 AR.1.12 [\[REP2-507\]](#) and their Written Representation [\[REP2-506\]](#) below.

RSPB and Suffolk Wildlife Trust comment

- 2.1.10 *"2. The estimates of additional visitor use within the Shadow HRA Recreational Disturbance Evidence Base Table 3.5 contain errors in their calculations:*

• Those visitors who did not state a location to which they would be displaced are not accounted for in these figures. This calculation has since been updated for Eastbridge and Minsmere Outer in the paragraphs 8.3.5–10 of the Shadow HRA Report Addendum (AS-173)2, as discussed in our Written Representations, but this has not been addressed for all sites."

SZC Co's response

- 2.1.11 SZC Co. has factored those potential additional displaced numbers (i.e. to include those people who said they would be displaced but did not name a displacement location) into the updated assessment in Appendix 6A of the SZC Co. response to ExQ1 AR.1.12 [\[REP2-108\]](#), and in the **Shadow HRA Second Addendum** [\[REP2-032\]](#), submitted at Deadline 2. SZC Co's **Shadow HRA Second Addendum** concluded that conclusions drawn in the **Shadow HRA Report** [\[APP-145\]](#) remain unchanged.

RSPB and Suffolk Wildlife Trust comment

- 2.1.12 *"• Existing visitor numbers to each location appear to be estimated"*

SZC Co's response

- 2.1.13 The existing visitor numbers to each location were arrived at as described in paragraph 3.2.29 of the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A** [\[APP-148\]](#)). Consultees including the RSPB and Suffolk Wildlife Trust were consulted on these figures before submission of the DCO.

RSPB and Suffolk Wildlife Trust comment

- 2.1.14 *"• The calculation of extra visits per year is based on the percentage of people who stated they would be displaced to a location applied to the number of*

people who already visit the location. This is incorrect and the percentage should be applied to the total number of people visiting locations further north around Sizewell (within and outside the Application site) from which some are likely to be displaced - the application of the percentage of all visitors being displaced to a location to the number of exiting visitors to that location does not make sense

- It would therefore have been better to take the percentage of interviewees at each location where surveys were conducted that stated they would be displaced to different locations and then scale those figures up, based on the observation data at the relevant survey locations”*

SZC Co's response

- 2.1.15 The two methods described above are presented in paragraphs 3.2.28 to 3.2.31 and Tables 3.5 and 3.6 of the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])**. The first approach, which RSPB and Suffolk Wildlife Trust have discussed in the first bullet point above, is described in paragraph 3.2.28. However, the figures from this approach were not used in assessing impacts in the Shadow HRA. The figures from the second approach described in paragraph 3.2.30 were used, which follows the approach RSPB and Suffolk Wildlife Trust say “*would ... have been better*” to use in their second bullet point above. SZC Co. also notes that, in the second report by Footprint Ecology in Appendix 2 of RSPB and Suffolk Wildlife Trust’s Written Representations (Doc Ref. 9.28) which includes a review of the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])**, Footprint Ecology support the approach followed by SZC Co., stating at paragraph 2.32 that “*the calculations given in columns 6-8 [of Table 3.5 of the Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])] are more reasonable and make much more sense.*” The second approach (which uses the calculations in columns 6-8 of Table 3.5) was followed by SZC Co. in arriving at the precautionary figures that were used in the Shadow HRA.
- 2.1.16 Both approaches were presented in the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])** to demonstrate two alternative ways of calculating displacement numbers and it was decided by SZC Co. that the second approach would be used to assess ‘worst case’ in the Shadow HRA. We note that the RSPB, Suffolk Wildlife Trust and Footprint Ecology support this approach.

RSPB and Suffolk Wildlife Trust comment

- 2.1.17 *“3. We also have concerns about the assumptions made in the interpretation of the visitor data. Whilst we acknowledge that surveys are one of the few options available to gather information about likely displacement, the limitations of such surveys should be acknowledged. The Shadow HRA Recreational Disturbance Evidence Base paragraphs 3.2.5-3.2.12 does discuss potential differences between stated and actual behaviour, but only the potential for fewer visitors to be displaced than stated, whereas the opposite could also occur. It is also possible that some survey respondents would not be able to adequately visualise the construction works (as no visual representation was given during the survey) and may be more likely to be displaced than they originally expected.”*

SZC Co's response

- 2.1.18 SZC Co. consider that the opposite (i.e. that a greater number of people would displace than indicated by the 2014 survey results) is highly unlikely to occur, and the RSPB and Suffolk Wildlife Trust have not provided any evidence to demonstrate that this may occur.
- 2.1.19 Information provided to respondents at the time of the surveys was sufficient to inform responses to the questions and enable reasonable results to question 4a of the 2014 visitor surveys *“Would you stop using the area around Sizewell C during the construction of the Nuclear Power Station?”* (2014 Sizewell C Visitor Surveys (Volume 2 Appendix 15A, page 31 of the ES [\[APP-268\]](#)).
- 2.1.20 SZC Co. does acknowledge the inherent uncertainty of estimating numbers of this nature, which is why it may not be productive to continue to debate the ‘maths’ at length. The survey results give an indication that a relatively small proportion of visitors may displace to a range of alternative locations but attempting very detailed analysis of the statistics may not be productive. The real issue involves reaching an informed judgement about the nature of any displacement, the prospect that may give rise to harm (and why) and then ensuring that any necessary mitigation and monitoring is in place to protect against any risk of harm.

RSPB and Suffolk Wildlife Trust comment

- 2.1.21 *“4. In conclusion, we therefore do not agree that the calculations of displaced visitors are precautionary, as the figures contain errors and the quality of the data around existing numbers of visitors is limited and hence calculations of visitor uplift are not reliable.”*

SZC Co's response

- 2.1.22 A small number of errors have been addressed in SZC Co's response to ExQ1 AR.1.12, Appendix 6A [REP2-108], and in the **Shadow HRA Second Addendum** [REP2-032], submitted at Deadline 2. SZC Co's **Shadow HRA Second Addendum** concluded that conclusions drawn in the **Shadow HRA Report** [APP-145] remain unchanged.

