



The Planning Act 2008

Sizewell C (SZC)

Planning Inspectorate Reference: *EN010012*

Deadline 3 – 24 June 2021

Comments on the Applicant's responses to SA questions

East Suffolk Council 20026200

East Suffolk Council has only included those questions with which we have made a further comment. ESC intend to continue to work collaboratively with the Applicant on the draft Deed of Obligation/s.106 agreement and at this stage, no conclusions have been reached by ESC as to the acceptability of the Applicant's Evolving Approach. A lack of comment by ESC on any aspect of the draft Deed of Obligation should not be taken as meaning that ESC agree with that part of the document.

SA.1. Section 106 Agreements		SZC CO. Response	ESC Comment D3	
Question to:	Question:			
SA.1.3	Applicant	<p>Please will the Applicant show which of that land it can bind by a s.106 planning obligation whether or not the Applicant currently proposes to bind such land in that way. If there is land it cannot bind, please state why.</p>	<p>The Applicant currently owns only a very small parcel of land within the main development site, and for reasons explained in Appendix 26A - SA.1 Response Paper does not propose that a s106 agreement is entered into which would bind the land.</p> <p>Rather, the 'Evolving Approach' would bind the 'undertaking' to the contractual commitments necessary to mitigate the impacts of the project and secure its benefits via a Deed of Obligation. The DCO would provide that all of the contractual commitments in the Deed of Obligation bind any transferee of the primary undertaking (the undertaking of NNB Generation Company (SZC) Limited).</p>	<p>To consider whether the proposed Evolving Approach is acceptable ESC would require (as a minimum) the dDCO and/or Deed of Obligation (as appropriate) to provide for:</p> <ul style="list-style-type: none">- The powers set out in s106(4) TCPA (modified accordingly) to apply (for ESC to be able to enforce the Deed of Obligation against any transferee of the DCO)- Confirmation that s106(5) TCPA (modified accordingly) will apply (that any restriction or requirement imposed by the Deed of Obligation is enforceable by injunction)

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			<p>against any transferee of the DCO)</p> <ul style="list-style-type: none"> - The powers set out in s106(6) TCPA (modified accordingly) to apply (the statutory rights of entry onto the order land and recovery of costs from the beneficiary of the DCO for any works undertaken) - Confirmation that s106(8) TCPA (modified accordingly) will apply (that any person who wilfully obstructs a person acting in exercise of power of entry shall be guilty of an offence) - Confirmation that s106(12) TCPA (modified accordingly) will apply (powers to charge the land) - ESC would require to be consulted regarding any transfer of the DCO. The dDCO and clause 4.5 of the Deed of Obligation should be amended to reflect this requirement. - No transfer of the benefit of the DCO should be permitted until a Deed of Covenant (in a form approved by ESC) from

SA.1. Section 106 Agreements		SZC CO. Response		ESC Comment D3
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				the proposed transferee (and any future transferees) is provided to confirm that the Deed of Obligation will be complied with, if such Deed of Covenant is deemed necessary by ESC taking into account who the transferee is. The dDCO and clause 4.5 and 5 of the Deed of Obligation would need to be amended to reflect this requirement.
SA.1.4	Applicant	The Applicant states in the draft s.106EM (para 2.2) that it does not own all of the land within the main development site. It is not unusual for an applicant for planning permission or a DCO not to own the whole application site. In such circumstances the landowner usually enters into the s.106 agreement. Please will the Applicant explain	Please see Appendix 26A - SA.1 Response Paper , and in particular the explanation under the heading 'Deed of Adherence Approach'.	The Applicant is still yet to provide ESC with any title to the order land or any details for the proposed structure of land acquisition for the order land. It is accepted that it may not be necessary to bind all of the Order Land but In ESC's view it is yet to be demonstrated that a section 106 agreement cannot be provided which would bind the main development site. With the land to be bound suitably restricted, the Deed of Adherence approach is reasonable.

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Question to:		Question:		
		why that cannot be done in this case.		
SA.1.7	Applicant, ESC, SCC, WSC	What consents would the Applicant need to obtain in order to enter into the modified s.106 arrangements it describes in its draft s.106EM [PDB-009]? What consideration and conclusions have been given or reached by ESC, WSC and SCC on this issue?	For the reasons given in Appendix 26A - SA.1 Response Paper , the Applicant no longer proposes to enter into the modified s.106 arrangements described in the draft s.106 Explanatory Memorandum [PDB-009] (i.e. the Sizewell Special Arrangements). The Evolving Approach as set out in Appendix 26A - SA.1 Response Paper is under discussion with ESC and SCC.	Agreed – Evolving Approach still under discussion
SA.1.8	Applicant ESC, SCC, WSC	How will the Sizewell Special Arrangements be enforced in the event of a breach, whether by the Applicant or a subsequent Undertaker?	Section 6 of the Appendix 26A - SA.1 Response Paper sets out how breaches of the Deed of Obligation would be addressed under the Evolving Approach.	ESC must be satisfied that it has sufficient powers in the event of any breach of the Deed of Obligation, however arising. Therefore ESC would prefer all of the enforcement powers provided for in s106 TCPA to be provided for in the dDCO and Deed of Obligation.
<i>Arrangements requiring third party involvement</i>				

