



The Sizewell C Project

9.107 Written Submissions Responding to Actions Arising from Issue Specific Hearing 14: DCO, DoO and allied documents (17 September 2021)

Revision: 1.0
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CONTENTS

CONTENTS	1
1 ISSUE SPECIFIC HEARING 14: DEVELOPMENT CONSENT ORDER, DEED OF OBLIGATION AND ALLIED DOCUMENTS.....	1
1.1 Introduction	1
1.2 Statement of Common Ground with Northumbrian Water Limited	1
1.3 Schedule 7: Approved Plans	1
1.4 Environmental Statement and Sports Facilities	1
1.5 Requirement 14C: Main Development Site – Marsh harrier	3
1.6 Construction Method Statement.....	3
1.7 Code of Construction Practice.....	3
1.8 Draft Legal Opinion	4
1.9 Response to MMO	5

APPENDICES

Appendix A: Draft Legal Opinion

1 ISSUE SPECIFIC HEARING 14: DEVELOPMENT CONSENT ORDER, DEED OF OBLIGATION AND ALLIED DOCUMENTS

1.1 Introduction

1.1.1 This document contains the Applicant's written submissions responding to actions arising from Issue Specific Hearing 14 (ISH14) held on 17 September 2021.

1.1.2 This document corresponds to the Applicant's **Written Summaries of Oral Submissions made at ISH14** (Doc Ref. 9.103) submitted at Deadline 8.

1.2 Statement of Common Ground with Northumbrian Water Limited

1.2.1 An updated SoCG with NWL is being prepared for Deadline 9 setting out the position of the parties in relation to Sizewell C's long term water supply, what has been agreed in the DCO and its implications.

1.3 Schedule 7: Approved Plans

1.3.1 In revision 10 of the draft DCO submitted at Deadline 8 (Doc Ref. 3.1(I)), Schedule 7 (Approved Plans) has been updated with each of the relevant work numbers added to the subheadings so that it is clear which parts of the authorised development relate to which plan.

1.4 Environmental Statement and Sports Facilities

1.4.1 A description of the proposed Leiston off-site sports facilities is presented within **Volume 2, Chapter 2** of the **ES** [[REP7-032](#)], with an illustrative layout plan provided within **Figure 2.12** [[REP5-057](#)]. A description of the construction activities is provided within **Volume 2, Appendix 3D** (Construction Method Statement) of the **ES** (Doc Ref. 6.3 3D(D)).

1.4.2 The conclusions of the environmental assessment of the proposed Leiston off-site sports facilities are reported within each of the technical chapters of **Volume 2** of the **ES** [APP-193 to APP-347]. The assessments reported within **Volume 2, Chapters 8-10** and **Chapters 26-28** accounted for the effects of the proposed Leiston off-site sports facilities as part of the project-wide effects assessment. **Volume 2, Chapters 11 to 19** reported the conclusions of the proposed Leiston off-site sports facilities assessment, with further detail provided within the following appendices:

- **Volume 2, Appendix 11E** (Sound Level Assessment of the Proposed Sports Facilities) of the **ES** [[APP-207](#)],
- **Volume 2, Appendix 12D** (Air quality off-site developments assessment) of the **ES** [[APP-214](#)],
- **Volume 2, Appendix 13G** (Landscape and visual off-site developments assessment) of the **ES** [[APP-217](#)],
- **Volume 2, Appendix 14D** (Terrestrial ecology and ornithology off-site developments assessment) of the **ES** [[APP-265](#)],
- **Volume 2, Appendix 15J** (Amenity and recreation off-site developments assessment) of the **ES** [[APP-270](#)],
- **Volume 2, Appendix 16F** (Terrestrial historic environment off-site developments assessment) of the **ES** [[APP-275](#)],
- **Volume 2, Appendix 17B** (Soils and agriculture off-site developments assessment) of the **ES** [[APP-278](#)],
- **Volume 2, Appendix 18D** (Geology and land quality off-site developments assessment) of the **ES** [[APP-296](#)], and
- **Volume 2, Appendix 19D** (Groundwater and surface water off-site developments assessment) of the **ES** [[APP-309](#)].