RSPB and Suffolk Wildlife Trust comment

- 2.1.23 *"5. It should be noted that we also have concerns regarding the calculation of recreational visits by the construction workforce. These are covered in the report section "Predictions of changes in visitor use – visits from the construction workforce" (again in the second report in Appendix 2 to our Written Representations)."*

SZC Co's response

- 2.1.24 The two reports in Appendix 2 of RSPB and Suffolk Wildlife Trust Written Representation [REP2-506] are:
- Footprint Ecology (1st October 2020a) Impacts of recreation related to Sizewell C and implications for European sites.
 - Footprint Ecology (1st October 2020b) Review of Sizewell C application documents and evidence in relation to recreation impacts.
- 2.1.25 SZC Co. notes that the two reports by Footprint Ecology, which were commissioned by the National Trust and RSPB, are dated 1st October 2020 but have not been made available to SZC Co. or the Examination until Deadline 2 on 2nd June 2021, 8 months later. It would have been helpful for SZC Co. to be given the opportunity to review the reports in advance of the Examination and respond to the issues raised before or earlier in the Examination process, to aid the Examining Authority. SZC Co. has been in regular consultation with the RSPB during this period, but these two reports have not been mentioned by the RSPB or Suffolk Wildlife Trust at any point.
- 2.1.26 A number of the RSPB and Suffolk Wildlife Trust's concerns raised in the second Footprint Ecology report are covered in SZC Co's response to the National Trust's comments under the heading 'Visits by the construction workforce' in section 1.2 below.

RSPB and Suffolk Wildlife Trust comment

2.1.27 “(ii)

1. One of our key concerns is the lack of detail around the proposals for mitigation and monitoring of impacts of increased recreational pressure. The Application documents variously refer to monitoring and mitigation of recreational pressure on designated sites through the Rights of Way and Access Strategy and through a monitoring and mitigation plan. However, no detailed monitoring or mitigation proposals were presented for the Minsmere-Walberswick SPA, SAC and Ramsar site or the Sandlings SPA as part of the Application.

2. We note that there has been some progress with mitigation for the effects of the worker campus with a proposed contribution to the Suffolk Councils’ Recreation Avoidance and Mitigation Strategy contained within Schedule 11 of the most recent iteration of the Draft Section 106 Agreement. We also consider that provision of suitable alternative natural green space for additional residents during the construction period will be required.

3. We welcome the continued engagement of the Applicant with us and others in discussions around the development of a plan for monitoring and mitigation of recreational impacts on designated sites from recreational displacement. We understand that the Applicant intends to submit mitigation and monitoring plans for the relevant protected sites to the Examination at this or a subsequent deadline. We look forward to the opportunity to update our position on the impacts of recreational pressure on protected sites and species following submission and review of these plans.”

SZC Co’s response

2.1.28 SZC Co. has undertaken consultation with the RSPB and other consultees on a number of draft versions of the **Monitoring and Mitigation Plan for Minsmere - Walberswick European Sites and Sandlings (North) European Site** and amended the drafts in response to comments. We note that the RSPB and National Trust have also been engaging with SZC Co. on the detail of Resilience Funds.

2.1.29 SZC Co. has submitted the fifth draft of the **Monitoring and Mitigation Plan for Minsmere - Walberswick European Sites and Sandlings (North) European Site** at Deadline 2 [\[REP2-118\]](#). SZC Co. will consult on a **Monitoring and Mitigation Plan for Sandlings (Central) and Alde, Ore and Butley Estuaries European Sites**, and submit this at a future Examination deadline. SZC Co. looks forward to further feedback but

believes that the draft **Monitoring and Mitigation Plan for Minsmere - Walberswick European Sites and Sandlings (North) European Site** [REP2-118] closely follows the feedback that the parties provided in this engagement so we anticipate general agreement.

- 2.1.30 The RSPB and Suffolk Wildlife Trust do not provide evidence to support their assertion that provision of suitable alternative natural green space (SANGs) for additional residents during the construction period will be required. It is noted that Natural England has raised the same issue in its Written Representation to Deadline 2 (item 29). SZC Co.'s response to this is provided in its response to Natural England's Written Representation item 29 submitted at Deadline 3 (Doc Ref 9.28) and is not repeated here. In summary, SZC Co believes the proposed package of mitigation measures together with the RAMS payment will prevent Adverse Effects on the Integrity of European sites, and that SANGs, or further green space provision following the SANGs principles, is not required.

3 RESPONSE FROM NATIONAL TRUST

- 3.1.1 The following response from the National Trust appears to be the same as paragraphs 6.8 to 6.19 of their Written Representation submitted at Deadline 2 [REP2-150].

National Trust's comment

- 3.1.2 *"The methodology for calculating the realistic approach is set out in Para.3.2.28, pdf page 438, marked page 38 of Annex A Recreational Disturbance Evidence Base contained in 5.10 Shadow Habitats Regulations Assessment Volume 1: Screening and Appropriate Assessment Part 4 of 5, Appendix E Recreational Disturbance Assessment (Minsmere to Walberswick SPA/SAC). This applies a percentage increase (2.33% which represents the number of respondents to the Visitor Survey who named Dunwich Heath as a location they would be displaced to) to represent displacement to Dunwich Heath based on the applicants estimated annual visitor numbers to Dunwich Heath. We disagree with this approach as it would not be visitors to our site that would be displaced to our site."*

SZC Co's response

- 3.1.3 Two methods of estimating displacement to European sites are presented in paragraphs 3.2.28 to 3.2.31 of the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])**. The first approach, which the National Trust has discussed above, is described in paragraph 3.2.28. However, these figures were not used in assessing

impacts in the Shadow HRA. The second approach described in paragraph 3.2.30 was used, which follows the approach that the RSPB, the Suffolk Wildlife Trust and their advisors Footprint Ecology support as discussed at section 1 above. The second approach was followed in arriving at the precautionary figures that were used in the Shadow HRA.

- 3.1.4 Both approaches were presented in the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])** to demonstrate two alternative ways of calculating displacement numbers and it was decided that the second approach would be used to assess ‘worst case’ in the Shadow HRA. We note that the National Trust has not questioned this approach, and that the RSPB, Suffolk Wildlife Trust and Footprint Ecology support this approach.

