

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.3	Applicant	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.
	Response by SZC Co. at Deadline 2	<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>
	Response by East Suffolk Council at Deadline 2	<p>The fundamental point to be made is that only where a signatory to the s106 agreement has a proprietary interest in the land will the obligations automatically run with the land (and only then, if such obligations fall within s106(1)(a) – (d)). The generally accepted position is that an interest for the purposes of s106(1) must be a proprietary interest (Southampton City Council v Halyard Ltd [2009] 1 P. & C.R. 5) and as such ESC would as standard require such persons to be party to the s106 agreement.</p> <p>Having the benefit of the DCO is not an interest in land for the purposes of s106(1) and therefore s106(3) will not apply as the obligations are not provided as planning obligations pursuant to s106 (1) TCPA in the absence of a proprietary interest in the development site. Questions therefore arise regarding the legitimacy of providing mitigation through an alternative means to a s106 agreement.</p> <p>Where the signatory has no proprietary interest in land, any agreement could not be entered into pursuant to s106 and any such agreement would not automatically run with the land. In such circumstances other powers will need to be considered, such as s1 of the Localism Act 2001 in conjunction with s111 of the Local</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>Government Act 1972 (s111 is an ancillary power that must be used with a primary power), provided that the signatory is not released upon disposal of its interest until the transferee has entered into mirror covenants with the councils . However, such alternative powers/provisions should only be considered where there is a legitimate reason why the landowner cannot sign a s106 agreement.</p> <p>We are concerned that DCO article 9(6) is no guarantee that ESC and SCC will be able to enforce the s106 agreement against a successor in the benefit of the DCO. As such ESC would require provisions in the s106 agreement so that if SZC Co. were to transfer all or part of its interest in the DCO, the transferee of the interest in the DCO would be required to enter into a deed of covenant with ESC, and SCC to ensure the obligations in the s106 agreement remain enforceable by the Councils. This deed of covenant would be required prior to SZC Co being released from liability under the s106 agreement. A completed deed of covenant should be a pre-condition of the transfer of the benefit of the DCO.</p>
	Response by Suffolk County Council at Deadline 2	<p>SCC would expect most, if not all, land to be bound by the s.106 agreement and SCC would welcome a clearer explanation of why the Applicant does not consider that possible in this case.</p> <p>SCC is concerned that DCO article 9(6) is no guarantee that ESC and SCC will be able to enforce the s106 agreement against a successor to the benefit of the DCO. As such, SCC would require provisions in the s106 agreement so that if SZC Co. were to transfer all or part of its interest in the DCO, the transferee of the interest in the DCO would be required to enter into a deed of covenant with SCC, and ESC, to ensure the obligations in the s106 agreement remain enforceable by the Councils. This deed of covenant would be required prior to SZC Co being released from liability under the s106 agreement. A completed deed of covenant should be a pre-condition of the transfer of the benefit of the DCO.</p>
	Response by SZC Co. at Deadline 3	Please see the amended draft Deed of Obligation (Doc Ref. 8.17(D)) which provides that the agreement is made under the Localism Act 2011 and s.111 of the LGA 1972.

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		Please see the Obligations Enforcement Paper , provided in Appendix 26A of this document (Doc Ref. 9.30.A), which provides for the entry into a Deed of Adherence by potential transferees prior to a transfer under Article 9.
	Response by East Suffolk Council at Deadline 3	<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 against any transferee of the DCO) • 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 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

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		the Deed of Obligation would need to be amended to reflect this requirement.
	Response by SZC Co. at Deadline 5	In addition to the response provided at Deadline 3, please see Post-Hearing Note: ISH 1 – Response to Enforcement Issues (Doc Ref. 9.48).
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 why that cannot be done in this case.
	Response by SZC Co. at Deadline 2	Please see Appendix 26A - SA.1 Response Paper , and in particular the explanation under the heading 'Deed of Adherence Approach'.
	Response by East Suffolk Council at Deadline 2	See SA.1.3 above.
	Response by Suffolk County Council at Deadline 2	SCC awaits the comments from the Applicant and is particularly interested in what land may be bound into the s.106 before the grant of any DCO and what land may be bound in the s.106 before the commencement of development on a particular part of the Sites (which could perhaps allow an obligation in the DCO to not commence development on a part of the Site until that part of the Site is bound into the s.106 agreement). SCC would also welcome clarity on what the 'Main Development Site' is. This is referred to in the s.106 agreement. Can a plan be provided to show this?
	Response by SZC Co. at Deadline 3	Please see Appendix 26B – SZC Co Land Plan in respect of the land in which the Applicant has a proprietary interest. The references to the 'Main Development Site' have been amended to read 'SZC Development Site', and references to the 'Associated Development Sites' have been amended to reference "other Sites". Plan 1A in draft Deed of Obligation Appendix A – Plans (Doc Ref. 8.17A (C)) shows this land.

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
	Response by East Suffolk Council at Deadline 3	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.
	Response by SZC Co. at Deadline 5	For the reasons previously given, the Applicant does not consider it is necessary to bind the Order Land and does not consider the Deed of Adherence approach is suitable or preferable to the Evolving Approach.
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?
	Response by SZC Co. at Deadline 2	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.
	Response by East Suffolk Council at Deadline 2	We are unsure what consents are referred to here. Please can this question be clarified.
	Response by Suffolk County Council at Deadline 2	SCC would welcome clarity from the ExA on the consents referred to in this question. Subject to this clarification, SCC's response is set out below. No conclusions have been reached by SCC as to the acceptability of the proposed Sizewell Special Arrangements and SCC requires further explanation of why this approach is necessary in this case.