1.4.3 In summary, the ES concluded that there are no likely significant effects associated with the construction and use of the proposed Leiston off-site sports facilities, with the following mitigation in place:

- measures set out within the **Code of Construction Practice** (Doc Ref. 8.11(E)), secured by Requirement 2 of the **dDCO** (Doc Ref. 3.1(I));
- provision of an acoustic screen along the eastern boundary of the site (secured by Requirement 12A);
- measures set out within the **Lighting Management Plan** (Doc Ref. 6.3 2B(B)), secured by Requirement 9 of the **dDCO** (Doc Ref. 3.1(I));
- implementation of the **Overarching Archaeological Written Scheme of Investigation** (Doc Ref. 6.14 2.11.A(B)), secured by Requirement 3 of the **dDCO** (Doc Ref. 3.1(I)); and

- measures set out within the **Drainage Strategy** (Doc Ref. 6.3 2A (C)), secured by Requirements 5 of the **dDCO** (Doc Ref. 3.1(I)).

1.4.4 Furthermore, the off-site sports facilities have been considered as embedded mitigation to reduce demand for formal sports and leisure facilities during construction and to provide a legacy benefit within **Volume 2, Chapter 9** (Socio-economics) of the **ES** [APP-195] and **Volume 2, Chapter 15** (Amenity and Recreation) of the **ES** [APP-267].

1.5 Requirement 14C: Main Development Site – Marsh harrier

1.5.1 The titles of the Marsh Harrier habitat reports secured by Requirement 14C will be updated at Deadline 10 to the following:

- The Westleton Marsh Harrier Compensatory Habitat Strategy (Doc Ref. 9.35(A));
- The on-site Marsh Harrier Compensatory Habitat Strategy (Doc Ref. 9.16(A)).

1.6 Construction Method Statement

1.6.1 The **Construction Method Statement** has been updated at Deadline 8 to include Grampian triggers for the Sizewell link road, two village bypass, temporary beach landing facility and rail works. The Deed of Obligation (Schedule 9) requires SZC Co. to use reasonable endeavours to deliver mitigation set out in Plate 2.1 of the CMS by the specified milestone dates. Where, despite using reasonable endeavours, the timescales indicated in **Plate 2.1** cannot be delivered, SZC Co. must deliver the project in accordance with the dates set out in Paragraph 2.1.6 of the Construction Method Statement, unless otherwise approved in writing by ESC following the procedure set out in Schedule 23 of the dDCO.

1.6.2 Wording within the Construction Method Statement has also been updated to provide greater certainty on the commitments it makes regarding the construction methodology.

1.7 Code of Construction Practice

1.7.1 The wording of the CoCP has been carefully reviewed and important improvements have been made to ensure that the necessary commitments and limits are expressed in terms that will allow ESC to exercise appropriate planning control.

1.7.2 The key changes to the CoCP include:

- **Level 2 documents:** Confirmation that subsequent approvals submitted pursuant to the CoCP must be done in the format defined by Schedule 23 of the DCO. The wording securing these documents have also been reviewed to ensure that appropriate triggers have been defined, such as the NMMP and DMMP, along with clarifying where approval from ESC is required.
- **DMMP:** the wording securing the DMMP has been amended to reflect comments from the ExA and ESC.
- **Imperative terms:** the documents have been reviewed to ensure that imperative terms are used to secure relevant control measures and mitigation.

1.7.3 The document has also been updated to reflect comments received from ESC following ISH14.

1.8 Draft Legal Opinion

1.8.1 The Applicant submits at **Appendix A** to these **Written Submissions Arising from ISH14** a draft Legal Opinion (Draft Confirmation and Compliance Document) which provides confirmation by Herbert Smith Freehills LLP of the following:

- **Status:** The NNB Generation Company (SZC) Limited ("**SZC Co.**") is a company duly incorporated with limited liability under English law.
- **Capacity:** SZC Co. has the power and legal capacity to enter into and perform its obligations under the Deed of Obligation.
- **Authority:** SZC Co. has taken all necessary corporate actions to authorise the execution, performance and delivery of the Deed of Obligation.
- **Due Execution:** The Deed of Obligation has been duly executed.
- **Validity:** The obligations of SZC Co. under the Deed of Obligation constitute legal, valid, binding and enforceable obligations of SZC Co.