National Trust’s comment

- 3.1.5 *“The methodology for calculating the precautionary approach is set out in Para.3.2.30, pdf page 439, marked page 39 of the document referenced above in para.6.8. For Dunwich Heath it applies the same 2.33% to an estimated figure of 500,000 visits/year in the Sizewell survey area. As set out in Para 3.2.27, (i. Calculation of annual visits to the area) of Annex A: Recreational Disturbance Evidence Base (see PDF page 438, printed page 38) this 500,000 figure is a rounding down of estimated annual levels of use (517,246) based on counts at each of the seven 2014 Sizewell C visitor surveys locations, with no explanation as to why a rounded down figure is deemed precautionary.”*

SZC Co’s response

- 3.1.6 The estimate of 500,000 visits per year to the area around the construction site is described at paragraph 3.2.27 of the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])** where it states:

“The total number of users observed over the survey days in the 2014 Sizewell C visitor surveys relate to part of the year from fixed locations which were agreed with consultees. Estimated annual levels of use based on counts at each of the seven 2014 Sizewell C visitor surveys locations is given in Table 8 of the 2014 report (ES Volume 2 Appendix 15A (Doc Ref. 6.3)). These estimates are based on the observation surveys using a recognised methodology for predicting total users used by the Heritage Lottery Fund. This gives a total of 517,246 estimated visitors per year at all seven locations (rounded to 500,000 in the calculations below), and estimated numbers at

individual locations ranging from 10,171 (at Bridleway 19) to 195,557 (at Sizewell Beach)."

- 3.1.7 The annual estimate of total visitors is based on extrapolation of data from the 2014 visitor surveys. The estimation provides a broad estimate based on observation survey results, and is not a precise number. The estimate has been used to inform the broad estimates of the scale and pattern of displacement. SZC Co. has taken a highly precautionary approach to estimates of numbers of additional visitors at European sites caused by the construction of Sizewell C for reasons set out in detail in our response to ExQ1 AR.1.12 at Deadline 2 (Appendix 6A) [\[REP2-108\]](#). The difference between an estimated baseline of 500,000 and 517,246 would not alter the conclusions of the Shadow HRA.

National Trust's comment

- 3.1.8 *"The National Trust is further concerned that the use of 2.33% does not represent a precautionary approach to the calculation of recreational displacement to Dunwich Heath. This is because this figure does not make any allowance for:*

- The 56 respondents (10.89% of the total no. of respondents) who stated they would be displaced but did not name a location*
- The 13 respondents (2.5% of the total no. of respondents) who said they were not sure they would be displaced by the development*
- The 18 respondents (3.5% of the total no. of respondents) who did not provide a response on displacement*

The NT accepts that it would be unrealistic to fully uplift the percentage increase in visitors at Dunwich Heath to reflect these three bullet points as these respondents are referring to the wider Sizewell area. However, we feel an appropriate approach that would be precautionary would have been to accommodate an allowance for this uncertainty in EDF's methodology. Given Dunwich Heath is one of the six locations identified as being most frequently mentioned (Para. 4.1.22 Appendix A of Volume 2 Main Development Site Chapter 15 Amenity and Recreation Appendices 15A - 15J Part 1 of 3 link to doc) by respondents as an alternative location for recreation, it would be seem reasonable to apportion this number across six sites.

The realistic approach that the applicant has used to inform their assessments gives a displacement figure of 4,288 for Dunwich Heath. However, we are of the opinion that using the precautionary approach set out

by the applicant and factoring in adjustments to resolve both the rounding down and the uncertainty contained within the survey as explained above, would provide a figure for recreational displacement closer to 26,000 additional annual visits to Dunwich Heath.”

SZC Co’s response

- 3.1.9 In the last paragraph above the National Trust refer to a figure of 4,288 for Dunwich Heath. We assume that this is taken from the fourth column Table 2.1 of the **Recreational Disturbance Evidence Base (Shadow HRA Report Volume 1 Appendix E)** [APP-148]. However, this figure is from the first approach which was not used in assessing impacts in the Shadow HRA as described above. The second, more precautionary approach was used as discussed at paragraphs 2.1.15 to 2.1.16.
- 3.1.10 The National Trust suggests a “displacement figure” closer to 26,000 to Dunwich Heath but there is no explanation of their calculation to arrive at this figure, which SZC Co. considers to be excessive and highly unlikely to occur, for reasons given in our response to ExQ1 AR.1.12 at Deadline 2 (Appendix 6A) [REP2-108].
- 3.1.11 The three bullet points from the National Trust’s response in paragraph 3.1.8 above are discussed below:
- a) The 56 respondents (10.89% of the total no. of respondents) who stated they would be displaced but did not name a location
- 3.1.12 As noted in SZC Co’s response to ExQ1 AR.1.12 at Deadline 2 (Appendix 6A, Part 2) [REP2-108] the National Trust previously advised SZC Co. that they did not consider the figures of the % of survey visitors displaced are precautionary because they do not make an allowance for those people who said they would be displaced but were uncertain where to (i.e. the 56 respondents in the National Trust’s first bullet point in paragraph 0.0.-1178772208ffffff)clxxv above). SZC Co. has factored those potential additional displaced numbers into the updated assessment in their response to ExQ1 AR.1.12, Appendix 6A [REP2-108], and in the **Shadow HRA Second Addendum** [REP2-032], submitted at Deadline 2. SZC Co’s **Shadow HRA Second Addendum** concluded that conclusions drawn in the **Shadow HRA Report** [APP-145] remain unchanged.

- b) The 13 respondents (2.5% of the total no. of respondents) who said they were not sure they would be displaced by the development and 18 respondents (3.5% of the total no. of respondents) who did not provide a response on displacement

3.1.13 SZC Co. has taken a highly precautionary approach to estimates of numbers of additional visitors at European sites caused by the construction of Sizewell C for reasons set out in detail in our response to ExQ1 AR.1.12 at Deadline 2 (Appendix 6A) [REP2-108]. It would be unreasonable to also add the 13 respondents who said they were not sure they would be displaced by the development, or the 18 respondents who did not provide a response on displacement to figures that are already highly precautionary and unlikely to actually occur. As described in SZC Co.'s response to ExQ1 AR.1.12, there is also likely to be some displacement from some locations at European sites, such as Dunwich Heath, but figures for displaced users only allow for potential displacement to European sites and not potential displacement from European sites. This is one of the elements of precaution incorporated into the Shadow HRA.

