Application by NNB Generation Company (SZC) Limited for an Order Granting Development Consent for The Sizewell C Project

The Examining Authority's (ExA) Commentary on the draft Development Consent Order (dDCO)

Issued on 03 August 2021

1. Introduction

1.1. This is the ExA's commentary for issue on 3 August 2021. It is of relevance to the Applicant and Suffolk County Council (SCC) and East Suffolk Council (ESC) (the Councils). In a number of places, we ask for their comments on specific points. The Marine Management Organisation (MMO) and Natural England (NE) will also be interested. The ExA has also expressly asked for comment from the MMO and Trinity House on specific points. Other Interested Parties are not excluded in any way. Responses and comments should be titled *"Response to the ExA's July commentary on the DCO, by [name of IP]"*. Responses are due at Deadline 7, 3 September 2021.

1.2. This commentary has been prepared following Deadline 5. In addition to making comments on the dDCO itself, it will comment on the "Other Written Submissions Responding to Actions Arising from ISH1" Doc 9.48 Revision 1.0 [REP5-113]. It will also comment on the draft Deed of Obligation (DoO) [REP5-083] and the draft Code of Construction Practice (CoCP)[REP5-079] and some other related documents. In the time available is has not yet been possible properly to assimilate all comments and submissions made on the dDCO and related documents at D5 by other parties.

1.3. The Applicant will have appreciated that the ExA is concerned in relation to the delivery of mitigation, flexibilities which the Applicant has built into the documentation, adherence to parameters and the Rochdale envelope, not exceeding predicted effects, "reasonable endeavours" and vague language. It is also concerned about the practicality of identifying documents used in regulating the Proposed Development. This is however not an exhaustive list of its concerns.

2. Other Written Submissions Responding to Actions Arising from ISH1 Doc 9.48 Revision 1.0 [REP5-113]

2.1. The ExA thanks the Applicant for this document. It welcomes the change to Requirement (Req)2 explained in paragraph (para) 1.1.1 so that matters are to be "in accordance" with the CoCP rather than in general accordance. It notes the proposed definition of "general accordance". On that point, the ExA will need to consider whether that is adequate and looks forward to reading the comments of ESC and SCC in particular.

2.2. The phrase "general accordance" and cognate expressions also appear in the CoCP and related documents. The clarification which appears in the

dDCO should, subject to the ExA's consideration noted in the last paragraph, be carried over to that suite of documents.

2.3. The ExA notes para 1.1.1 and the change to Req 8 to clarify that the temporary buildings will be in accordance with the construction parameters. However, this paragraph and the reference in Req 8 to the Construction Method Statement (CMS) illustrates well the ExA's concern about finding the regulating documents. The definition in the dDCO for the CMS says that it is "section 3.4 of Chapter (Ch) 3 of Volume (Vol) 2 of the Environmental Statement (Book 6.2)". There is no such section as 3.4 in Chapter 3. If the ExA turns back to para 1.1.1 of the Other Written Submissions document it sees the Examination Library (EL) reference given for the CMS to be [AS-202]. That however is appendices 2.2. A-D of Doc 6.13, Vol 3, Ch2. It does not appear to contain the CMS. There is a version of the CMS at [REP3-015] which is Doc 6.3, Vol 2, Ch3, Appendices 3A – 3D. The CMS is not shown in the title and it is to be found at Appendix 3D on page 38. In addition, the CMS is not listed in the index. Nor is it listed in the Navigation Document.

2.4. The Applicant will appreciate that these difficulties in tracking down the documents which are vital to the regulation of the development are not only time consuming to the ExA but will make enforcement difficult if the dDCO is made. It may also delay necessary enforcement. The ExA urges the Applicant to address not only the mis-referencing but also to consider what steps it can take to help the enforcement authorities through the opacity of the naming and findability of its documentation.

2.5. In relation to limits of deviation and parameters the ExA notes the explanations. The ExA however does not understand why the Applicant is refusing to put a statement into the dDCO that where there are parameter plans the Proposed Development shall be carried out wholly within those plans. The ExA appreciates that not all of the Proposed Development is covered by parameter plans and that there are other verbal expressions of the Rochdale envelope. They are of course welcome and necessary. But Req 11 for example allows construction in accordance with the Approved Plans or alternative designs within the parameter plans. As the ExA explained at ISH1 it is not able to compare the Approved Plans with the Parameters Plans. Further clarification is required.

2.6. In relation to the parameters plans and limits of deviation, expressly Article (Art) 4 the Applicant has helpfully drawn attention to the opening words of the Article which make it subject to the Requirements.
(A) Is the Applicant's point that the right of unlimited vertical deviation in Art 4(1)(a) is limited in the case for example of the borrow pits to a level which leaves an unsaturated zone of at least 2 metres as the CMS is imposed by Req 8?
(B) If that is the case, then should not Req 8 be amended so as to apply to all construction work?
Borrow pits do not obviously fall within the list at the opening of Req 8. The Applicant should please consider this in relation to the other examples and explanations it gives in section 1.6.

2.7. Please could the Applicant clarify the statement in para 1.6.8. It reads: "Article 4(1)(b) currently restricts the limits of deviation for Work No. 4C to no more than +/- 1m to the levels stated. Work No.s 4A and 4B do not yet have defined limits of deviation, but it is proposed to also restrict these works to a limit of deviation of +/- 1m to the stated levels" However, Art 4 gives +/- 1 metre for Work **4B**. Previously it was **4C**. It has never covered **4A**. If all three are now to be limited to +/- 1m the point is academic, but if not, please will the Applicant clarify?