SA.1. Section 106 Agreements			SZC CO. Response	ESC Comment D3
Question to: Question:				
<i>Allocating tasks / functions to bodies which are not legal persons</i>				
<i>Giving tasks to individuals</i>				
<i>The s.111 agreement</i>				
SA.1.1 6	Applicant, ESC, SCC, WSC	Interpretation – are there any EIA issues as a result of the deemed approval provisions in CI 1.2.7. The Applicant ESC, SCC and WSC are reminded of the litigation in Wells v. Secretary of State [2005] All E.R. (EC) 323 and other cases in relation to multi-stage consents and deemed approvals under the review of mineral planning permissions.	The inclusion of a deemed approval provision in the Deed of Obligation is considered appropriate to enable the Applicant to efficiently undertake the Project. The Applicant does not consider that the deemed approval provision would have the effect of creating a 'new consent' as was the case in Wells v Secretary of State [2005] All E.R. (EC) 323. This is because the approvals that will be subject to the deemed approval provision either do not engage the EIA Regulations or will have already been assessed as part of the envelope of the ES. In the unlikely event that the approval might go beyond the scope of the original ES, then under the EIA Regulations the Applicant would be required to submit	It should not be incumbent on ESC to refuse an application that requires further information or clarification or risk a deemed approval. The deemed approval provisions must be deleted.

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			<p>further environmental information with its application and the deemed approval provisions would not override this. By the same token, if the discharging authority considers that it has not been provided with sufficient information (including any necessary assessments) to enable it to consider the application and reach an informed judgement on effects, it can request such information from the undertaker and/or refuse the application. Again, the deemed approval provisions do not override this. On this basis, the Applicant does not consider there to be any public interest justification for the deemed approval provision to be removed or limited in any way.</p>
SA.1.2 5	Applicant, ESC, SCC, WSC	CI 3.1.1 – drafting point; is not the effect with the words in square brackets [“with the	<p>Please see the amended Clause 3 of the draft Deed of Obligation (Doc Ref. 8.17(C)).</p> <p>As there are pre commencement obligations in Deed of Obligation</p>

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Question to:		Question:		
		exception of this clause 3 and clauses [●] and clause 4 insofar as it relates to obligations in the Schedules that must be complied with ... etc] circular? How can there be a requirement to comply if that requirement is in a part of the agreement which is conditional? It may be better to put this in the opening of Cl 3.1.		certain obligations should take effect prior to the Commencement Date. Therefore, ESC is of the opinion that the original wording for clause 3 is acceptable and the draft should revert to this wording.
<i>The s.106 agreement</i>				
SA.1.2 7	Applicant	Cl 4.1 – please will the Applicant explain how the development consent obligations can bind the Sites when the Applicant owns only part of them?	Please see Appendix 26A SA.1 Response Paper which explains the 'Evolving Approach', pursuant to which there would be no need to bind land.	See SA1.3 above
SA.1.2 8	Applicant	Cl 5.1 – release. The ExA notes also para 2.8 of the draft 106EM which states that the release operates only on transfer of the whole benefit to another party	NNB Generation Company (SZC) Limited may transfer the benefit of the whole or part only of its DCO powers under article 9. Clause 5 of the draft Deed of	See SA1.3 above. The decision as to who the Deed of Obligation is enforceable against is also a matter for ESC to consider, as well as the