National Trust's comment

3.1.14 *"The National Trust is also of the opinion that the additional infrastructure proposed as a result of the changes to the application (notably the addition of a new temporary beach landing facility and conveyor which would cross the beach in front of the application site, requiring walkers to pass underneath it) would further deter people from Sizewell and displace visitors to other locations. The extent and impact of the development now proposed is therefore different from that which was used to inform the questions posed as part of the Sizewell C Visitor Surveys undertaken in 2014. Given this and preceding points made in this document the Trust remains concerned that figures used in the assessments are not precautionary."*

SZC Co's response

3.1.15 The level of detail on the proposed development that is known now was not available in 2014. An explanatory note was provided to respondents to the questionnaire survey in 2014 which included the following statements regarding the coast:

- The development would include the construction of sea defences along the beach, similar to those in front of Sizewell B, a temporary jetty, and rail extension; and

- The Coast Path would remain open during construction, but may need to be closed for short periods to ensure public safety.

(See Appendix A of the **2014 Sizewell C Visitor Surveys (Volume 2 Appendix 15A)** of the ES [[APP-268](#)].)

- 3.1.16 There will now be two Beach Landing Facilities (BLFs) during construction rather than a single jetty assumed in the 2014 survey. SZC Co does not consider this would have a significant bearing on responses in the context of the proposed Sizewell C project as a whole.
- 3.1.17 The DCO changes submitted in January 2021, which have been accepted by the Examining Authority in April 2021, include new detail that the Coast Path would only be closed in rare circumstances, see **Volume 1, Chapter 2** of the **ES Addendum** [[AS-181](#)]. The Coast Path would now be kept open at all times except in rare circumstances where it is considered unsafe to do so, when it may be necessary to close it for short periods. This is a substantial improvement to the position in the original DCO application where temporary closures, including closure for approximately six months during construction of the BLF and a temporary diversion inland, was assumed. This also provides certainty that closures would be very limited which SZC Co. was not able to make respondents aware of when they completed the 2014 visitor surveys, because the information was not available.
- 3.1.18 Further information is also available now which is likely to reduce displacement to (and the number of construction workers visiting) European sites, as stated at paragraph 3.6.1 of SZC Co's response to ExQ1 AR.1.12 at Deadline 2 (Appendix 6A) [[REP2-108](#)]:

"It is also notable that the calculations were based on the results of the 2014 Sizewell C Visitor Surveys when the alternative recreational space provided by SZC Co. at Aldhurst Farm (27ha of new Open Access land where dogs are allowed off-lead, a new car park and Public Right of Way (footpath)) and other new and improved access outside European sites which will attract some displaced people and construction workers, which will be delivered through Sizewell C, was not known. If respondents had known that these improvements and alternative locations would be available some who named locations that they would displace to within or adjacent to European sites may not have done so."

National Trust's comment

3.1.19 "Visits by the construction workforce"

3.1.20 *The applicant has sought to quantify the number of visits made to Dunwich Heath by the construction workforce in their application. The National Trust has concerns about the methodology used to estimate the use of the countryside by the workforce and believe the resultant estimates are exceptionally low and not precautionary.*

It is stated in Para 3.3.17, PDF page 447, number page 47 of Annex A: Recreational Disturbance Evidence Base (Link) that a mid-range estimate (between what is uncertain) has been set at around 10% to represent the likelihood of campus, private rented sector and tourist accommodation based workers (who do not have dogs with them – this is 4,800 workers) visiting outdoor informal recreational resources around Sizewell once a week. The National Trust believes the use of the 10% figure is very low and would question whether it represents a precautionary approach to estimating the number of additional visits to the countryside that could be made by the construction workforce. It is of note that the 2018/19 MENE report (Monitor of Engagement with the Natural Environment: Headline report and technical reports 2018 to 2019) states 65% of adults spend time in the natural environment at least once a week. The use of this figure would clearly increase the number of estimated visits to Dunwich Heath by the construction workforce without dogs by 6.5 times. We remain unclear as to the justification and evidence on which the 10% figure has been based.

The 10% figure is then multiplied to reflect a theoretical number of annual visits and adjusted down to allow for shift patterns and holidays. To make this figure site specific a percentage has been derived for each named location from a survey of Non-home based outage workers in 2016 (see para 15.6.52, pdf page 64, number page 61, Environmental Statement - Volume 2, Chapter 15, Amenity and Recreation) Link which asked workers where they visited in 'the countryside around Sizewell', as well as 'other' and 'open space, park or playing field in town or village'. Given the long lead-in time for this development proposal it is of concern to the Trust that the assessment of visits to the countryside (including our site) by the construction workforce is reliant on a single survey of construction workers. Given the applicants unique position to access this type of audience the Trust would have expected the applicant to draw on a more comprehensive evidence base in support of estimates contained within its submission."

SZC Co's response

- 3.1.21 SZC Co. considers the 10% is a suitable estimate to represent the likelihood of campus, private rented sector and tourist accommodation-based workers who do not have dogs (estimated 4,800 workers at peak) being likely to visit outdoor informal recreation resources around Sizewell once per week. The 10% estimate is described at paragraphs 3.3.12 to 3.3.15 of the **Recreational Disturbance Evidence Base (Shadow HRA Report Volume 1 Appendix E Annex A [APP-148])**. The estimations of numbers of construction workers visiting European sites are broad estimates and not precise numbers.
- 3.1.22 SZC Co. considers that the survey of Sizewell B outage workers undertaken in 2016 provides a sound basis for the estimations of numbers of Sizewell C construction workers likely to visit European sites. It is notable that only 1% of 423 respondents said that they visit Dunwich Heath (see paragraph 15.6.52 of **Volume 2, Chapter 15** (Amenity and Recreation) of the **ES [APP-267]**), supporting the low number estimated to visit Dunwich Heath in Table 3.9 of the **Recreational Disturbance Evidence Base (Shadow HRA Report Volume 1 Appendix E Annex A) [APP-148]**.