2.8. The structure of control documents and subsequent approvals – Appendix A. The ExA thanks the Applicant for the explanations in this appendix. The ExA is however unclear as to how the Applicant intends that the documents of Level 2 and below are to be enforced. Whilst it is clear that Level 2 documents are to be approved by ESC, SCC, the MMO or in one case by the Ecology Working Group, unless they are already in existence at the time of the DCO (and in effect final agreed versions at the end of the Examination), are these Level 2 documents to be enforceable by ESC / SCC / MMO? (The Environmental Topic column of Table 1 is not obvious. Groups rather than topics are listed.) From the Applicant's submissions at ISH1 the ExA understood that the Subject Specific Management Plans (SSMPs) and Construction Environmental Management Plans (CEMPs) are effectively internal documents and are not for the approval by any external body. They were said to be the way the Undertaker passes down obligations which are in the CoCP. Appendix A is silent on this. Please will the Applicant make its position clear in its response to this commentary. If it is not to be ESC / SCC / MMO then please will the Applicant explain who and how, and how this is justified?

2.9. What is the position on CEMPs and other documents which flow from the CoCP and Level 2 documents? The ExA realises from section 1.5 of Other Written Submissions Responding to Actions Arising from ISH1 that CEMPs are to be prepared by contractors and other bodies. The ExA requires further explanation of the statement in para 1.5.2 that "another body [can be] responsible for the mitigation". The responsibility for delivering the mitigation for the project lies with the Undertaker. Or is the point being made that under for example the DoO the Undertaker is delivering the mitigation via a new body such as the Accommodation Working Group?

2.10. It is convenient here to raise some questions about the drafting of some of the documents, taking the Bat Mitigation Strategy as an example. It has been chosen at random by the ExA. It is not clear whether it is a Level 2 or Level 3 document. Issues on the drafting and practicality of enforcing the document are set out in Appendix A to this commentary. It was drafted in preparation for ISH1 and although some issues will have been addressed by Deadline 5, many remain.

2.11. Framework of Control and Implementation Plan: Appendix B to [REP5-113] – The ExA needs to consider this Appendix and the interaction between the reasonable endeavours obligation for the Implementation Plan and the other controls to which the Applicant refers. The ExA awaits the Applicant's D6 response on "reasonable endeavours" promised at

para 2.1.2 of [REP5-113]. Please will the Applicant include an explanation of the meaning of the phrase "reasonable endeavours" in law, referring to the relevant cases. Whilst the ExA of course has an open mind the Applicant should be in no doubt that at this stage the ExA has considerable concerns about the "reasonable endeavours" approach.

2.12. Apart from that, the ExA raises the following questions at this stage:

2.13. Para 4.1.2 the second bullet explains that the controls "would ensure that the Councils can have the confidence that the project's delivery must stay within the limits that the ES has assessed and mitigated". At ISH2 the ExA thought it heard counsel for the Applicant state that there was no legal requirement for this or for there to be no exceedance of effects assessed. Please will the Applicant clarify the submission made and its current position?

2.14. At para 4.1.8 the Applicant observes that "The principle that the construction process would need to regularly pause and seek consent" is not reasonable or acceptable to the Applicant. Why is seeking the approvals in good time not acceptable?

2.15. Para 5.1.1 The Applicant is unwilling to commit to precise dates. The ExA understands that difficulty. But the way in which developers have avoided that problem for at least three decades is to use triggers, phases and events. Is that not appropriate in this case?

2.16. Para 6.1.9 -please will the Applicant explain which provisions of the DoO would be breached in these cases?

2.17. Para 6.1.15, second bullet – the ExA does not understand why construction of the campus before the earlier of 2028 or the engagement of 7,000 workers would be financially ruinous.

2.18. The RESPONSE TO ENFORCEMENT ISSUES ARISING FROM ISH1 (Appendix C). The ExA thanks the Applicant for this Appendix relating to the DoO.

2.19. The ExA will need to take legal advice and give fuller consideration in relation to a number of the points made by the Applicant in this Appendix including the submissions on criminal liability. However, in order to move things on the ExA makes the following observations at this stage.

2.20. Injunctions and cross-undertakings in damages. The ExA's understanding is that the practice of the Courts in relation to cross-undertakings where injunctions are sought under the Town and Country Planning Act 1990 (TCPA 1990) is generally not to require them. The ExA is simply suggesting that the practice should in TCPA 1990 injunction cases should be made to apply expressly in this very large project. Please will the Applicant and the Councils consider this.

2.21. The ExA notes that in the D5 version of the dDCO (Revision 5) the provision of Clause 9(5)(b) that "the Deed of Obligation completed pursuant to this Order, and any variations to it at the date of transfer or grant, shall be enforceable against the transferee or lessee as they would against the transferor" has been deleted and replaced by a procedure needing a deed of adherence. The stated intention of the Applicant when it put forward the DoO was to make the DoO apply to the undertaker, just like the DCO. It is to run with the DCO rather than "with the land".

Accordingly, the ExA strongly suggests a return to the original wording rather than adding the need for another action – the execution of a deed. The ExA also does not see a justification for the "save to the extent" wording, giving the SofS the ability to relieve a transferee undertaker of the obligations in the DoO. No such option is available if the deed were a conventional s106 agreement; no such option is available in the case of any provisions of the DCO. The ExA's comment applies also to the "unless otherwise agreed" provisions of the DoO in clause 4.5. There are consequential effects to Clause 8.10 of the DoO.