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		<p>pursuant to Art 9 of the DCO, and the response to Observation 17 set out at the Appendix to the draft 106EM. Those contemplate transfer to only one party. Art 9 on the other hand allows transfer of parts to different parties. Clause 5.1 is ambiguous on this. What is proposed? The ExA notes that the Applicant is not released until all the benefit of the DCO has been transferred, which is the correct position under s.106(4).</p> <p>The ExA notes in passing that in Art 9 of the DCO the word "undertaker" is used to describe both the transferor / lessor undertaker and the transferee / lessee undertaker. Thus under Art 9(6)(b) a transferred</p>	<p>Obligation (Doc Ref. 8.17(C)) provides that NNB Generation Company (SZC) Limited remains liable for commitments under that agreement unless and until it has transferred all of its obligations to another party (and no longer therefore has any benefit of the DCO powers itself). This appears to us to give maximum reassurance that the company will stay on the hook until it has no interest whatsoever in the project. The Rev 4.0 dDCO (Doc Ref. 3.1(C)) drafting provides in Art 9(6) 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'. As explained in Appendix 26A - SA.1 Response Paper, this means that the</p> <p>Secretary of State, therefore no transfer of all or part of the benefit of the DCO should be allowed without the approval of ESC. ESC must also have the option of binding the transferee of the DCO to the Deed of Obligation if it is deemed necessary.</p>

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		benefit of the DCO is not enforceable against the transferor because they are the undertaker nor against the transferee because they too are the undertaker by virtue of Art 9(5). Please will the Applicant tidy up Art 9?	Secretary of State may consider on a case by case basis whether any particular transferee should be bound. If a transferee is taking over all of NNB Generation Company (SZC) Limited's powers this will certainly be appropriate, but if a transfer of some more minor element of the DCO powers is to be made, it is unlikely to be appropriate to bind the transferee to the Deed of Obligation commitments. Therefore, the Applicant does not consider that any change to Clause 5 of the draft Deed of Obligation (Doc Ref. 8.17(C)) is necessary.	
SA.1.3 3	Applicant, ESC, SCC, WSC	CI 12.4 – variation of trigger points. The proviso begins to address the EIA issue inherent in tailpieces; the ExA’s questions in relation to that in the ExQs (DCO.1.73) apply here also.	Please see the response to DCO.1.73 (Chapter 14) of the responses to ExQ1). Suitable proposed amendments have been made to the draft Deed of Obligation (Doc Ref. 8.17(C)) to reflect those to the dDCO (Doc Ref. 3.1(C)).	ESC is happy with the revised wording

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SA.1.3 8	Applicant, ESC, SCC, WSC	Sch 1, para 4.1 – return of unspent contributions. Whilst the ExA is familiar with such provisions, if the money is not spent at the appropriate time the mitigation it secures will be lost. As the mitigation will be required, should there not be an obligation on the relevant host authority to spend it on the mitigation?	Please see updates to the draft Deed of Obligation (Doc Ref. 8.17(C)) placing	For the obligations upon the host authority to provide the mitigation to be acceptable Sch 1 para 4.1 must be amended to refer to unallocated or uncommitted sums
<i>General questions on the schedules:</i>				
<i>Specific questions on the Schedules and remainder of the s.106 agreement</i>				
SA.1.4 0	Applicant, ESC, SCC, WSC	Sch 1, para 5.1. – this imposes an obligation on the host authorities to register the deed as a local land charge. A development consent obligation is a local land charge – see s.106(11). The local authority will	As set out in Appendix 26A SA.1 Response Paper , it would seem sufficient for the local planning authorities to enforce any failure to pay contributions under the Deed of Obligation as a breach of contract, for which the contribution could be enforced as a debt. However, the Applicant is willing to consider	See SA1.3 above

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		<p>normally register it. But in addition, a local land charge binds persons acquiring the land, whether or not the charge is registered (s.10, Local Land Charges Act 1975).</p> <p>Please will the Applicant and Host Authorities reflect on the implications of this and respond.</p>	<p>authorising the local planning authorities (via a DCO provision) to enforce such debts as land charges against land within the Order limits owned by the Applicant if considered preferable.</p>	
SA.1.4 5	Applicant, ESC, SCC, WSC	<p>Sch 3 – para 3.1 – this is an obligation to use reasonable endeavours to deliver the Accommodation Campus in accordance with the Implementation Plan?</p> <p>(i) Is reasonable endeavours an adequate obligation?</p> <p>(ii) In the event of failure, the relevant host authority would normally have a right of entry to do the work</p>	<p>(i) Please see the response to SA.1.52.</p> <p>(ii)(a) Please see Sheets 1 and 2 of Appendix 26B – SZC Co Land Plan. The Applicant does not own or have an option in respect of the Accommodation Campus.</p> <p>(ii)(b) Please see Appendix 26A – SA.1 Response Paper in respect of the proposed methods of enforcement under the Evolving Approach.</p>	<p>The use of a reasonable endeavours clause is not agreed. The mitigation must be provided unless ESC agrees otherwise. ESC can agree to consider revising the timetable for delivery if reasonable endeavours has been used to meet it. The suggested amendments to the DCO/Deed of Obligation in SA.1.3 would provide ESC with suitable means of enforcement.</p>