Chapter 26 - SA.1. Section 106 Agreements	
Question to:	Question:
	<p>At present, SCC is not aware of the ownership position of all of the redline land proposed for the s.106 and requests that the Applicant deduces title. In the first instance this should relate to any land owned or controlled by the Applicant and any land owned or controlled by any associated or linked company or other corporate entity so as to better inform consideration of what parts of the site could be readily made subject to a conventional s.106 agreement.</p> <p>For the Applicant's proposed deeming provision (set out at paragraph 2.6.1 of the Applicant's draft EM as "For the purpose only of Section 106 (1) of the Act the undertaker shall be deemed to be a person interested in the Order land or any part of it and for the avoidance of doubt Section 106(3)(a) shall include any transferee under Article 8 of this Order") to operate this will require the Secretary of State to rely on section 120(5) of the Planning Act 2008. SCC would welcome any precedent, further explanation or comfort the Applicant can provide that such modification is within the powers of s.120(5) PA 2008. SCC has concerns that the deeming for the purposes of s.106(1) only will not address the operation of s.106(3)(b), s.106(4), s.106(9)(b), or s.106(9)(c) Town & Country Planning Act 1990, all of which require an actual interest in land in order to function. SCC is also concerned that the deeming could create confusion as to whether the enforcing authority could rely on s.106(6) or the offence in s.106(8), and how any such offence would be compatible with s.120(8) of the Planning Act 2008.</p> <p>The Sizewell Special Arrangements also appear to rely on the Applicant (or any entity that is transferred the benefits or rights of the DCO pursuant to Article) being the only entity that may construct and subsequently carry on the operations authorised by the DCO within the Order Limits to ensure that there will always be an entity against which ESC and SCC may enforce (e.g. so the Applicant/transferee as a corporate entity is not simply wound down to make enforcement of the obligations impossible). SCC note that Article 7 of the DCO "authorises" the Applicant to operate and use the authorised development (presumably relying on section 140 of the PA 2008). SCC considers that this Article 7 is permissive rather than expressly preventing any other entity from carrying on such activities and</p>

Chapter 26 - SA.1. Section 106 Agreements	
Question to:	Question:
	<p>SCC questions whether consideration should be given to amending Article 7 in light of this.</p> <p>SCC also have concerns (separate and in addition to those expressed above and in the event the Applicant's proposed deemed amendment to s.106(1) was considered acceptable) that the Applicant's proposed wording in Article 9 (i.e. <i>"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"</i>) would mean that enforcement of a breach of the s.106 would be possible pursuant to s.106(3) and there would be no privity of contract between the transferee and SCC/ESC. SCC consider this could prevent enforcement of the s.106 under any other local government powers. SCC's view is that a pre-requisite of any transfer under Article 9 of the DCO should be that a transferee must enter into a Deed of Adherence to the s.106 and provide an executed copy of the same to SCC and ESC. This would give greater comfort on this point and also have the practical effect of ensuring that any transferee would then clearly demonstrate that they are aware of its obligations under the s.106, particularly if only part of the benefit of the DCO is transferred under Article 9. It is also considered that Article 9 should include a requirement to notify the Councils prior to any intended transfer (e.g., 28 days' notice) and also to provide a copy of the completed s.106 agreement to any proposed transferee.</p> <p>SCC also consider particular care should be taken with regards to transfers of the benefit of the DCO which may take place before commencement (i.e., before the time that the s.106 may be entered into by the Applicant). SCC note that the "Undertaker" is defined in the DCO as being the Applicant or any person having the benefit of the DCO after a transfer under Article 9. Notwithstanding the s.111 agreement proposed as part of the Sizewell Special Arrangements (which would only enforceable against the Applicant), if the Applicant transferred some of the obligations before commencement and then entered into the s.106 then SCC</p>

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		<p>question whether the transferee would then also be required to enter into the s.106 before commencement too.</p> <p>SCC also consider that the new Article proposed for the s.106 to be entered into before the development beings pursuant to s.155 of the 2008 Act is too broad. The s.106 should be in place before any works whatsoever are carried out under the DCO as the s.106 itself has its own carve outs for the definition of "Commencement".</p>
	Response by SZC Co. at Deadline 3	Under the 'Evolving Approach', the Deed of Obligation would be entered into prior to the grant of the DCO. Please see the Obligations Enforcement Paper , provided in Appendix 26A of this document (Doc Ref. 9.30.A), in respect of enforcement of the obligations.
	Response by East Suffolk Council at Deadline 3	Agreed – Evolving Approach still under discussion
	Response by SZC Co. at Deadline 5	No further response required.
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?
	Response by SZC Co. at Deadline 2	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.
	Response by East Suffolk Council at Deadline 2	ESC does not have a specific enforcement policy with regards to breach of Section 106. We would rely on Section 106(5) of the Town & Country Planning Act 1990 which provides that "[a] restriction or requirement imposed under a planning obligation is enforceable by injunction". Pursuant to s106(3), a s106 obligation is enforceable by the local planning authority that is identified in the obligation. It is enforceable against the person entering into the obligation and any person deriving title from them, unless the s106 obligation itself provides that a person shall not