National Trust's comment

- 3.1.23 *"Uncertainty over use of figures in documents"*
- 3.1.24 *The Trust is also concerned that the use of figures by the applicant is inconsistent and it is difficult to follow where and how these figures have been used. This is compounded when different totals are used, for example;*
- It is stated in 6.3 Volume 2 Main Development Site Chapter 14 Terrestrial Ecology and Ornithology Appendix 14B1 Plants and Habitats Synthesis Report Para 1.3.52 pdf page 23, marked page 20, that 'The Recreational Disturbance Evidence Base has estimated that the total number of additional visits to the wider countryside by the construction workforce would be 60,000 per year.' This figure is then assigned to key locations but does not add up to the number specified."*
- 3.1.25 *"Table 3.9: Estimated numbers of construction worker visits to locations per year included in Annex A: Recreational disturbance evidence base of Appendix E: Recreational Disturbance Assessment (PDF page 450) does not include a total column that aggregates the numbers of visits by workers without dogs and workers with dogs. If it did it would state a figure of 32,706 for total visits by construction workers. This does not accord with the above"*

total figure (60,000) contained within the Plants and Habitats Synthesis Report or its breakdown of key locations.

- 3.1.26 *Table 2.1 of the Shadow HRA report Appendix E: Recreational Disturbance Assessment (PDF page 320) does not include in its total the visits by construction workers with dogs.”*

SZC Co’s response

- 3.1.27 The National Trust has previously questioned how the additional number of recreational visits has been calculated. SZC Co. responded to this point in the **Shadow HRA Second Addendum** [REP2-032] submitted at Deadline 2, which links to SZC Co.’s response to ExQ1 AR.1.12.
- 3.1.28 The National Trust is correct and the total numbers should include construction workers with dogs. The locations where it has been assumed construction workers are likely to visit at or near European sites, based on the results of a survey of Sizewell B outage workers, are shown in Table 3.9 of the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A** [APP-148] (pdf page 450). The construction worker numbers in the 5th column of Table 3.9 were included in the total estimated numbers of additional visits to European sites in Table 2.1 of the **Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E** [APP-148] (pdf page 320), but the numbers in the sixth column of Table 3.9 were inadvertently not included.
- 3.1.29 The **Shadow HRA Second Addendum** [REP2-032] allowed for the potential that some construction workers would have dogs on their visits to European sites. This matter is purely related to the ‘number of people’ estimates in the recreational evidence base used to inform the Shadow HRA, and not the potential impacts of dogs.
- 3.1.30 Adding these construction worker numbers would make little difference to the numbers of visits to locations within European sites relative to the existing visitor numbers, as illustrated in Table 3.1.

Table 3.1: Estimated visits of construction workers with dogs

	Existing annual visitor numbers to location*	Additional annual construction workers with dogs**	Percentage increase over existing annual visits
Aldeburgh	150,000	3591	2.4%
Aldringham Walks	60,000	414	0.7%
Rendlesham	150,000	276	0.2%
Thorpeness	60,000	2072	3.5%
Tunstall Forest	150,000	276	0.2%
Dunwich Heath	175,934	138	0.1%
Dunwich / Beach	150,000	276	0.2%
Minsmere core	103,844	55***	0.1%
Minsmere outer	30,000	221***	0.7%
Southwold	150,000	1243	0.8%
Walberswick	150,000	138	0.1%
Westleton	60,000	138	0.2%

*Column '2' of Table 3.5 of the Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148], pdf page 439))

**6th column of Table 3.9 of the Recreational Disturbance Evidence Base (Shadow HRA Volume 1 Appendix E Annex A [APP-148])

***20% of 276

****80% of 276

- 3.1.31 These additional visits would make very little difference to the estimated highly precautionary numbers of displaced visitors to European sites and would not alter the conclusions of the Shadow HRA.

National Trust's comment

- 3.1.32 *"The inconsistent use of figures is of great concern when trying to establish whether the approach adopted by the applicant is precautionary and when seeking clarity over the figures applied to consideration of our site. We currently have a range of visits by construction workers quoted to be 327 or 2,000. We presume this disparity makes it difficult for EDF, other managers of sites and regulators to clearly understand the impacts or mitigation requirements related to recreational displacement. We have asked for clarity on this matter from EDF but have yet to receive a clear and concise explanation regarding the use of figures in each assessment."*

SZC Co's response

- 3.1.33 Inconsistent figures have been reviewed and, where necessary, updated at Deadline 2 via the **Shadow HRA Second Addendum** [REP2-032], which links to SZC Co.'s response to ExQ1 AR.1.12 [REP2-108]. SZC Co. considers that the focus of the examination should fall on the effectiveness of the measures outlined in the Monitoring and Mitigation Plans that will be implemented and which aim to ensure that no Adverse Effects on the Integrity (AEol) of European sites will occur with any alteration in predicted displacement, based on the highly precautionary numbers.

4 FURTHER EVIDENCE THAT SZC CO'S ASSESSMENT IS HIGHLY PRECAUTIONARY

- 4.1.1 At section 3.4 of SZC Co's response to ExQ1 AR.1.12 at Deadline 2 (Appendix 6A) [REP2-108] it is explained that the precautionary figures only allow for potential displacement to European sites and not potential displacement from European sites. Displacement from European sites is not "credited" in the gross numbers of additional people who have been assumed to visit European sites due to the construction of Sizewell C and in the assessment of potential effects.
- 4.1.2 Further detail on the level of potential displacement from each of the seven 2014 visitor survey locations is provided below.

Table 4.1: Distribution of those responding to question Q4a 'Would you stop using the area around Sizewell C during the construction of the Nuclear Power Station?'