2.22. The ExA notes the point made at para 5.5 in Appendix C in relation to the position of ENGL, National Grid and Network Rail and will consider it.

2.23. Bonds – the Applicant states at para 7.3 that if the Undertaker had failed financially the project would cease and the triggers for further payment would not arise. This is not the case in at least the matter of the Fen Meadow Contingency Fund, in fact in that case the trigger would be more likely to occur. Please will the Applicant and the Councils give consideration whether there are any other exceptions to the Applicant's para 7.3 statement to what would be appropriate in those cases and the case of the Fen Meadow Contingency Fund.

3. Comments on the dDCO, Revision 5 [REP5-030]

3.1. These comments are made using the track changes version, and references to page numbers are accordingly to that version. There may be other comments made in due course as the ExA gives further consideration to the dDCO. The comments focus on the changes between Revisions 4 and 5.

3.2. Definitions – the name of EDF Nuclear Generation Ltd has been amended by the addition of "Energy" after EDF. Whilst this is no doubt simply a correction, please will the Councils check that throughout the DoO the correct entities are correctly described, not only as to their names but also as to registered offices and company registration numbers.

3.3. Art 9 – see comments above.

3.4. Arts 9A and 9B – please will the Council's comment.

3.5. Art 53 – the ExA will, in view of its comments at ISH1 and the Applicant's response during ISH7, consider these amendments carefully.

3.6. Sch 1, Work No. 13. Is it really correct to move the words "The location of the above works is shown on sheet no. 23 of the Works Plans" above the description of the FMF, even if it is below the words "Work No. 13"? That is not the layout adopted elsewhere in Sch 1.

3.7. Sch 2, para 1(4) – meaning of "general accordance";

3.7.1. Please will the Councils comment?

3.7.2. Should not the clarification be carried into the CoCP and other level 1, 2 and below documents?

3.8. Sch 2 para 1(3) – Please will the Applicant comment on the case of <u>R v. Bromley ex p Barker</u> [2001] EWCA Civ 1766 in this context. Would it be right and safe to draw support for the Applicant's approach from the judgment of Lord Hope at paragraphs 19 (the quotations from the CJEU decision paras 100 and 102); 22, the last sentence and 23 "Conditions

designed to ensure that the project remains strictly within the scope of that assessment will minimise the risk that those effects will not be identifiable until the stage when approval is sought for reserved matters"?

3.9. Should not para 1(3) be expressly carried over to similar provisions in other documents regulating the development pursuant to the Application - the DoO, CoCP and other Level 1, 2 and 3 documents?

3.10. Req 14. Why can the landscape and ecology scheme not be submitted earlier than commencement of operation of Unit 1 or 2? As drafted, a least six months of growing is lost.

3.11. Req 14C – there is no definition of marsh harrier compensation land.

3.12. Req 18. Why is Work No. 4A(c) excepted from the need to comply with the plans in Sch 7?

3.13. Sch 22 – certified documents – the Deed of Obligation; the current revision no. is 6 whereas 2 is stated in the schedule. However, should not the executed version be certified? In the case of execution in counterparts all the execution pages would be certified. The ExA is not encouraging execution in counterpart – with only three parties a single document or perhaps triplicates should suffice.

3.13.1. Why has the Rail Noise mitigation strategy been deleted?

4. The Deed of Obligation

4.1. The ExA notes the submissions in Appendix C of Other Written Submissions Responding to Actions Arising from ISH1. For the present it makes the following comments and observations on the deed Revision 6.0 submitted at D5 [REP5-082]. As before these are made on the tracked version [REP5-083] and any epage numbers given are the numbers in that version.

4.2. The ExA notes the changes to the recitals. What is the purpose of the split between the Planning Inspectorate and the Secretary of State in revised recital (A)? Section 37(8) of the 2008 Act says that applications are made to the SofS.

4.3. Does the definition of Councils need to extend to West Suffolk Council? The ExA notes that SCC is exercising its functions which may be enough.

4.4. As with the dDCO please will the Councils be alert to the naming of companies and other entities and ensure the details are correct.

4.5. Indexation, clause 10. Please explain the reason for the inclusion of the phrase "(where the Index at Payment Date / Index at today's date is equal to or greater than one (1)).

4.6. Third parties and the deed of covenant. Clause 15 and Annex [•] (epage 111). The ExA has some concerns that whilst this is desirable from the point of view of ensuring participation in the various governance bodies in the case of payments it is imposing administrative and accounting obligations which have not been negotiated with the recipients. They may turn out to be onerous in the case particularly of smaller recipients or administratively incompatible. It notes however the provisions of Clause 15.3. The ExA can see the desirability of ring-fencing the payments so that they are used for the purpose for which they are paid. And the ExA

can see that the duty in the deed of covenant to repay unused funds is an incentive to ensure that. But if a payment is repaid that would surely mean that the mitigation is not delivered. (A) Please will the Applicant and Councils reflect on the repayment obligation. (B) If clause 15.3.3(a) – alternative arrangements for the relevant mitigation – is engaged should there not be a covenant by the relevant Council to deliver the mitigation? (C) Please will the Applicant and Councils confirm that quorum and voting arrangements have been adjusted to deal with the possibility that a body which is to participate in a governing body declines to enter into the deed. (D) The ExA also observes that the donee / participating body needs to be added to the execution provisions on epages 114 and 115.