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>be bound in respect of any period during which they no longer have an interest in the land.</p> <p>We may choose to apply to the County Court for an injunction preventing being proceeded with or we could take formal proceedings (debt recovery action) with the aim of securing an order from the Court requiring the developer to take specific positive action to meet the requirements of a Section 106 Agreement.</p>
	Response by Suffolk County Council at Deadline 2	<p>The approach to enforcement in the event of a breach would need to be considered on the circumstances relating to that breach at the time of the breach.</p> <p>Depending on the nature of the breach SCC may consider it appropriate to engage in discussions with the Applicant (or subsequent Undertaker) outside of any formal enforcement procedure and as a precursor to enforcement action in the event that a breach cannot be resolved informally.</p> <p>SCC also notes that the draft s.106 includes a clause (Clause 6) relating to the resolution of disputes. It is understood that this clause may be subject to further amendment by the Applicant in due course but in principle it may be appropriate for the parties to any alleged breach to engage in the procedure set out in such a clause.</p> <p>If the s.111 agreement is breached by the Applicant, it is expected that this would require enforcement using contractual remedies which may also include seeking a mandatory injunction. Subject to the points raised in SCC's response to SA.1.7, failure to adhere to the s.111 by not entering into the s.106 before the commencement of development under the DCO may also be enforced under the proposed new article in the DCO that the s.106 must be entered into before commencement.</p> <p>Depending on the nature of the breach (e.g. whether it relates to a failure to pay monies, failure to submit a scheme/specification for approval or a failure physically to deliver certain mitigation/compensation works/measures on land) then SCC may consider enforcing the s.106 by way of an injunction, contractual remedies for payment of monies or by entering the land to carry out the operations required on</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>that land and recovering the expenses of doing so from the Applicant under s.106(6).</p> <p>SCC request that the Applicant confirm its views on whether not binding any landowners of land within the Order Limits would affect the ability of SCC and ESC to enforce against breaches of the s.106 using the provisions in s.106(6).</p> <p>Whilst it is understood that bonded obligations were not required for Hinkley Point C, SCC consider that in light of the Sizewell Special Arrangements that the Applicant again considers the provision of providing bonds to guarantee the performance of obligations in the s.106 and also considers when such bonds could be provided. In addition, SCC (and ESC) have no control over the entity that may receive a transfer of the benefit of the DCO and that entity may not be an owner of any of the land within the Order Limits. If bonds can be provided against the performance of obligations this would provide SCC (and ESC) with a clear mechanism under which the obligations could be enforced.</p> <p>A further approach which may be considered by the Applicant where appropriate is for an obligation to procure the transfer (which would need to be negatively worded and restrictive to prevent e.g. Commencement until such a transfer has taken place to ensure this is enforceable) of land on which mitigation is to be delivered to SCC for £1 which would then ensure that SCC had access to that land in order to step in and carry out the works on that land if the Applicant defaulted. The transfer arrangements would need to include provisions obliging the Applicant to carry out such works (and SCC's consent for this) and arrangements (if appropriate) about the transfer of this land back to the Applicant once the relevant obligations are discharged.</p>
	Response by SZC Co. at Deadline 3	The Applicant is grateful for SCC's confirmation that in principle it may be appropriate for the parties to any alleged breach to engage in a dispute resolution procedure. The dispute resolution clause remains subject to further consideration by the Applicant.

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		Please see the Obligations Enforcement Paper , provided in Appendix 26A of this document (Doc Ref. 9.30.A), in respect of the Applicant's Evolving Approach to enforcement.
	Response by East Suffolk Council at Deadline 3	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.
	Response by SZC Co. at Deadline 5	See sections 3 and 4 of the Post-Hearing Note: ISH 1 – Response to Enforcement Issues (Doc Ref. 9.48).
<i>Arrangements requiring third party involvement</i>		
No further comments received at Deadline 3.		
<i>Allocating tasks / functions to bodies which are not legal persons</i>		
No further comments received at Deadline 3.		
<i>Giving tasks to individuals</i>		
No further comments received at Deadline 3.		
<i>The s.111 agreement</i>		
SA.1.16	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.
	Response by SZC Co. at Deadline 2	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

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>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 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.</p> <p>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>
	Response by East Suffolk Council at Deadline 2	<p>ESC would also draw the ExA's attention to paragraph 6 of Schedule 1 in the s.106. ESC is not content with the proposed deemed approval provisions in Clause 1.2.7 (or paragraph 6 of Schedule 1 in the s.106). It is understood that the Applicant intends to discuss these further with SCC and ESC. Matters for approval under the s.106 are expected to be relevant to delivering mitigation set out in the EIA and automatic approval of schemes may undermine SCC's ability to control this. There may be some approvals which would not have such an effect but this will need to be considered when the Applicant has provided further detail about the substantive provisions.</p> <p>Substantive schemes will not be approved under the s.111 and it is not considered necessary to include Clause 1.2.7 in the s.111 as a result. The Applicant still would have the benefit of Clause 9.2 relating to not unreasonably withholding or delaying approvals (to the extent any are required under the s.111).</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
	Response by Suffolk County Council at Deadline 2	<p>SCC would also draw the ExA's attention to paragraph 6 of Schedule 1 in the s.106. SCC is not content with the proposed deemed approval provisions in Clause 1.2.7 (or paragraph 6 of Schedule 1 in the s.106). It is understood that the Applicant intends to discuss these further with SCC and ESC. Matters for approval under the s.106 are expected to be relevant to delivering mitigation set out in the EIA and automatic approval of schemes may undermine SCC's ability to control this. There may be some approvals which would not have such an effect, but this will need to be considered when the Applicant has provided further detail about the substantive provisions.</p> <p>Substantive schemes will not be approved under the s.111 and it is not considered necessary to include Clause 1.2.7 in the s.111 as a result. The Applicant still would have the benefit of Clause 9.2 relating to not unreasonably withholding or delaying approvals (to the extent any are required under the s.111).</p>
	Response by SZC Co. at Deadline 3	For the reasons previously given in response to this SA.1.16, the inclusion of a deemed approval provision in the Deed of Obligation is considered appropriate to enable the Applicant to efficiently undertake the Project. However, the Applicant intends to discuss this further with SCC and ESC.
	Response by East Suffolk Council at Deadline 3	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.
	Response by SZC Co. for Deadline 5	Please see the amendments to Schedule 1, Paragraph 5 and Clause 20 in the draft Deed of Obligation (Doc Ref. 8.17(E)) to provide a mechanism enabling the Councils to request further information or clarification.
<i>The s.106 agreement</i>		
SA.1.25	Applicant, ESC, SCC, WSC	CI 3.1.1 – drafting point; is not the effect with the words in square brackets ["with the 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