Survey location	Yes	No	Not sure	No response	Totals	% Yes of total respondents
1. Aldringham Walks*	21	38	0	2	61	34.43
2. Bridleway 19	3	6	1	0	10	30.00
3. Kenton Hills car park	34	56	3	2	95	35.79
4. Dunwich Heath*	23	43	0	0	66	34.85
5. Eastbridge-Minsmere sluice path	21	48	1	1	71	29.58

Survey location	Yes	No	Not sure	No response	Totals	% Yes of total respondents
6. Suffolk Coast Path intersect with Sandlings Walk	7	24	2	0	33	21.21
7. Sizewell Beach	25	94	6	3	128	19.53
Postal	17	30	0	3	50	34.00
Totals	151	339	13	11	514	29.38

*Locations within European sites

4.1.3 It can be seen from Table 4.1 that the greatest percentage of ‘yes responses’ was over 34% and occurred at three sites, including the two survey locations which lie within European sites (Aldringham Walks and Dunwich Heath). Over 34% of the respondents to question 4a at these European sites said that they would stop using the area around Sizewell C during construction, and therefore potentially displace from these locations within European sites. The highly precautionary approach used in the Shadow HRA is that approximately 29.4% of people (average from all seven survey locations) would displace to European sites. More people may actually displace from Aldringham Walks and Dunwich Heath than to these locations within European sites, thus potentially lessening the potential for recreational disturbance.

4.1.4 It is also important to note that the displacement figures used in the Shadow HRA, estimating the highly precautionary figures of numbers of people who might displace to European sites, includes the respondees at Aldringham Walks and Dunwich Heath who are already recreating in European sites. SZC Co. has not deducted this number from the calculations of displacement to European sites and the assessment of potential increased recreational disturbance at European sites, again emphasising how highly precautionary our approach is.

4.1.5 The figures also reveal that the two survey locations on the coast (Sizewell Beach south of the main development site and Suffolk Coast Path intersect with Sandlings Walk on coast at the northern edge of the main development site) show the lowest percentages of displacement (19.53% and 21.21% respectively) of all seven survey locations. Sizewell Beach and the car park recorded the most visits of all seven survey locations in 2014, by far the greatest number of dog walkers¹ (see Tables 7 and 8 of **Volume 2 Appendix**

¹ At Sizewell Beach 312 dog walkers were observed, whereas at the other six survey locations combined, only 254 dog walkers were observed (Table 7 of **Volume 2 Appendix 15A** of the **ES** [APP-268]).

15A of the **ES** [[APP-268](#)] and the lowest percentages of displacement. This indicates that users of the beach and Coast Path, and the relatively large number of dog walkers at Sizewell Beach, would be less likely to displace to other locations than the other locations surveyed. These two locations lie outside European sites.

4.2 Conclusion

- 4.2.1 The recreational evidence base has been developed in consultation with consultees (including Natural England, the RSPB, Suffolk Wildlife Trust and the National Trust) over many years, and provides broad and highly precautionary estimates of displacement to European sites and potential visits by construction workers to European sites. The mathematical results should not be seen as precise numbers. SZC Co. considers that precautionary estimated numbers of additional visitors at European sites due to the construction of Sizewell C (including updates submitted at Deadline 2 (SZC Co's response to ExQ1 AR.1.12, Appendix 6A [[REP2-108](#)])), which are used to inform the Shadow HRA, are substantially higher than would actually occur and should provide confidence when considering the robustness of the recreational evidence base supporting the Shadow HRA.
- 4.2.2 SZC Co. consider that the focus of the examination should fall on the effectiveness of the mitigation measures, including measures outlined in the Monitoring and Mitigation Plans that will be implemented to ensure that no AEoI of European sites will occur with any additional recreational pressure.
- 4.2.3 SZC Co. has engaged with Natural England, the RSPB, the National Trust, and other consultees on a number of draft monitoring and mitigation plans. SZC Co. has submitted the fifth draft of the **Monitoring and Mitigation Plan for Minsmere - Walberswick European Sites and Sandlings (North) European Site** at Deadline 2 [[REP2-118](#)]. SZC Co. will consult on a **Monitoring and Mitigation Plan for Sandlings (Central) and Alde, Ore and Butley Estuaries European Sites**, and submit this at a future Examination deadline).
- 4.2.4 The Monitoring and Mitigation Plans will be implemented and, if necessary, adapted to address all new information gathered during the course of the pre-construction, construction and operational phases to ensure that no AEoI occur.

APPENDIX 26A RESPONSES TO ESC AND SCC RESPONSES TO EXQ1 SA.1 RELATING TO SECTION 106 AND THE APPLICANT'S EVOLVING APPROACH

OBLIGATIONS ENFORCEMENT NOTE

Deadline 3: 24 June 2021

**RESPONSES TO ESC AND SCC RESPONSES TO EXQ1 SA.1 RELATING TO SECTION 106
AND THE APPLICANT'S EVOLVING APPROACH**

OBLIGATIONS ENFORCEMENT NOTE

1. INTRODUCTION

- 1.1 A number of the responses ("Council Responses") made by East Suffolk Council and Suffolk County Council to the ExA's First Written Questions on the Section 106 Agreement (now Deed of Obligation) (referred to as 'SA.1 Questions' hereafter) relate to how obligations secured by way of the Deed of Obligation proposed under the Evolving Approach would be enforced. The two Councils naturally wish to ensure that they have all necessary and appropriate enforcement powers, and are not disadvantaged compared with use of a s106 agreement. This paper therefore focuses on the issue of enforcement, looking at each of the means of enforcement which the Councils have discussed in their responses. Where relevant we refer back to the Applicant's SA.1 Response Paper submitted at deadline 2 to address a number of the SA.1 Questions [\[REP2-100\]](#).
- 1.2 It is important to note that the ExA's SA.1 Questions related to the 'Sizewell Special Arrangements' originally proposed by the Applicant. The written responses of the Councils to the SA.1 Questions therefore respond to those proposals, rather than the Evolving Approach outlined by the Applicant at deadline 2 in the SA.1 Response Paper. The current response paper therefore addresses the themes and concerns picked up by the ExA and the Councils in the SA.1 Questions and responses as they apply to the Evolving Approach, rather than to the Sizewell Special Arrangements.