4.7. Clause 20 and Approvals. Where in the deed is the equivalent of the dDCO Sch 2 para 1(3) applied to approvals?

4.8. Sch 1, para 4 – unspent contributions. The comments of the ExA on the third-party deed of covenant apply also here.

4.9. Schedules 3-17. Comments will be made separately on the substance and form of these schedules.

4.10. Annexes. The ExA thanks the Applicant for adding text to some of the formerly blank annexes.

4.10.1. Please will the MMO comment on the Marine Technical Forum terms of reference at epage 135. The ExA notes this is a pre-existing document from 2015 and presumes it is operative at the moment. But please indicate if that is not the case.

4.10.2. There are many blanks however and the ExA is concerned that the DoO, which sits with equal status to the DCO as part of the suite of primary documents regulating the proposed development and delivering mitigation, has some way to go, with a busy examination timetable ahead.

5. The Code of Construction Practice

5.1. A revised CoCP [REP5-079] was issued at Deadline 5 and the ExA notes that it has been tightened up and a number of amendments have been made which appear to respond to some of its comments made at ISH1. The ExA drafted a note on the CoCP in preparation for ISH1. It was obviously on the basis of Revision 3 of the CoCP [REP2-057]. Some of the points in it will have been addressed by Revision 3 [REP5-079]. However, there was not time at ISH1 to go through all the ExA’s concerns. The note is attached at Appendix B to this commentary and the Applicant is requested to consider it and to amend the CoCP in the light of it. There may be points which have subsequently been dealt with (for example the issue about the applicability of the oLEMP to the entire development) or with which the Applicant disagrees. It would be helpful if the next revision of the CoCP could be accompanied by a brief note explaining the purpose of the changes which were made between Revision 3 and 4, likewise for changes from Revision 4 to 5 and the reasons why any of the ExA’s comments in the note are rejected

5.2. In relation to the changes effected by Revision 4, the ExA would like to know the Councils' and (in relation to marine matters) the MMO's views on them. To save the need for multiple documents and exchanges please will the Applicant, the Councils and the MMO submit a Statement of Common Ground on the CoCP. It may be possible for that to address the next revision and for it and the SoCG to be submitted simultaneously. The ExA requests the next version of the CoCP and the SoCG at Deadline 7.

5.3. The ExA has read Revision 4 quickly and has some comments and questions on it which are set out below. They cannot address the substantive detail. Comments on that will, if necessary, be made in due course.

5.3.1. Applicant, Councils – objectives – para 2.3.2 says the CoCP measure must be implemented in "a way which aims to ensure the project minimises its adverse environmental impacts". There is wording elsewhere in the regulatory suite of documents which refers to the aim of (to paraphrase) ensuring effects are no worse than residual impacts. Would this be more appropriate?

5.3.2. Applicant, Councils – Monitoring – para 2.4.10 says monitoring will be look at the effectiveness of measures in the "CoCP and related construction controls". Could it be clarified that this includes and extends to all of the Level 1, 2 and 3 documents?

5.3.3. Applicant, Councils – There are many references to the draft DCO and draft DoO. The Applicant will of course need to update these to simply the made and executed versions before the end of the examination.

5.3.4. Applicant, Councils – Part B Appendix A Monitoring – aquatic invertebrates and fish. Why have the criteria for success been removed?

The Examining Authority

Appendix A

The Bat Mitigation Strategy – [APP-252] A sample route to find mitigation and how it is enforced. The ExA has chosen this document at random among the ecological mitigation.

1 Begin at e-page 36, para 14.4.7 of the ES [AS-033], bullet at the bottom of the page:
"A Bat Mitigation Strategy (Appendix 14C1A of this volume) has been provided as part of this ES (Doc Ref. Book 6) as well as a draft Bat Method Statement (Appendix 14C1B of this volume)."
2 The CoCP , originally [REP2-057] Table 6.1 at epage 79 that there are bat protection measures. Among these "Trees containing bat roosts will felled under a Natural England licence in accordance with the Bat Mitigation Strategy provided in Appendix 14C1A of Volume 2 of the ES (Doc Ref. 6.3) [APP-252]". **Q.1 Is the strategy a document which must be followed in order to comply with Req2, or is it something else**?
3 The CoCP must be followed – Req 2 "The construction, removal and reinstatement of the authorised development must be carried out in accordance with the Code of Construction Practice, unless otherwise approved by East Suffolk Council".
4 The reader turns to the Bat Mitigation Strategy at [APP-252]. That is part of a 474 page document containing mitigation strategies for several species, including bats. At para 1.1.3 of the Bat Mitigation Strategy (e-page 7) we read: "This document has been drafted to form part of the Development Consent Order (DCO) submission. This document will be subject to future updates prior to and during each phase of the proposed development to ensure the recommended mitigation remains relevant".
5 **Q.2 How is the updating to be regulated?** The ExA cannot see any part of the dDCO obliges the Undertaker to obtain the approval of the local planning authority, nor any obligation to review during each phase.
6 Para 1.1.4 on the same e-page states that the strategy must be read alongside three other documents. They are
• Arcadis. 2020. Sizewell C Project, main development site, Environmental Statement. Chapter 14.21 Bats.
• Arcadis. 2020. Sizewell C Project, main development site, Ecology Technical Appendix 14A8 Bats (in draft); and
• Arcadis. 2020. Sizewell C Project, main development site, Bat Non-licensed Method Statement (in draft).
7 Apart from the reference in the second bullet to Appendix 14A8, none of these documents is referenced in the Applicant's numbering system for the application documents. **Q.3 What are the other two documents and where are they to be found?**
8 The reader turns to the navigation document (Book 1, 1.3 Rev 6.0. [AS-283]) page 42 where Appendix 14A8 is listed. It is in five parts, [APP-242] – [APP-246]. Opening [APP-242] yields a 560 page document.