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		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.
	Response by SZC Co. at Deadline 2	Please see the amended Clause 3 of the draft Deed of Obligation (Doc Ref. 8.17(C)).
	Response by East Suffolk Council at Deadline 2	ESC is happy with the current wording, clause 3 takes effect from the date of the s106 agreement.
	Response by Suffolk County Council at Deadline 2	SCC would be agreeable to including this in the opening of Clause 3.1. However, SCC considers that the intention is that any obligations which need to be complied with before the Commencement Date would not be condition on the Commencement Date.
	Response by SZC Co. at Deadline 3	The pre-Commencement obligation to provide notice under Clause 12 of the Deed of Obligations is not conditional upon Commencement. Please see SA.1.22 in respect of the obligations in the Schedules which are to be complied with "on or before Commencement".
	Response by East Suffolk Council at Deadline 3	As there are pre commencement obligations in Deed of Obligation 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.
	Response by SZC Co. at Deadline 5	The Applicant considers that the proposed drafting carves out the relevant pre-commencement obligations from Clause 3.
SA.1.27	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?
	Response by SZC Co. at Deadline 2	Please see Appendix 26A SA.1 Response Paper which explains the 'Evolving Approach', pursuant to which there would be no need to bind land.

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
	Response by East Suffolk Council at Deadline 2	ESC: Clarification is required from the Applicant regarding is current and proposed ownership of the Sites
	Response by Suffolk County Council at Deadline 2	SCC would welcome an explanation from the Applicant on this point and also clarification over which parts of the "Sites" it owns now, will own at the close of the examination, will own at the point any DCO is granted and will own before any works under the DCO are commenced on such parts of the Sites.
	Response by SZC Co. at Deadline 3	Please also see the response to SA.1.2.
	Response by East Suffolk Council at Deadline 3	See SA1.3 above
	Response by SZC Co. at Deadline 5	See SA.1.3.
SA.1.28	Applicant	<p>CI 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 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 benefit of the DCO is not enforceable against the transferor because they are the undertaker nor against the</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		transferee because they too are the undertaker by virtue of Art 9(5). Please will the Applicant tidy up Art 9?
	Response by SZC Co. at Deadline 2	<p>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 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.</p> <p>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'.</p> <p>As explained in Appendix 26A - SA.1 Response Paper, this means that the 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.</p> <p>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.</p>
	Response by East Suffolk Council at Deadline 2	ESC would require the clause 5.1 to be amended to provide of a deed of covenant discussed in SA1.3

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
	Response by Suffolk County Council at Deadline 2	SCC highlights its response to SA.1.7 on this question.
	Response by SZC Co. at Deadline 3	Please see the further responses to SA.1.3 and SA.1.7 .
	Response by East Suffolk Council at Deadline 3	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 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.
	Response by SZC Co. at Deadline 5	See SA.1.3 and Section 5 of the Post-Hearing Note: ISH 1 – Response to Enforcement Issues (Doc Ref. 9.48).
SA.1.33	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.
	Response by SZC Co. at Deadline 2	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)).
	Response by East Suffolk Council at Deadline 2	ESC: We refer to ESC's response to question DCO.1.73. (i) ESC considers that with this provision the Applicant is appropriately trying to limit the amount of changes that can be made to the authorised development once consented, however ESC agrees that the wording is perhaps not as clear as it could be. The provision is intended to mean that any approvals given can only be given to activities within the scope of the environmental assessment. ESC suggests the following wording would be more appropriate:

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>"(3) Where an approval of details or other document is required under the terms of any requirement or where compliance with a document contains the wording "unless otherwise agreed" by the discharging authority, such approval of details or of any other document (including any subsequent amendments or revisions) or agreement by the discharging authority is not to be given except in relation to changes or deviations where it has been demonstrated to the satisfaction of the discharging authority that giving such approval would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement."</p> <p>(ii) It is not considered appropriate for the authorised development to be subject to an ongoing assessment which compares any potential new effects to a changing baseline. The future changing baseline is taken into account in the ES: the ES assesses the likely significant effects of the authorised development and predicts the expected changes to the baseline in the cumulative effects section.</p> <p>(iii) ESC would welcome an approach to subsequent approvals similar to that set out in the Northampton Gateway Strategic Railfreight Interchange DCO, as made. In particular, Article 44 of that DCO gives clarity to the process for subsequent approval under the Requirements. It makes it abundantly clear what can and cannot be given approval, and it references an appropriate procedure within Schedule 2 'Requirements' for applying for and obtaining such approval.</p> <p>ESC notes that Schedule 23 of the draft DCO appears to be an attempt on behalf of the Applicant to set out a similar procedure, but ESC would welcome the Applicant reviewing this procedure in light of the approach and the procedure in the Northampton Gateway Strategic Railfreight Interchange DCO.</p>
	Response by Suffolk County Council at Deadline 2	<p>In respect of DCO 1.73</p> <p>- SCC considers the ExA's proposal helpful under sub-para (iii) in particular. Similarly helpful is ESC's request in their draft response for the inclusion of a provision like Article 44 of the Northampton Gateway DCO;</p>