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Question to:	Question:		
		and recharge the person responsible. (a) Is the Accommodation Campus on land owned or controlled by the Applicant? (b) How does the Applicant propose that the obligation to deliver the Accommodation Campus is enforced?	
SA.1.5 0	Applicant	Sch 7, para 2.1 – this contains the phrase “On or before Commencement SZC Co shall ...”. Is this intended to be a restriction in development contemplated by s.106(1)(a)? If so, should it not be expressed as a restriction? The phrase appears elsewhere in the s.106. Please will the Applicant address the question for all of them.	The Evolving Approach does not require obligations to meet the tests in s106(1). The phrase "On or before Commencement", wherever it appears, is intended to restrict the development. Please see the amendments to Clause 4 of the draft Deed of Obligation (Doc Ref. 8.17(C)).
			Mitigation must be provided before commencement therefore “On or before Commencement” is not acceptable. Please amend the Deed of Obligation to <i>"Not to Commence or allow Commencement unless and until..."</i>

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	Question to:	Question:		
SA.1.5 2	Applicant, ESC, SCC, WSC	<p>Sch 9, para 2. Para 2.1 – this is an obligation to use reasonable endeavours to deliver the Key Environmental Mitigation.</p> <p>(i) Is reasonable endeavours an acceptable standard and if so, how?</p> <p>(ii) Please will the Applicant supply the Implementation Plan referred to.</p> <p>(iii) The ExA notes this includes the Fen Meadow Works which have a ten year timescale.</p> <p>Para 2.4. This provides for review of the Implementation Programme in the event of delays. Given that the mitigation is necessary, please will the Applicant say how</p>	<p>(i) The Applicant considers that reasonable endeavours is an acceptable standard to secure the delivery of the Key Environmental Mitigation. The same standard was used to secure the delivery of the associated development in Schedule 11 of the Hinkley Point C Section 106 Agreement [AS-038] and [AS-039].</p> <p>(ii) Please see the draft Implementation Plan (Doc Ref 8.4I(A)).</p> <p>(iii) n/a</p> <p>(iv) The Sizewell Project will be one of the most complex and long-running construction projects in the UK, with a build period of 9-12 years, involving management of the movement and accommodation of construction workers and their families, and the transportation of large volumes of freight. Given the complexity and construction period of the Sizewell project, the Applicant considers it appropriate to provide for the management of delays which may be experienced</p>	<p>The use of a reasonable endeavours clause is not agreed. The mitigation must be provided unless ESC agrees otherwise. ESC can agree to consider revising the timetable for delivery if reasonable endeavours has been used to meet it.</p>

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Question to:		Question:		
		changes to timescale are appropriate?	despite the reasonable endeavours of the Applicant. Paragraph 2.4 provides a reporting mechanism where such delays occur to ensure that the Councils are informed of this and to enable a review to be carried out. The review and any changes to the timescale must take into account the assessments in the Environmental Statement and the Transport Assessment (Doc Ref. 8.5(B)) (Para 2.5).	
SA.1.5 3	Applicant, ESC, SCC, WSC	Sch 10, leisure etc. (i) Is the proviso in para 2.1.1 appropriate if the Leiston Sports Facilities are necessary? (ii) Design of the facilities is in the hands of ESC. Given that the design will presumably have to be approved under the DCO there appears to be a dual role. Whilst being mindful of the	(i) Please see the amended paragraph 2.1.1 of the draft Deed of Obligation (Doc Ref. 8.17(C)). (ii) The Applicant notes the concern in respect of the dual role of East Suffolk Council in respect of the Leiston Sports Facilities. Paragraph 2.2 is intended to provide for the discharge of Requirement 12A such that the Leiston Sports Facilities may be developed pursuant to the development consent. The Applicant will continue to engage with East Suffolk Council in respect of this issue	(i) Now acceptable to ESC