The actual appendix, leaving aside the annexes, is only 77 pages long. The executive summary states that the appendix is to describe the bat baseline. It appears to be a finished, not draft document as stated in the para 1.1.4 bullet point. It is not attributed to Arcadis, as stated in the bullet, but as it is clearly document "Appendix 14A8 Bats" it seems safe to treat it and the supporting data in [APP-243] – [APP-246] as the document referred to in the bullet.

9 **Q.4 What of the other two documents listed in the Bat Mitigation Strategy at [APP-252]?** There is no Chapter 14.21 in the environmental statement. The ExA can find one reference to a "Bat Non-licensed Method Statement" in the Bat Mitigation Strategy, at Table 1.2 which states that a specification for bat boxes is to be found in it. Locating the Bat Non-licensed Method Statement is important.

10 The reader returns to the Bat Mitigation Strategy [APP-252]. It is to be used by the consultant ecologist, SZC Co (presumably this should read "the Undertaker") and any relevant subcontractors (para 1.1.2). Reference is again made to Appendix 14A8 the results of which and the subsequent assessment are explained by para 1.2.2 to be areas of key importance, are presented in Figure 14C1.1. In the list of figures in the index (on e-page 5) there are 14 figures, but they do not include a Figure 14C1.1. **Q.5 Where is Figure 14C1.1?**

11 Section 1.6, at e-page 16 of the Bat Mitigation Strategy [APP-252] explains the Mitigation and Enhancement Proposals. After first referring the reader to the "non-licensed Reasonable Avoidance Measures Method Statement presented in SZC Ecology Technical Appendix 14A8 Bats" (which it will be noted is a different title from the "Bat Non-licensed Method Statement" **– Q.6 is it the same document?**), it is stated that Table 2 shows "the proposed Construction and Operational Phases in relation to bat mitigation and includes both primary and tertiary mitigation measures". There is no Table 2 in the Bat Mitigation Strategy. A word search of [APP-242] which is Part 1 of Appendix 14A8 does not yield a Reasonable Avoidance Measures Method Statement. Nor does reading the index of the documents in the Appendix group, set out at the opening of [APP-242].

12 Table 2 of the Bat Mitigation Strategy is stated by para 1.6.2 to include the primary and tertiary mitigation measures. Para 14.13.516 of the ES [AS-033] states that there are no secondary mitigation measures so that is to be expected. That paragraph also states that full details of the mitigation measures for bats are provided in the Bat Mitigation Strategy, Appendix 14C1A (which is within [APP-252]).

13 Reading Table 1.2 of the Bat Mitigation Strategy [APP-252] turns up a number of references to a "non-licensed method statement". A word search in Appendix 14C [APP-252], which is the Protected Species mitigation strategies, and is not Appendix 14A8, for "non-licensed method" does take the reader to para 1.2.1 of a "Bat Method Statement" (e-page 45 of [APP-252]. It will be seen that the cross-references are incorrect. The titles and terminology are inconsistent. The "non-licensed Reasonable Avoidance Measures Method Statement" is not in Appendix

14A8; it is in Appendix 14C; it is also known as the "non-licensed method statement" and as the "Bat Method Statement". It is not obviously the "Arcadis. 2020. Sizewell C Project, main development site, Bat Non-licensed Method Statement (in draft)" listed at para 1.1.4 of the Bat Mitigation Strategy.

14 The language of Table 1.2 is, on occasions, tentative. It states that measures are "proposed". For example: "It is proposed that for every tree with medium or high roosting potential which is to be lost (this will be minimised through micro-siting), a minimum of one bat box will be erected", and "As it is not possible to accurately estimate the likelihood of roost abandonment, it is proposed to provide precautionary mitigation including the provision of a bat house (or comparable mitigation within an existing structure) likely to be at Lower Abbey Farm". The ExA expects that the intention is not to seek approval of a proposal but that this is a firm commitment, but in documentation which creates criminal liability (whether under the DCO or a bat licence) the language should be clear.

15 There are other examples of tentative language. For example: "In the event of confirmed bat roosts being lost, subject to further agreement with Natural England the following ratios for roost re-provision may be appropriate:" (italics added). **Q.7 How are the correct ratios to be determined? Cannot the appropriate ratios be stated now? If not, why not?**

16 Turning to the tentative ratios which are:

- 1:1 potential roosting features
- 2:1 low status roost of common species
- 4:1 maternity roosts of common species
- 4:1 low status roost of Annex 2 species

Q.8 please will the Applicant clarify which figure is the loss and which is the re-provision.

13 The Bat Method Statement. Now that this document has been located (Appendix 14C.1B, to be found at e-page 36 of Appendix 14C, [APP-252], **Q.7 how is it secured and enforced?** The Bat Mitigation Strategy para 1.6.2 refers to "the non-licensed Reasonable Avoidance Measures Method Statement" as giving "further details" of the main proposals contained in the Bat Mitigation Strategy. Given the terminological confusion, the ExA suggests that the Bat Method Statement is specifically referenced in the CoCP. This would also put beyond doubt any concern as to whether or not the Bat Method Statement is part of the Bat Mitigation Strategy by giving it equal status.