2. BINDING OF TRANSFEREES

- 2.1 The Evolving Approach as outlined in the SA.1 Response Paper is based upon the premise that it is the primary undertaker of the project who should be bound by the obligations in the Deed of Obligation ie that the obligations should 'run with the undertaking' rather than running with the land.
- 2.2 We have proposed drafting in Rev 4 of the dDCO at art 9(4)(b) providing that: "*save to the extent agreed by the Secretary of State, the Deed of Obligation completed pursuant to this Order, and any variations to it at the date of transfer or grant, shall be enforceable against the transferee or lessee as they would be against the transferor*".
- 2.3 The Councils Responses relate to an earlier version of this drafting¹. Nevertheless, we assume that the Councils may have similar concerns with the suggestion of making transferees liable to comply with the Deed of Obligation by means of an article in the DCO rather than through entering into a contract directly with them. The Councils Responses refer in a number of places to their preference for a 'deed of adherence' or 'deed of covenant' to be entered into by a transferee prior to any transfer taking place. In this way the transferee would have a direct contractual relationship with the Councils. The Applicant is content to

¹ "subject to the same restrictions, liabilities and obligations (including development consent obligations within the meaning of section 106 of the 1990 Act (Planning obligations) as would apply under this Order if those benefits or rights were exercised by the undertaker"

adopt this approach. We suggest that it could be achieved by amending the drafting of article 9(4) to state as follows:

"save to the extent agreed by the Secretary of State, a deed of adherence shall be entered into by a transferee or lessee with East Suffolk Council and Suffolk County Council prior to any transfer or grant being made in accordance with this Order"

- 2.4 A definition of 'deed of adherence' would be added to article 2:

"deed of adherence" means a deed binding the transferee or grantee (as defined in article 9), from the date of transfer or grant, to the Deed of Obligation and any variations to it at that date"

- 2.5 By virtue of clause 5 of the Deed of Obligation, NNB Generation Company (SZC) Limited will remain bound by the obligations in the deed until such time as it has transferred the 'entire benefit' of the Development Consent Order pursuant to article 9. This would apply similarly to any future undertaker bound to clause 5 of the Deed of Obligation by virtue of a deed of adherence.

3. LOCAL LAND CHARGES AND CHARGING ORDERS

Local land charges

- 3.1 Section 106(11) TCPA 1990 states that "*A planning obligation shall be a local land charge and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.*" Local land charges are financial charges, or restrictions on the use of land. They are registered against the land.
- 3.2 We have considered whether it would be appropriate for the Deed of Obligation to be registered as a local land charge against all land within the Order limits. However, this may be considered unfair to owners of land within the Order limits who have no interest in the Sizewell project, will not have been party to the Deed of Obligation, and therefore should not have to accept this burden being imposed upon their land.
- 3.3 We considered alternatively whether it would be appropriate for any land owned by the Applicant within the Order limits to be bound by a local land charge as and when it is acquired by the Applicant. Since under the Evolving Approach it is the 'undertaker' and not the land which is to be bound by the obligations², other remedies seem to us to be more appropriate. However, we are open to further discussions with the Councils in this regard.
- 3.4 If this were to be provided for in the dDCO, the following drafting could be added:

"The Deed of Obligation shall be local land charges and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge."

Charging Orders in respect of land

- 3.5 Section 106(12) provides that Regulations may be made to provide for 'the charging on the land' of both sums due under a planning obligation or the recovery of expenses incurred under s106(6)(b) for carrying out works where there has been a failure to carry them out as required under a planning obligation. However, both Councils have noted that "Regulations which may provide for the charging of land under s.106(12) have yet to be made". This is

² Like most DCOs, the Applicant has availed itself of s153 Planning Act 2008, to give the benefit of the order to a specific party, subject to transfer to another specific party with Secretary of State consent.

also our understanding, and therefore the benefit of this provision is not lost through adoption of the Evolving Approach as opposed to use of a s106 agreement.

4. INJUNCTION

- 4.1 Section 106(5) TCPA 1990 provides that "*A restriction or requirement imposed under a planning obligation is enforceable by injunction.*" As the ExA and the Councils will be aware, injunctions are available as a remedy in any event to enforce contracts where the Courts consider such a remedy to be equitable. We believe that in deciding whether to grant an injunction in respect of the breach of a s106 agreement, the Courts would in any event be under a duty to consider whether such a remedy was equitable. Nevertheless, if the Councils consider that the existence of a specific statutory provision for enforcement by injunction (as in s106(5) TCPA 1990) provides a more robust basis upon which an application to the Courts for injunction can be made, we would be content to provide for this in the DCO in relation to the Deed of Obligation. Drafting along the following lines might be included:

(1) Restrictions or requirements imposed under the Deed of Obligation³ and deeds of adherence are enforceable by injunction.

- 4.2 We suggest that this drafting forms part of the new article on 'Enforcement of the Deed of Obligation' set out below.

5. ENTRY ONTO LAND TO CARRY OUT WORKS, RECOVERY OF EXPENSES, OFFENCE, NOTICE

- 5.1 Section 106(6) TCPA 1990 provides that, in addition to or instead of seeking an injunction: "*if there is a breach of a requirement in a planning obligation to carry out any operations in, on, under or over the land to which the obligation relates, the [local planning authority] by whom the obligation is enforceable may – (a) enter the land and carry out the operations; and recover from the person or persons against whom the obligation is enforceable any expenses reasonably incurred by them in so doing.*"
- 5.2 Section 106(7) TCPA 1990 provides that: "*Before [a local planning authority] exercise their power under subsection (6)(a) they shall give not less than twenty-one days' notice of their intention to do so to any person against whom the planning obligation is enforceable.*"
- 5.3 Section 106(8) TCPA 1990 provides that: "*Any person who wilfully obstructs a person acting in the exercise of power under subsection (6)(a) shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.*"
- 5.4 We propose that the following provision to added to the dDCO to enable enforcement in respect of the Deed of Obligation:

Enforcement of the Deed of Obligation

(1) Restrictions or requirements imposed under the Deed of Obligation and deeds of adherence are enforceable by injunction.

