

The Sizewell C Project, Ref. EN010012

**Response to the ExA's second commentary on the draft DCO [PD-042]
issued on 9 September 2021, by Suffolk County Council**

Suffolk County Council Registration ID Number: 20026012

Deadline 8

24 September 2021

Response to the ExA's commentary on the draft DCO [PD-042], by Suffolk County Council

Paragraph	ExA comment	SCC's reply												
2.A Reasonable endeavours in the DoO														
1	Dealing first with the DoO, Sch 9 para 2 states that "With effect from the Commencement Date, SZC Co shall use reasonable endeavours to carry out and complete the Key Environmental Mitigation in accordance with the Implementation Plan. The ExA notes that the Implementation Plan itself is only indicative.	SCC notes the ExA's observations and shares the same concerns. Additionally, we also have concerns that a 'reasonable endeavours' provision on its own would weaken certainty in the effectiveness of any framework of controls.												
2	The Questions of Control Appendix to [REP5-113] asserts there is "a comprehensive framework of controls that 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" and "a comprehensive framework of controls that 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".													
3	<p>The ExA is having difficulty seeing where this is. In the table below the ExA lists the Key Environmental Mitigation and Accommodation Campus and whether it has identified controls apart from the RE obligation. This is based on a word search for the relevant items.</p> <p>Table 1</p> <table border="1"> <thead> <tr> <th>Item of Key Environmental Mitigation</th><th>DCO</th><th>DoO</th></tr> </thead> <tbody> <tr> <td>Project Accommodation</td><td>Nothing</td><td>Nothing</td></tr> <tr> <td>Permanent Beach Landing Facility</td><td>No compulsion</td><td>No compulsion</td></tr> <tr> <td>Fen Meadow Works</td><td>Reqt 14A - No vegetation clearance on the SSSI till the fen meadow plans (including an</td><td>Provisions requiring payment of the Fen Meadow Compensation Fund if inadequate</td></tr> </tbody> </table>	Item of Key Environmental Mitigation	DCO	DoO	Project Accommodation	Nothing	Nothing	Permanent Beach Landing Facility	No compulsion	No compulsion	Fen Meadow Works	Reqt 14A - No vegetation clearance on the SSSI till the fen meadow plans (including an	Provisions requiring payment of the Fen Meadow Compensation Fund if inadequate	<p>SCC notes the ExA's observations and agrees that all mitigation measures listed in the table should have targets in the implementation plan and also longstop dates secured in an appropriate certified document under Schedule 22.</p> <p>We're currently in the process of negotiating these with the Applicant and hope to make progress. We will update the ExA at Deadline 10 on any areas of disagreement.</p>
Item of Key Environmental Mitigation	DCO	DoO												
Project Accommodation	Nothing	Nothing												
Permanent Beach Landing Facility	No compulsion	No compulsion												
Fen Meadow Works	Reqt 14A - No vegetation clearance on the SSSI till the fen meadow plans (including an	Provisions requiring payment of the Fen Meadow Compensation Fund if inadequate												

		implementation timetable) have been approved, and a requirement to carry out the works in accordance with the approved plan. So +ve obligation to deliver	delivery of Fen Meadow		
	Marsh Harrier Habitat Improvement Works	Reqt 15 – No commencement of Wk No.1A till a marsh harrier implementation plan for establishment of marsh harrier compensation land (including an implementation timetable) have been approved, and a requirement to carry out the works in accordance with the approved plan. So +ve obligation to deliver1	Not obviously		
	Green Rail Route	No compulsion	No compulsion		
	Freight Management Facility	No compulsion	No compulsion		
	Park and Rides	No compulsion	No compulsion		