Chapter 26 - SA.1. Section 106 Agreements	
Question to:	Question:
	<p>- SCC waits to see the Applicant's response (and the revised drafting in the forthcoming draft DCO) and comments on the updated text at Deadline 3.</p> <p>SCC considers that with this provision the Applicant is appropriately trying to limit the amount of changes that can be made to the authorised development once consented, however SCC agrees that the wording is perhaps not as clear as it could be. The provision is intended to mean that any approvals given can only be given to activities within the scope of the environmental assessment. SCC suggests the following wording would be more appropriate:</p> <p>"(3) Where an approval of details or other document is required under the terms of any requirement or where compliance with a document contains the wording "unless otherwise agreed" by the discharging authority, such approval of details or of any other document (including any subsequent amendments or revisions) or agreement by the discharging authority is not to be given except in relation to changes or deviations where it has been demonstrated to the satisfaction of the discharging authority that giving such approval would not give rise to any materially new or materially worse adverse environmental effects in comparison with those reported in the environmental statement."</p> <p>(ii) It is not considered appropriate for the authorised development to be subject to an ongoing assessment which compares any potential new effects to a changing baseline. The future changing baseline is taken into account in the ES: the ES assesses the likely significant effects of the authorised development and predicts the expected changes to the baseline in the cumulative effects section.</p> <p>(iii) SCC would welcome an approach to subsequent approvals similar to that set out in the Northampton Gateway Strategic Railfreight Interchange DCO, as made. In particular, Article 44 of that DCO gives clarity to the process for subsequent approval under the Requirements. It makes it abundantly clear what can and cannot be given approval, and it references an appropriate procedure within Schedule 2 'Requirements' for applying for and obtaining such approval. SCC notes that Schedule 23 of the draft DCO appears to be an attempt on behalf of the</p>

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		Applicant to set out a similar procedure, but SCC would welcome the Applicant reviewing this procedure in light of the approach and the procedure in the Northampton Gateway Strategic Railfreight Interchange DCO.
	Response by SZC Co. at Deadline 3	The Applicant is grateful to the Councils acknowledgement that it is appropriately trying to limit the amount of changes that can be made to the authorised development once consented. The Applicant considers that the amended Clause provided at Deadline 2 provides appropriate clarity in this regard. Please see the further response to DCO.1.73 (Doc. Ref. 9.30).
	Response by East Suffolk Council at Deadline 3	ESC is happy with the revised wording
	Response by SZC Co. at Deadline 5	No further response is required from the Applicant.
SA.1.38	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?
	Response by SZC Co. at Deadline 2	Please see updates to the draft Deed of Obligation (Doc Ref. 8.17(C)) placing obligations upon the relevant host authority to provide the mitigation.
	Response by East Suffolk Council at Deadline 2	ESC requires that Sch1 para 4.1 be amended so that monies allocated or committed within a reasonable time are not returned. If such monies cannot be spent, allocated or committed within a reasonable timeframe then it is reasonable to assume that mitigation is not required. ESC would be happy to increase the 5 year timeframe to 10 years to allow for more time for mitigation to be provided.
	Response by Suffolk County Council at Deadline 2	Contributions will be spent on the agreed mitigation measures – plus flexibility in the agreement.

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>SCC would anticipate a minimum spend period of 10 years. In some instances, a longer spend period might be appropriate e.g., mitigation on the AONB.</p> <p>Please see SCC response to SA.1.35. Subject to considering the request on an obligation by obligation basis, SCC agree in principle that a mechanism to ensure sums paid are spent on the mitigation may be agreed.</p>
	Response by SZC Co. at Deadline 3	<p>Please see response to SA.1.35.</p> <p>The Applicant considers that the proposed five year timeframe is appropriate and notes that this runs from the date of payment, which is to be appropriately staggered through the use of instalments and annual payments during the Construction Period.</p>
	Response by East Suffolk Council at Deadline 3	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.
	Response by SZC Co. at Deadline 5	Please see response to SA.1.35 submitted at Deadline 3.
<i>General questions on the schedules:</i>		
No further comments received at Deadline 3.		
<i>Specific questions on the Schedules and remainder of the s.106 agreement</i>		
SA.1.40	Applicant, ESC, SCC, WSC	<p>Sch 1, para 5.1. – this imposes an obligation on the host authorities to register the deed as a local land charge.</p> <p>A development consent obligation is a local land charge – see s.106(11). The local authority will 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>

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		Please will the Applicant and Host Authorities reflect on the implications of this and respond.
	Response by SZC Co. at Deadline 2	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 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.
	Response by East Suffolk Council at Deadline 2	ESC: To bind all of the land, the s106 agreement must signed by persons with a the proprietary interest in all of site and be registered as a local land charge
	Response by Suffolk County Council at Deadline 2	SCC note the ExA's point and consider that binding those acquiring the land under the local land charge is useful. SCC awaits further comment from the Applicant as to the parts of the Sites it owns currently and will own before and after the commencement of the works under the DCO. SCC also notes that Schedule 1 paragraph 5.1 is solely an obligation on ESC, not SCC.
	Response by SZC Co. for Deadline 3	Please see the Obligations Enforcement Paper , provided in Appendix 26A of this document (Doc Ref. 9.30.A).
	Response by East Suffolk Council at Deadline 3	See SA1.3 above
	Response by SZC Co. at Deadline 5	See SA.1.3.
SA.1.45	Applicant, ESC, SCC, WSC	Sch 3 – para 3.1 – this is an obligation to use reasonable endeavours to deliver the Accommodation Campus in accordance with the Implementation Plan? (i) Is reasonable endeavours an adequate obligation?