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		<p>complexities of the General Regulations (SI 1992/1492) is there a need for separation in this case and if so how should it be achieved without complexity? Is this what para 2.2 is designed to achieve?</p> <p>(iii) What is the test for the “appropriate timescale” for delivery?</p> <p>(iv) Para 2.3.2 is a restriction on occupation of the sports facilities prior to ESC submitting a management plan to SZC Co for approval. Given that the facilities are necessary, how does this restriction incentivise the Applicant?</p> <p>(v) Para 2.3.4 then provides a further restriction on occupation whilst the Applicant decides whether or not to approve the management plan. Is</p>	<p>and make any amendments to paragraph 2.2 considered necessary. (iii) to (v) Please see the responses to AR.1.0 and AR.1.1 in Chapter 6 of the written responses. These restrictions are considered appropriate by the Applicant.</p> <p>The Leiston Sports Facilities are proposed in order to contribute towards community integration and cohesion. Such integration and cohesion will require the implementation of a suitable management plan which should be in place prior to occupation of the facilities.</p> <p>The Clause 19 of the draft Deed of Obligation (Doc Ref. 8.17(C)) requires the Applicant to act reasonably and in good faith in the discharge of the obligations in the the deed. Any dispute in respect of the approval of the Management Plan would be determined in accordance with the dispute resolution procedure is set out in Clause 8.</p> <p>(vi) The remainder of the Annual Maintenance Payment is to be placed in the sinking fund. It is intended that paragraphs 2.4.2 and 2.4.3 together</p>

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Question to:		Question:		
		<p>this an appropriate control? If it is, what is the dispute resolution procedure?</p> <p>(vi) Para 2.4.2 this states the destination of part of the Annual Maintenance Payment. What is the destination of the rest?</p>	set out the destination of 100% of the Annual Maintenance Payment.	
<i>The following questions relate to the draft s.106EM</i>				
SA.1.6 7	Applicant, ESC, SCC, WSC	<p>Observation 27 and title investigation by the Host Authorities. The ExA notes that the SZC Co's solicitors are willing to provide the confirmation document sought by the ExA. The ExA looks forward to the submission of the draft at the earliest possible opportunity.</p> <p>In relation to title investigation, the ExA notes that the Applicant is discouraging the Host Authorities from</p>	<p>The Applicant owns very limited property within the Order limits, and while it expects to obtain options over more of the land during the course of the examination, these options would not be exercised until some time after the DCO is granted and so would not be relevant to any s106 agreement which might be entered into during the Examination. Given that the Applicant's Evolving Approach does not rely upon land ownership or s106, it is not considered worthwhile for the Host Authorities to conduct title investigations at this time. In the event that the Applicant reverts to an approach of entering into a s106</p>	<p>To ensure the Deed of Obligation is enforceable against any transferee of the benefit of the DCO a Deed of Covenant should be provided, before the benefit in the DCO is transferred.</p>

SA.1. Section 106 Agreements		SZC CO. Response	ESC Comment D3	
Question to:	Question:			
		carrying out title investigation. As the Applicant observes, the Sizewell Special Arrangements are a new approach. It is evidently evolving. In addition the final position on the s.106 agreement is not yet settled. The ExA will be asking the Host Authorities for their confirmation that they are satisfied with all of the provisions of any s.106 agreement, including its enforceability throughout the construction and operation of the Project, should the DCO be made. Therefore to allow and to carry out title investigation would seem prudent.	agreement binding the small amount of land it owns on the main development site, title investigation would be a short and simple process.	
SA.1.6 8	Applicant	Please will the Applicant state how a future undertaker would know	A transfer of the benefit of the DCO or any part of its powers cannot take place pursuant to art 9 of the draft	See SA1.3 above

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Question to:		Question:		
		<p>of the existence of this extensive s.106 agreement. Such an undertaker might only be a transferee of part of the benefit of the DCO and not acquire any land.</p> <p>How would a lender or an investor who is not an undertaker know of the existence of the s.106 agreement?</p>	<p>DCO (Doc Ref. 3.1(C)) without the incoming undertaker being bound by the Deed of Obligation (save where the Secretary of State agrees otherwise). Any prospective transferee would reasonably be expected to undertake a thorough due diligence exercise, and would through this means be aware of the fact that art 9 binds them to comply with the Deed of Obligation. Drafting not sufficient. Mortgagees will not be bound by the Deed of Obligation, only the relevant undertaker. This is only reasonable as the mortgagee will not be able to exercise the DCO powers to build out the project. The position would be different with respect to a planning permission, which would not be personal to named parties and therefore could be implemented by a mortgagee in possession.</p>	
SA.1.6 9	Applicant, ESC, SCC, WSC	The ExA draws attention to s.106(6) which, where there is a breach of a requirement in a development consent obligation, gives the authority by whom it is enforceable the right to	As set out in Appendix 26A SA.1 Response Paper , the Applicant is open to including such rights for the host authorities in the Deed of Obligation itself, or via drafting in the DCO.	See SA1.3 above

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Question to:	Question:		
		enter the land to carry out the operations. The host authorities, on the scheme in the Sizewell Special Arrangements, are the enforcing authorities of a s.106 agreement which is expressly stated to bind the Sites, i.e. the Order lands (see clause 4.1). Will they be able to exercise this power in relation to all the Sites?	