	<table> <tr> <td>Sizewell Link Road</td><td>No compulsion</td><td>No compulsion</td></tr> <tr> <td>Yoxford Roundabout</td><td>No compulsion</td><td>No compulsion</td></tr> <tr> <td>Works Nos.15, 16 and 17</td><td>No compulsion</td><td>No compulsion</td></tr> <tr> <td>Accommodation Campus</td><td>Nothing</td><td>Nothing</td></tr> <tr> <td>LEEIE caravan park</td><td>Nothing</td><td>Nothing</td></tr> <tr> <td>Employment and Skills (Sch 7, para 2.1.6(c))</td><td>Nothing</td><td>Nothing</td></tr> </table> <p>This review was carried out by a word search of the words in the first column, so there may be measures after all. It is also possible that for example an obligation to achieve a modal split will necessitate the construction of the Green Rail Route. But leaving that indirect enforcement aside, the only elements of Key Environmental Mitigation which are compelled are the Fen Meadow and the Marsh Harrier compensation. Also, modal splits are difficult to monitor and control and a more readily identifiable construction threshold would be more easily enforced.</p> <p>In relation to the marsh harrier compensation land the ExA notes that there was no definition of the marsh harrier compensation land and this would need to be rectified not only to include the Westleton site if the SofS decides to include it, but also the on-site compensation. The ExA notes that the Applicant has modified the wording in Revision 8 of the DCO which may have dealt with this point.)</p>	Sizewell Link Road	No compulsion	No compulsion	Yoxford Roundabout	No compulsion	No compulsion	Works Nos.15, 16 and 17	No compulsion	No compulsion	Accommodation Campus	Nothing	Nothing	LEEIE caravan park	Nothing	Nothing	Employment and Skills (Sch 7, para 2.1.6(c))	Nothing	Nothing	
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LEEIE caravan park	Nothing	Nothing																		
Employment and Skills (Sch 7, para 2.1.6(c))	Nothing	Nothing																		
4	In relation to Employment and Skills the ExA notes that this has been redrafted in the D7 version of the DCO.	There are still a number of issues outstanding which SCC is working through with the Applicant to resolve. We expect Employment and Skills to be largely dealt with via the DoO rather than the DCO.																		
5	The ExA also notes from the D7 submissions that the question of RE and the Accommodation Campus and LEEIE caravan park has progressed	SCC as highway authority notes that delivery of the accommodation campus also impacts on transport																		

	with a financial scheme. A question on that is whether it will prevent the effects from arising before they arise.	matters, specifically movement of NHB workers. The authority would be concerned that delays in delivery of the campus would create difficulties in achieving the mode share targets stated in the CWTP as the majority of walking and cycling trips to the site are related to workers using these facilities.
6	The only elements of Key Environmental Mitigation which are compelled are the Fen Meadow and the Marsh Harrier compensation. Please will the Applicant set out how the others are compelled, or if not how the Applicant proposes to address the matter adequately.	For the Applicant
7	For clarity, the ExA does not at present see any issues with Sch 14 paras 2.4.9 and 2.4.10 of the DoO where the Suffolk Community Trust are to use reasonable endeavours in relation to grants and the Sizewell C Community Fund as the fallback position is that, if SZC following the use by them of RE "is unable to enter into a Deed of Transfer and an Administration Agreement with the Suffolk Community Foundation pursuant to paragraph 2.2, SZC Co shall establish a new trust established to administer and apply the Sizewell C Community Fund for the purposes of mitigating the intangible and residual impacts of the Project by enhancing the quality of life of communities within the Area of Benefit and all references to the Suffolk Community Foundation in this Schedule 14 shall be deemed to be references to such new trust". Nor does it have any issue with the obligation on ESC at Sch 3 Accommodation and Housing to use RE to identify initiatives for the use of Housing Fund payments which are required, practically deliverable and would deliver 1,000 bedspaces or more, all prior to the 6th anniversary of the Commencement Date. If the ESC, SCC or Applicant take a different view on either of these, please will they say so.	For the Applicant to confirm that it is fully engaged with the Suffolk Community Foundation in respect of this Schedule. SCC does not take a different view.
8	The ExA also reiterates that the Implementation Plan is indicative. An obligation to use reasonable endeavours to deliver an indicative plan seems to amount to a loose obligation squared, which is very loose.	SCC shares these concerns.
2.B The ExA turns now to the dDCO		
10	There are RE provisions in the Protective Provisions. The ExA assumes that the persons protected are content with that. If that is not the case,	SCC defers to the relevant organisations.