Chapter 26 - SA.1. Section 106 Agreements		
Question to:	Question:	
		(ii) In the event of failure, the relevant host authority would normally have a right of entry to do the work 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?
Response by SZC Co. at Deadline 2		(i) Please see the response to SA.1.52 . (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. (ii)(b) Please see Appendix 26A – SA.1 Response Paper in respect of the proposed methods of enforcement under the Evolving Approach.
Response by East Suffolk Council at Deadline 2		ESC requires the Accommodation Campus to be provided unless otherwise agreed with the Council in writing, use of reasonable endeavours is not acceptable. With the proprietary interest in the Accommodation Campus bound by the s106 agreement, ESC would be able to rely on powers of entry
Response by Suffolk County Council at Deadline 2		(i) Avoid use of 'reasonable endeavours'. SCC's position is that the obligation to use "reasonable endeavours" is not acceptable. This provides no certainty that this mitigation will be delivered and could make enforcement difficult. (ii) SCC await the Applicant's response to this question and SA.1.27 which SCC consider is linked to this question. One alternative method of enforcement may be for ESC/SCC to seek an injunction to stop works (depending on the content of the Implementation Plan) but again, note that the inclusion of the "reasonable endeavours" wording may make this more difficult.
Response by SZC Co. at Deadline 3		Please see response to SA.1.52 , in respect of the use of "reasonable endeavours" in this obligation.

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		Please see the Obligations Enforcement Paper , provided in Appendix 26A of this document (Doc Ref. 9.30.A), in respect of the Applicant's further comments on enforcement under the Evolving Approach.
	Response by East Suffolk Council at Deadline 3	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.
	Response by SZC Co. for Deadline 5	Please see Post-Hearing Note: ISH 1 – Implementation Plan (Doc Ref. 9.48).
SA.1.50	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.
	Response by SZC Co. at Deadline 2	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)).
	Response by East Suffolk Council at Deadline 2	ESC agrees with the ExA and would prefer wording such as “Not to Commence or allow Commencement unless and until...”.
	Response by Suffolk County Council at Deadline 2	SCC agrees with the ExA and would prefer wording such as “Not to Commence or allow Commencement unless and until...”.
	Response by SZC Co. at Deadline 3	Clause 4 of the draft Deed of Obligation includes the requested restriction.

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
	Response by East Suffolk Council at Deadline 3	Mitigation must be provided before commencement therefore "On or before Commencement" is not acceptable. Please amend the Deed of Obligation to "Not to Commence or allow Commencement unless and until...
	Response by SZC Co. at Deadline 5	Please see the amended Clause 4.3 of the draft Deed of Obligation (Doc Ref. 8.17(E)).
SA.1.52	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 changes to timescale are appropriate?</p>
	Response by SZC Co. at Deadline 2	<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>

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		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).
	Response by East Suffolk Council at Deadline 2	ESC requires provision of the Key Environmental Mitigation to be an absolute obligation unless otherwise agreed with the ESC
	Response by Suffolk County Council at Deadline 2	(i) SCC's position is that the obligation to use "reasonable endeavours" is not acceptable. This provides no certainty that this mitigation will be delivered and could make enforcement difficult. (ii) SCC awaits a copy of the Implementation Plan. (iii) See paragraph 8 of Schedule 11 which deals with a contingency fund which may be payable after 10 years.
	Response by SZC Co. at Deadline 3	Please see paragraph 32.1.9 in Comments on the Local Impact Report (Doc Ref. 10.2) and section 5 of the Comments on Written Representations (Doc Ref. 10.1)
	Response by East Suffolk Council at Deadline 3	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.
	Response by SZC Co. at Deadline 5	Please see Post-Hearing Note: ISH 1 – Implementation Plan (Doc Ref. 9.48).