14 **Q.9 Is the Bat Mitigation Strategy actually secured by the CoCP?** A word search for it returns only one reference to it in the CoCP. This is in Table 6.1 on e-page 73 of [AS-273] where it is stated that: "Trees containing bat roosts will felled under a Natural England licence in accordance with the Bat Mitigation Strategy provided in Appendix 14C1A of Volume 2 of the ES (Doc Ref. 6.3) [APP-252]". This is limited to tree felling. Unless there are other ways in which it has been incorporated into the CoCP, the Bat Mitigation Strategy will have been neither secured nor

given effect, except in relation to tree felling, and then only on the Main Development Site.

15 Language of the CoCP. In some cases this is conditional, rather than imperative. For example in Table 6.1 we read "Appointment of an Ecological Clerk of Works (ECoW) who would be an experienced ecologist, or similarly competent person, responsible for overseeing on-site ecological mitigation … ". (Italics added.) This is in contrast to "Toolbox talks and briefings will be held … " in the following line. (Again, italics added.) Statutory drafting convention is now that "must" should be used for imperatives, though many lawyers have been content with "shall" for some considerable time. There is also a view that "will" is an expression of hope. **Q.10 How does the Applicant propose to address these language issues across the suite of Level 1, Level 2 and below documents?**

16 The Applicant will see that documents referred to are difficult to find, inconsistently referred to, that it is not clear by whom they are to be enforced or how. The ExA has not conducted reviews to the same level of intensity on all the documents, but it is concerned that these examples, whether in the Bat Mitigation Strategy or elsewhere in the suite of regulatory documents they may undermine the enforceability and effectiveness of the documents and the mitigation they help to deliver.

Appendix B

Securing mitigation – issues in the Code of Construction Practice.

1. Req 2 makes it an obligation to comply with the CoCP in the construction of the authorised development and the removal and reinstatement of temporary works (unless otherwise approved by ESC). This is a project-wide obligation.
2. The CoCP (Doc 8.11) was updated at D2 with Revision 3 [REP2-057]. This note takes into account the changes made by Revision 3, using the tracked changes version. E-page numbers are accordingly to that version. Normally this note uses paragraph and table numbers.
3. The CoCP is in three parts, A, B and C relating to the whole project, main development site and associated sites respectively. Paper page numbering restarts at 1 for each part. The ExA does not use the paper numbering. The CoCP is designated in the ES as Tertiary mitigation, being controls applied by other legislation and normal industry practice.

   Part A – project wide

4. In relation to part A there are no changes between Revision 2 and 3 which are of significance to this note.
5. Each part has its own introduction. In the part A executive summary we read that: "*The aim of this CoCP is to provide a clear and consistent approach to the control of Sizewell C construction activities on the main development site and the associated development sites, to minimise impacts on people and the environment.*" The same formulation is used for parts B and C.
6. We learn at para 2.2.3 that: "This CoCP also requires a number of subsequent plans and documents to be prepared during the construction process, setting out further details of how additional mitigation measures would be applied during the construction phase. Where such details are set out, the CoCP details who would prepare such details, along with the securing mechanism proposed."
7. The ExA is not clear that this has in fact been done, or at least not in all cases. There is no indication for example of how the Two Village Bypass oLEMP nor the Sizewell Link Road oLEMP are secured, nor how they are implemented. There are similar concerns in relation to the overall oLEMP. All three oLEMPs are listed in the CoCP so para 2.2.3 ought to apply to them. Other documents are listed at para 2.3.13 of Par A, para 1.4.1 of Part B and 1.2.1 of Part C. The Applicant is asked to give the details of the Reqs or other mechanisms which are used.
8. Para 2.3.4 explains that there will be further details in subject specific management plans (SSMPs). The ExA has not been able to locate how these will be prepared and approved, nor by whom they will be approved. Word searches in the dDCO for "subject specific" and "subject specific management plans" return no results.
9. The CoCP does not appear to have further details. Plate 2.1 suggests they flow from the Environmental Management and Monitoring Plan. Is that the Terrestrial Ecology Monitoring and Mitigation Plan (TEMMP) which is obligated by Req 4? If it is, will it deal with the production and approval of SSMPs nor the subjects to be covered. The Terrestrial Ecology Monitoring and Mitigation

Plan only appears in Req 4 and is not defined. Is it meant to be [REP1-016]? Why is it not referenced in the D2 revision of the dDCO? Is document [REP2-016] agreed by Natural England and the host authorities? A word search of Document [REP2-016] does not return any results for "subject specific management plan" nor for "SSMP".