please will the Applicant explain. There are 15 occasions of RE in the DML. The formula goes like this: "(3) Unless a shorter period is agreed with the MMO in writing, the undertaker must use reasonable endeavours to submit the detailed method statement to the MMO at least 6 months prior to the proposed commencement of the licensed activity, or each phase of a licensed activity". In some cases there is then a ban on the related works until the approval has been issued. The use of RE therefore appears acceptable. But there is not always a ban. In the following table the ExA lists the conditions, and whether they have a corresponding ban. The conditions in italics do not have a ban and therefore the RE obligation seems to the ExA to be inadequate.

Table 2

Condition	Subject	Corresponding ban?	Adequate/Inadequate
11(3)	Detailed method statement for works	Yes, 11(2)	Adequate
17(3)	<i>Coastal Processes Monitoring and Mitigation Plan</i>	<i>No</i>	<i>Inadequate</i>
18(3)	Marine Environmental Management Plan	Y, 19(2)	Adequate
19(3)	<i>Marine Archaeological Written Scheme of Investigation</i>	<i>N</i>	<i>Inadequate</i>
20(3)	<i>Fisheries and Liaison and</i>	<i>N</i>	<i>Inadequate</i>

		<i>Coexistence Plan</i>			
	34(5)	<i>Submission and refreshment of a Maintenance Activities Plan</i>	<i>N</i>	<i>Inadequate but 34(3) covers the position on additional activities and could be amended to cover the first and subsequent plans</i>	
	35(3)	Dredging activities plan	Y	Adequate	
	36(3)	sample plan and sediment sample analysis	Y	Adequate	
	40(5)	Work No. 1A(m) and Work No. 1A(bb) activity details	Y	Adequate	
	41(3)	Work No. 1A(n) (SCDF) activity details	Y	Adequate	
	44(3)	Work Nos. 2K and 2L (CDO) activity details	Y	Adequate	
	45(3)	<i>Sabellaria monitoring plan</i>	<i>Y – provided Wk 2B is the southern intake</i>	<i>Inadequate unless it is clarified that Wk2B is the southern intake</i>	
	47(3)	Work Nos. 2A to 2J activity details	Y 47(1)	Adequate	
	48(3)	Work Nos. 2B, 2D, 2G and	Y 48(3)	Adequate	

		2H and 2I and 2J details			
	50(2)	impingement monitoring plan	Y 50(1)	Adequate	
11	The ExA would press the Applicant to include clear enforceable obligations to deliver all the elements of the Key Environmental Mitigation unless it can convince the ExA that other aspects of the DCO and DoO deal with it effectively. On the delivery of the Accommodation Campus and Caravan Park (i.e. the Project Accommodation) the ExA does not understand the Applicant's explanations of why RE is enough. The ExA is not content to rely on RE in the instances in the two tables.				SCC agrees with the ExA's assessment
12	The Applicant has in [REP5-113] pointed to its experience at HPC to seek to show that the RE approach has worked. Without working through the examples given with the HPC DCO in one hand and its s.106 in the other the ExA does not understand. If the Applicant wants to persist with that it needs to walk the ExA through it with chapter and verse and evidence. But Sizewell C is of course a different project in different circumstances.				Noted
13	The ExA thanks the Applicant for its note on the law on "reasonable endeavours" (Appendix D to 9.72 Response to ExA's Commentary on the draft DCO and other Documents) submitted at D7 which it has been able to consider. It is not reassured however. For example, the note draws out common principles of interpretation of the standard as follows: "2.4 In the context of this case-law, some common principles around the interpretation of a reasonable endeavours obligation can be seen: 2.4.1 In discharging such an obligation, the company will be required to: (A) balance its contractual obligation with all relevant commercial considerations; (B) take into account the chances of achieving the desired result via the proposed action, 2.4.2 The obligation will be interpreted against the position of a reasonable and prudent person in light of the obligor's particular circumstances and interests."				SCC shares these concerns with the ExA.
14	The ExA would observe that commercial interests could prejudice the delivery, or timely delivery of "Key Environmental Mitigation".				