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
SA.1.53	Applicant, ESC, SCC, WSC	<p>Sch 10, leisure etc.</p> <p>(i) Is the proviso in para 2.1.1 appropriate if the Leiston Sports Facilities are necessary?</p> <p>(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 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 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>
	Response by SZC Co. at Deadline 2	<p>(i) Please see the amended paragraph 2.1.1 of the draft Deed of Obligation (Doc Ref. 8.17(C)).</p> <p>(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 and make any amendments to paragraph 2.2 considered necessary.</p> <p>(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. The Leiston Sports Facilities are proposed in order to contribute towards</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>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 set out the destination of 100% of the Annual Maintenance Payment.</p>
	Response by East Suffolk Council at Deadline 2	<p>ESC requires the proviso to be deleted and monies paid the Council prior to Commencement</p> <p>Seemingly, the only reference to what is presumably Leiston Sport Facilities in the draft DCO is through Work No. 5 which is: "Landscape works including open space, sports facilities and associated structures and plant." The Requirements do not refer to Work No.5 at all (or generally to the totality of the works) and it therefore seems that there is no control under the DCO for the design of these works to be approved by ESC. Please can the Applicant to explain this as the s.106 agreement does refer to this control as being under Requirement 12 but it doesn't appear to be.</p> <p>ESC requires 2.3.4 be deleted so Applicant is provided with management plan but cannot hold up occupation</p> <p>Percentages awaited but provided % in 2.4.2 and 2.4.3 equals 100% then all money is allocated</p>
	Response by Suffolk County Council at Deadline 2	<p>SCC considers that ESC is the appropriate Host Authority to respond to this question. The understanding is that the sports facilities will be consented under the DCO.</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
	Response by SZC Co. at Deadline 3	ESC is correct that Leiston Sports Facilities is Work No. 5. As set out in the Applicant's previous response, Requirement 12A references Work. No. 5 and allows ESC to control the design of these works. The Applicant's approval of the management plan is considered necessary to ensure that the Leiston Sports Facilities contribute towards community integration and cohesion during the Construction Period.
	Response by East Suffolk Council at Deadline 3	(i) Now acceptable to ESC
	Response by SZC Co. at Deadline 5	No further response required.
SA.1.59	Applicant	<p>Sch 15 – Transport</p> <p>(i) Para 3.3 – the transport review group. Para 3.3.5 contemplates a tied vote. Is the chair not to have a casting vote? Does this apply to all the other groups and committees created by the s.106 agreement and if so what is the resolution process in those cases?</p> <p>(ii) How is paragraph 3.5.2 (duty to promote objectives and benefits of the Transport Management Plans) and following (paras 3.5.3 – 3.5.8) enforced? Failure to perform is unlikely to sound in damages. Would an injunction be issued (leaving aside for the moment the fact that that person given the duties is not a person bound by the s.106 agreement).</p> <p>(iii) the ExA's questions above in relation to third party involvement, the allocation of functions to persons who are not a party to the agreement and to groups, SA1.10 -1.12) are also relevant here.</p> <p>(iv) Paragraphs 4.4 and 4.9 (and potentially a paragraph in the section on Marlesford and Little Glemham – 4.13 – 4.17) have considerable discretion over the schemes to be implemented. Please will the Applicant explain how this meets the policy and legal tests?</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>(v) Para 5.2 – SZC Co to check road condition “regularly”? Please will the Applicant state how regularly? For example is it to be weekly, monthly or some other interval?</p> <p>(vi) How is para 6.1 and 6.2 a planning obligation?</p>
	Response by SZC Co. at Deadline 2	<p>(i) The decision making arrangements are subject to further consideration by the Applicant. However, it is not proposed that the chairs of the governance groups created through the Deed of Obligation shall have a casting vote.</p> <p>As shown in Figure 1 of Schedule 17 (Governance) of the draft Deed of Obligation (Doc Ref. 8.17(C)), each group save for the Delivery Steering Group is part of a hierarchy and matters which are not agreed shall be escalated upwards for determination. In the event of a dispute between the members of the Delivery Steering Group, this would be determined in accordance with Clause 8.</p> <p>(ii) Please see Appendix 26A SA.1 Response Paper in respect of enforcement of the obligations in the Deed of Obligation.</p> <p>(iii) Noted. Please see responses to SA.1.10 to 12.</p> <p>(iv) The scope of these schemes will be specified in the Deed of Obligation by reference to the description in Schedule 16 and the outline designs to be annexed to the Deed of Obligation.</p> <p>The Applicant considers that the discretion is appropriately limited. However, the Applicant intends to continue to progress the details of these schemes with the relevant parties.</p> <p style="padding-left: 40px;">The Applicant's general approach to the commitments which the Secretary of State may take into account in his determination is set out in section 10 of Appendix 26A SA.1 Response Paper.</p> <p>(v) Please see amended draft Deed of Obligation (Doc Ref. 8.17(C)).</p> <p>(vi) The Evolving Approach does not rely on whether obligations meet the tests for planning obligations in s106(1). See the Appendix 26A SA.1 Response Paper.</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
	Response by Suffolk County Council at Deadline 2	(i) As set out in SCC's answer to ExQ TT1.23, SCC proposes for the Transport Review Group for Suffolk County Council (as the local Highway Authority) to chair the group, and that the Chair would have the casting vote. This is notwithstanding SCC's acceptance that the Transport Review Group would aim to reach consensus in its decision making as suggested by the Applicant, and that the arbitration route is seen as appropriate to resolve disputes. SCC has not yet fully considered whether the same approach is appropriate across all the other groups.
	Response by SZC Co. at Deadline 3	The Applicant agrees that SCC would chair the Transport Review Group. It is not proposed that the chair would have a casting vote. This follows the approach at Hinkley Point C which the Applicant considers has worked well.
	Response by Marlesford Parish Council at Deadline 3	<p>In particular, MPC is concerned about resolving any tied vote in the Transport Review Group (which it would expect Suffolk County Council to chair). If tied matters are to be referred upwards for resolution, this potentially pushes decision making (which affects local communities), further from the grass roots. MPC asks that this be avoided and expresses its preference for tied matters in the Transport Review Group to be determined by the Chairman's casting vote. We agree with SCC's response to this question.</p> <p>We share the concern of the ExA that at this stage, the Applicant has considerable discretion over how the Marlesford and Little Glemham mitigation scheme is implemented. We note that the Applicant relies on the fact that "The scope of these schemes will be specified in the Deed of Obligation" and we would expect to be able to review the draft Deed before it is formally adopted. We will be pushing for this in our ongoing discussions with the Applicant and SCC.</p>
	Response by SZC Co. at Deadline 5	An updated draft Deed of Obligation (Doc Ref. 8.17(E)) has been submitted to the Examination and is available to be reviewed by Marlesford Parish Council. The Applicant would be willing to consider any comments of Marlesford Parish Council on Schedule 16 of the draft Deed of Obligation.