10. This is important for a number of reasons and particularly that the contractors "will use the SSMPs and other project requirements provided to them to produce their CEMP" (Part A para 2.3.5).
11. Para 2.3.8 states that "The documents will be produced, reviewed and approved by SZC Co". For SZC to do all three sounds pointless. Presumably it is only the review and approval function which is with SZC. Please will the Applicant confirm. However, is that appropriate? The Applicant would appear by that to be setting its own regulatory standards.
12. The SSMPs may change with the project – para 2.3.12. How will ESC know what the changes are so that they can ensure they are complied with? How can ESC approve the changes?
13. There appears to be more self-setting of standards in relation to environmental monitoring reports which are mandated by para 2.3.10; they are to be "in line with SZC Co's requirements". What are those requirements? Are they appropriate and suitably rigorous? Would it not be better for monitoring reports to be submitted to ESC and publicly available? Similarly, there are to be event-based checks following significant events such as heavy rainfall or high winds, complaints, a non-compliance report or exceedance in monitoring results. Whilst these are valuable, how is the enforcing authority to know of the relevant event, check and result?
14. It is noted that a number of plans are to be secured by s.106 obligations (Revision 2) or the draft Deed of Obligation (Revision 3). A separate discussion is under way in the examination on the appropriateness of a separate contractual agreement.

<u>Part B – Main development site</u>

15. The Ecological Clerk of Works (ECoW), Table 6.1 and elsewhere. The ExA asked in ExQ1s what would be the powers of the ECoW. In particular, would the ECoW have the power to halt work? The functions of the ECoW listed in Table 6.1 include: "overseeing on-site ecological mitigation and ensuring that the ecological measures in this CoCP are implemented"; "ECoW will advise and assist the contractor in avoiding, minimising and mitigating adverse ecological effects"; overseeing the Installation of overhead lines above the SSSI "to ensure impacts on retained habitats are minimised"; overseeing coastal defence works to ensure appropriate layers, i.e. (sic) those likely to include seedbanks are safeguarded"; to advise on appropriate courses of action to protect badgers, natterjack toads, reptiles, otters, water voles, newts; and so on. Many of these functions involve judgment calls on matters which are not necessarily mandated by law but are desirable. The ES specifically calls in aid the ECoW as mitigation.
16. However the powers of the ECoW are, by line 1 of Table 6.1, limited to matters which are a breach of the law. The table states: "*Where the ECoW disagrees with works being undertaken by the contractor, which could lead to*

a breach in the CoCP, or DCO Requirement, or measures detailed in the ES, or a protected species licence, the ECoW will inform SZC Co. or the SZC Co. Environment Manager immediately. On advice of the ECoW, the SZC Co. Environment Manager may halt the works or parts thereof".

17. Breaches of the law are matters the contractors (and the Undertaker) ought to be avoiding of their own volition. The ECoW appears to be simply a policeman. The ECoW cannot stop the works even for breaches of the law. That decision lies elsewhere, with SZC Co (or presumably with the Undertaker at the time). The matters involving the application of judgment, discretion and good practice but which are not unlawful, are not ones where the ECoW has any power. The ECoW is therefore not an agent of mitigation, but a monitor.
18. Para 6.2.2 – mitigation at the Sizewell Marshes SSSI to be agreed with local site managers. What if they won't agree?
19. Responsibility for monitoring – para 6.2.4 distinguishes between monitoring which is the responsibility of the undertaker (or SZC Co as the Applicant says) and the contractor. It should be understood that the whole responsibility is with the undertaker. The CoCP is telling the contractor what the undertake expects it to do. A breach by the contractor will be just as much a breach by the undertaker and the CoCP should not seek to change that.
20. Standard of duty. There are several references which qualify the duty by making it "where feasible and practical" (e.g.Table 9.1 row 2, soils, table 12.1, Piling and UXO detonation) or simply "practical". These qualifications could come into play for a wide range of avoidable reasons. For example, if the right machinery is not ordered in time, then to perform the task to standard may not be feasible or practical. But the failure to procure the machine should not be an excuse. Is this watering down of the standard really appropriate? In Table 12.1 we see that the 5m bund is not to be altered "where possible". Are not precautions to be put in place if it is altered? How is it appropriate to alter a defence?
21. "Measures contained in relevant Defra and Environment Agency best practice guidance on the control and removal of invasive weed species will be implemented where appropriate." Table 9.1 e-page 85. Why would they not be appropriate?
22. Watching brief, Table 11.1, row 2. What action is taken as a result of what is observed? There are many instances of monitoring but without any action to be taken on the basis of what is observed. No thresholds, no tests.
23. Marine environment and the conditions of the DML. Para 12.1.3 gives examples, but does not say which conditions on the DML relate to them. Please say which they are.
24. Table 12.1 – Piling and UXO detonation, the references to feasibility should not water down the maxima which have been assessed by the ES.
25. Greenhouse gas emissions – para 14.1.2 "*The contractors will be required to specify measures to reduce greenhouse gases from construction activities, such as*: … ". The use of "such as" means none of the six measures which are listed is obligatory. The contractor can pick and choose.

26. The Freshwater Fish and Aquatic Invertebrates Mitigation Strategy at Part B Appendix A
    26.1. Para 5.1.6 – should the ref be to para 5.1.1. and 5.1.2?
    26.2. Section 7 – criteria for success – what is Natural England's view on this?