(2) Without prejudice to paragraph (1), if there is a breach of a requirement in the Deed of Obligation to carry out any operations in, on, under or over the land to which the requirement relates, East Suffolk Council or Suffolk County Council may:

(a) enter the land and carry out the operations; and

(b) recover from the undertaker any expenses reasonably incurred by them in so doing.

³ To be defined to include variations to it



(2) For the purpose of exercising the power to carry out operations under subsection 2(a), East Suffolk Council and Suffolk County Council will be deemed to have the benefit of the Order under article 8 (Benefit of Order) to carry out those operations.

(3) Before exercising their power under subsection (2)(a) East Suffolk Council or Suffolk County Council shall give not less than twenty-one days' notice of their intention to do so to any owner or occupier of the land.

(4) If entry to the land by East Suffolk Council or Suffolk County Council is refused or hindered by the owner or occupier, they may issue a warrant to-

- (a) the sheriff, or
- (b) the enforcement officer,

to allow entry to it by the person appointed in the warrant to receive it.

(5) On receipt of the warrant the person to whom it is issued shall allow entry to the land accordingly.

(6) If, by virtue of paragraph 3A of Schedule 7 to the Courts Act 2003, the warrant is issued to two or more persons collectively, the duty in subsection (5) of this section shall apply to the person to whom the warrant is allocated in accordance with the approved arrangements mentioned in that Schedule.

(7) [The Deed of Obligation shall be local land charges and for the purposes of the Local Land Charges Act 1975 the authority by whom the obligation is enforceable shall be treated as the originating authority as respects such a charge.]

(8) In this section-

"the enforcement officer", in relation to a warrant to under this article, means the officer or officers identified for that purpose in paragraph 3A of Schedule 7 to the Courts Act 2003, and

"sheriff" includes an under sheriff or other legally competent deputy, and means the sheriff for the area where the land is situated, or if land in one ownership is not situated wholly in one such area the sheriff for the area where any part of the land is situated.

5.5 The above drafting provides the same types of enforcement powers available in respect of planning obligations under s106 TCPA 1990, save in respect of criminal enforcement.

5.6 Criminal offences may not be created by a DCO (save in respect of matters set out in 32A of Schedule 5 of the Planning Act 2008). For this reason, the proposed drafting would instead authorise use of warrants in cases where there is a refusal of a land owner to allow entry to land (similar to the s13 Compulsory Purchase Act 1965 procedure which the dDCO applies in relation to possession of land pursuant to compulsory purchase or temporary possession powers in the Order). The use of warrants is considered to be an appropriate and effective alternative to criminal sanctions where what is sought is entry to land to carry out works, just as it is for the possession of land in the context of articles 26 and 37.

6. OTHERS MEANS OF ENFORCEMENT

6.1 The Councils mention other remedies which would also be available in the event of a breach of the Deed of Obligation, namely, the making of applications to Court for the equitable

remedy of specific performance, or enforcing the payment of sums due as debts. We agree that such other remedies would also be available.

7. **MODIFICATION AND DISCHARGE**

7.1 The Councils raise the issue of the process for modifying the Deed of Obligation or discharging its obligations. They refer to two means of varying s106 agreements set out in s106(1) TCPA 1990, which in respect of a 'development consent obligation' are:

7.1.1 by agreement between the parties at any time; and

7.1.2 by application to the Secretary of State after 5 years from the date the s106 agreement was entered into on the basis that the obligation no longer serves a useful purpose, or the purpose would be equally well-served by a modification.

7.2 We consider that no drafting is needed in the DCO to enable the parties to agree to vary the Deed of Obligation. It will be open to the Councils to agree to vary the deed by means of another deed in future should they be persuaded that this is necessary or appropriate. From the Applicant's point of view, however, we consider there is merit in providing drafting in the DCO which would allow the undertaker to appeal to the Secretary of State after 5 years, to discharge or modify obligations as is possible under s106(A). Subject to further consideration and discussion with the Councils, we intend to include such drafting in the next version of the dDCO.

8. **BONDS**

8.1 The Councils' responses allude to the possibility of seeking bonds to give further reassurance in relation to the delivery of the proposals in the event that the undertaker becomes insolvent. In principle we agree that bonds are one means of ensuring delivery, most often in the context of highway works. It would be useful to understand from the Council the specific purposes and value of the bonds it would be seeking. We note the suggestion that a bond may be worthwhile in relation to early works in relation to the main development site. We consider that such a bond would not serve a useful purpose, given the multi-billion pound nature of even the early construction works for the nuclear power station. In the unlikely event that the Applicant were to become insolvent and abandon the project, the Council would not have the technical capability to step in and remediate the site. Furthermore, it would not be economically viable, or good value for money, for the Applicant to put in place a bond for the significant cost of these works. So far as we are aware, bonds of that scale are not in any event usually required to cover such eventualities on other large energy and infrastructure projects.

9. **ARTICLE 7 – AUTHORISING USE**

9.1 The Planning Act 2008 only provides that a DCO must be obtained to authorise the 'construction' or 'extension' of a generating station. It would not, therefore, be an offence for a party to merely operate the Sizewell C power station without the benefit of the Order. Article 7 nevertheless authorises both the construction and use of the power station in order to ensure that the undertaker has the benefit of statutory authority when using the power station as well as when constructing it. This is important as it protects the operator of the power station from actions for nuisance in the event that the operation of the power station unavoidably breaches third party rights in land (such as easements or restrictive covenants) which must be over-ridden to enable the project, or other actions for public or private nuisance. We would expect any in-coming operator of the power station to therefore wish to



take this benefit, and therefore for the benefit of the Order to be transferred to them under article 9 (Consent to transfer benefit of Order).

- 9.2 The Applicant is therefore content to amend article 9 to provide that the undertaker may not authorise operation of the power station by any person without transferring the benefit of the Order. In this way, any incoming operator of the power station would be caught by the need to execute a deed of adherence in relation to the Deed of Obligation, which would secure compliance by that incoming operator with the (limited number of) obligations relevant to the operational phase, such as the operational travel plan.

- 9.3 The following drafting will therefore be added to the next version of the dDCO:

(1A) The undertaker may not authorise the operation or use of the power station by another person without transferring the benefit of the Order to that person.

Herbert Smith Freehills LLP