Chapter 26 - SA.1. Section 106 Agreements		
Question to:		Question:
		<p>It is proposed that an outline of the Marlesford and Little Glemham Improvement Scheme will be annexed to the Deed of Obligation. Therefore, it is intended that the scope of the Scheme will be agreed with the Councils prior to the end of the Examination.</p> <p>As set out in paragraph 4.5 of Schedule 16 of the draft Deed of Obligation (Doc Ref. 8.17(E)), Suffolk County Council shall be responsible for the further design and implementation of the Marlesford and Little Glemham Improvement Scheme. The draft details of the Marlesford and Little Glemham Improvement Scheme, as prepared and proposed by Suffolk County Council, will be approved by the Transport Review Group on a majority voting basis. Where the Transport Review Group are not able to agree the approval of these details, then this would be referred to the Delivery Steering Group who shall make the decision by agreement (i.e. including the agreement of Suffolk County Council). This follows the approach at Hinkley Point C which the Applicant considers has worked well.</p> <p>Therefore, the Applicant considers that Suffolk County Council has sufficient control over the details of the proposed Marlesford and Little Glemham Improvement Scheme.</p>
<i>The following questions relate to the draft s.106EM</i>		
SA.1.67	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 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</p>

Chapter 26 - SA.1. Section 106 Agreements		
Question to:	Question:	
		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.
Response by SZC Co. at Deadline 2		<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.</p> <p>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.</p> <p>In the event that the Applicant reverts to an approach of entering into a s106 agreement binding the small amount of land it owns on the main development site, title investigation would be a short and simple process.</p>
Response by East Suffolk Council at Deadline 2		Deed of covenant and land charge would assist with ensuring enforceability.
Response by Suffolk County Council at Deadline 2		<p>SCC draws the ExA's attention to the response to SA.1.7 and awaits title details from the Applicant.</p> <p>SCC also notes that it will not be possible for the Applicant to provide confirmation as to the execution and enforceability of the s.106 where that will not be entered into until after the grant of any DCO pursuant to the Sizewell Special Arrangements.</p>
Response by SZC Co. at Deadline 3		<p>See SA.1.3 in respect of enforcement against transferees and Article 9.</p> <p>See the Obligations Enforcement Paper, provided in Appendix 26A of this document (Doc Ref. 9.30.A), in respect of the Applicants comments on enforcement of the Deed of Obligation.</p>

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		The Deed of Obligation would be entered into prior to the end of the Examination, which the Applicant hopes provides confidence that the requested Confirmation Document will be able to provide the requested confirmations as to execution and enforceability.
	Response by East Suffolk Council at Deadline 3	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.
	Response by SZC Co. at Deadline 5	As set out in Section 2 of the Obligations Enforcement Paper (Doc Ref. 9.30.A) provided at Deadline 3, the Applicant is content that transferees should enter into a deed of adherence unless otherwise agreed by the Secretary of State. This would be secured through Article 9 of the DCO.
SA.1.68	Applicant	<p>Please will the Applicant state how a future undertaker would know 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>
	Response by SZC Co. at Deadline 2	<p>A transfer of the benefit of the DCO or any part of its powers cannot take place pursuant to art 9 of the draft 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.</p> <p>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</p>

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		respect to a planning permission, which would not be personal to named parties and therefore could be implemented by a mortgagee in possession.
	Response by East Suffolk Council at Deadline 2	Please see comments at SA1.3. Any transferee of the benefit of the DCO would be required to enter into a Deed of Covenant. The s106 agreement and DCO should be worded appropriately.
	Response by Suffolk County Council at Deadline 2	<p>SCC draws the ExA's attention to its comment at SA.1.7 and the proposal for the transferee to provide a Deed of Adherence as a pre-requisite of any transfer under Article 9.</p> <p>SCC also observes that it is proposed that the s.106 will be registered as a local land charge (which a lender/investor could then pick up, notwithstanding that these parties would not actually be bound under the Sizewell Special Arrangements unless they were a transferee under Article 9) and SCC question whether the s.111 should also be registered as a local land charge by ESC for the same reason and given the potential delay in entering into the s.106 post DCO but precommencement.</p>
	Response by SZC Co. at Deadline 3	See the response to SA.1.67.
	Response by East Suffolk Council at Deadline 3	See SA1.3 above
	Response by SZC Co. at Deadline 5	See SA.1.3 above.
SA.1.69	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 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.

Chapter 26 - SA.1. Section 106 Agreements		
	Question to:	Question:
		the Order lands (see clause 4.1). Will they be able to exercise this power in relation to all the Sites?
	Response by SZC Co. at Deadline 2	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.
	Response by East Suffolk Council at Deadline 2	ESC have general enforcement powers to enter onto land in the event of a breach of planning. SZC can only give the Council express permission for ESC to enter onto its own land. Given the above, ESC would expect all persons with a proprietary interest in the Sites to be party to the agreement.
	Response by Suffolk County Council at Deadline 2	SCC awaits the Applicant's response to question SA.1.27 before finalising its position on this question. As set out in the SCC response to SA.1.8 there are other mechanisms of enforcement which could be utilised but in any event SCC has yet to receive suitable explanation as to why at least parts of the Sites could not be bound into the s.106 before the commencement of development on those parts of the Sites even if the Applicant does not own those Sites now. SCC also highlights its request to the Applicant to consider providing bonded obligations.
	Response by SZC Co. at Deadline 3	Please see the Obligations Enforcement Paper , provided in Appendix 26A of this document (Doc Ref. 9.30.A).
	Response by East Suffolk Council at Deadline 3	See SA1.3 above
	Response by SZC Co. at Deadline 5	See SA.1.3 above.