<u>Part C Associated sites</u>

27. At para 1.2.1 the ref to the oLEMP – but not the TVB and SLR oLEMPS – has been removed from the list of relevant EMS and Plans. Given that from its introduction, para 1.1.1 the oLEMP [APP-588] is supposed to be project-wide, can this be right?
28. Headings in section 6.1 (overview) are not giving clarity. Is the first heading – (i) - is needed; what does it achieve, especially as it is not referenced in the previous para (this info is probably the ecological measures which are outside the CoCP) and there is no section (ii). Instead we go to section (a). Would it be clearer to refer to paras 6.1.2 - 6.1.4 in para 6.1.1.
29. Historic environment,
    29.1. tertiary mitigation. It is said that none have been identified. But the ES chapters all say the CoCP is tertiary mitigation. Please explain what is the status of the "Additional Mitigation, Monitoring and Management" in the Primary, Secondary, Tertiary classification we find at para 8.2. This is a question which goes across the whole suite of the CoCP.
    29.2. Para refers to measures to be secured by reqts, including that it will be an Archaeological Contractor which does the archaeological fieldwork. That is not yet in Req 3.
30. Table 9.1: Control measures to mitigate soils and agriculture impacts – line 3 "*Measures contained in relevant Defra and Environment Agency best practice guidance on the control and removal of invasive weed species will be implemented where appropriate*." How could they not be appropriate?
31. Table 10.1 Control measures to mitigate impacts on geology, soils and land contamination – "*If unidentified contamination is encountered, works will be temporarily suspended in the area and appropriate investigations and remediation will be discussed and agreed with stakeholder*s … ". What if they disagree?
32. Table 11.1: Control measures to mitigate groundwater and surface water impacts, row 7 "*Construction works for activities within or adjacent to surface water flood routes / zones <u>should</u>*
    employ weather monitoring". <u>Will</u> they? An extreme example of conditional language. Same problem in Row 11.
33. Language. The CoCP is a regulatory document, breach of which gives rise to criminal sanctions. Some aspects are clearly set out as obligations, using the word "shall". There are also a number of uses of "will". However, there are many instances of "would", sometimes there is "should" and there is even an "is to" and the odd "could". These words are conditional. There are evidently several draftspersons at work on the document. The ExA expects that in most cases the words used should be imperative, that is to say "shall". The convention is that where a different word is used, that is for a reason. The

ExA suggests that the Applicant standardises the obligatory matters with "shall".

34. Standards. In part C at Table 6.1 line 6 – nesting birds – we read that "*The removal of scrub and trees and ground clearance works will generally be undertaken outside of the breeding bird season*". The line goes on to say what will happen when removal is outside the nesting season and prescribes an "estimated 10 metre standoff" within works must cease. Can more precision and criteria be given for the standoff? Also, the ExA questions whether "generally" is appropriate here. In a prescriptive document (which is forward looking to what ought to be done), as opposed to a review document (which looks backwards at what has been done) generally is of little help in setting the standard.

Overall

35. It is not clear how some subsidiary documents are required or are created. Nor is there a clear external approval process. For example it is not clear how the Two Village Bypass oLEMP, the Sizewell Link Road oLEMP are secured, nor how they are implemented. There are similar concerns in relation to the overall oLEMP (on which see the separate note on securing mitigation issues in the oLEMP). All three oLEMPs are listed in the CoCP so para 2.2.3 of Part A ought to apply to them. Other documents are listed at para 2.3.13 of Part A, para 1.4.1 of Part B and 1.2.1 of Part C. Are there adequate mechanisms securing these; the Applicant is asked to give the details of the Reqs or other mechanisms which are used.
36. There are similar concerns about SSMPs. This is important for a number of reasons and particularly that the contractors "will use the SSMPs and other project requirements provided to them to produce their CEMP" (Part A para 2.3.5).
37. In many cases the Applicant appears to be setting its own regulatory standards, and for there to be no external scrutiny.
38. Provisions for revision of the documents required by or deriving from the CoCP appear to exclude ESC, and it is difficult for ESC to tell whether the triggers for revision have occurred and whether revisions have occurred.
39. These and other aspects will make enforcement of req 2 – that the CoCP is complied with – difficult.
40. The ECoWs enforceable powers are limited to breaches of the DCO, requirements and the CoCP, measures detailed in the ES or protected species licences. These are all breaches of the law (subject on to the assumption that the Applicant has successfully translated all the measures in the ES into requirements, Articles of the DCO, the CoCP and its subsidiary documents being correct, as it should be) and there are already enforcement mechanisms for that. However the ECoW's power is simply to alert SZC (who may themselves be a perpetrator of the breach). The ECoW cannot halt work. The ECoW's judgment calls and advice cannot be enforced if they are ignored. Given that these powers are part of mitigation, this needs to be addressed. As it stands, the ECoW is therefore not an agent to deliver mitigation, but a monitor.

41. Many duties are diluted by references to practicality, feasibility, appropriateness and other qualifications. Many things go to practicability and these qualifications, and they include human error, and failure to plan ahead. In principle, mitigation is required, come what may, or environmental effects will be worse than what is concluded in the ES. It is difficult to see that the qualifications are appropriate.
42. Similarly, some standards are vague, as in the case of the discovery of nesting birds.
43. Monitoring and watching briefs. It is rare for the CoCP to specify what is to be done if the monitoring reveals failures. This should be remedied.
44. Some measures require the agreement of stakeholders or landowners. But what is to happen if they do not consent? The environmental effect will not be mitigated and the ES – which relies on tertiary mitigation of which the CoCP is an important part – will have incorrect conclusions.
45. Identity. The CoCP identifies SZC Co as the person with overall responsibility for compliance. However, the DCO can be transferred to another person. The references to SZC Co should surely all be to the undertaker.
46. Language. Mitigation duties are often expressed in conditional rather than imperative language. The ExA has made observations about this in other commentary on documents in the suite of regulatory documentation. These documents create criminal liability, so the language needs to be clear. "Should", "could" and "would" are inappropriate. They are used inconsistently. In most cases they ought to be replaced with "shall" or "must".