1.8.2 The Legal Opinion is addressed to the Secretary of State and the other parties to the Deed of Obligation (ESC and SCC).

1.8.3 The final form Legal Opinion (Confirmation and Compliance Document) will be submitted at Deadline 10.

1.9 Response to MMO

Appeals under Schedule 20A

- 1.9.1 The MMO's written submissions in respect of the appeals procedure provided by Schedule 20A of the dDCO completely fail to engage with and thus respond to the submissions made on behalf of the Applicant at ISH1 (see [REP5-106] at section 1.4 and additional references therein).
- 1.9.2 By way of example, the Applicant's submissions have already dealt with the other DCOs to which the MMO refers and the issue of 'evidence' – see internal pp. 15-16 of REP5-106. The MMO's most recent submission neither acknowledges nor addresses what the Applicant has said about those matters.
- 1.9.3 When properly analysed, it is apparent that the MMO's most recent written submission is simply repeating the points it made before ISH1, and not engaging with or responding to the detailed submissions that the Applicant has provided in response to those points.
- 1.9.4 In those circumstances it would be reasonable to infer that the MMO's reluctance to acknowledge and address those submissions is because it has no answer to them. That is unsurprising, because those submissions can fairly be described as compelling.
- 1.9.5 It is instructive that the MMO acknowledges the problems associated with delay at para. 2.10 of its written submission, but having done so it then just asserts that it does not delay unnecessarily. No doubt any public body with important decision-making powers would say the same, but that is not regarded as sufficient to obviate the need for statutory timeframes to be set to ensure that decisions are made promptly, and that there are safeguards to protect the interests of applicants in the event that does not occur.
- 1.9.6 Furthermore, the MMO's assurances about not delaying unnecessarily are rather undermined by the suggestion in 2.11 that in the event timeframes are imposed it should have 6 months to make a decision in all cases. The draft DML at Schedule 20 to the dDCO provides bespoke determination periods for each relevant condition. Some allow six months, others less, depending on the subject matter and relative complexity. The MMO's most recent written submission treats all as alike, building in an excessive amount of time for the discharge of more straightforward conditions without any attempt at reasoned justification.
- 1.9.7 The whole project relies on a very well-defined programme and construction schedule. The potential knock-on delays to other elements of the SZC project from a delay to an offshore element would be very significant. For

example, the whole transport strategy is based on the availability of the BLF and MBIF so delays to the discharge of conditions relating to those works would have significant impacts on the overall construction programme. Similarly, offshore works rely entirely on dredging and disposal works and delays to those works can also have significant impacts on programme as well as logistical issues with leasing vessels. Aside from potential delays to the construction and delivery of an operational Sizewell C, the costs associated with such delays could be very significant given the need to pre-book very large vessels of limited availability or progress other inter-related elements on the MDS (10s to 100s millions of pounds).

1.9.8 Government policy also identifies the need for new large scale nuclear power stations as urgent; the delivery of Sizewell C should not be delayed for want of an effective consenting process. The DCO provides a mechanism through which the Government can and should provide such a process. Schedule 20A contains provisions which are necessary and proportionate to the scale of the Project. Each project should be considered on its own merits, and Schedule 20A provides a fair and appropriate appeal mechanism to reduce what would otherwise be the real risk of delay and impediment to the timely delivery of the Sizewell C Project.

1.9.9 Finally, it is noteworthy that Parliament didn't provide a mechanism for appeal of requirements in DCOs, yet DCOs now add that in as standard because it's useful so SZC Co is of the view that it is equally useful for DMLs.

Appeals Process for Environment Agency Permits

1.9.10 In addition to a response to the MMO's position on the need for an appeals process, the ExA asked the Applicant to provide a written response explaining why it was not seeking to impose an appeal mechanism in respect of conditions on Environment Agency administered consents in the same way that it was seeking to create an appeal mechanism in respect of conditions on the Deemed Marine Licence ("DML").

1.9.11 There are two related reasons why the DCO does not seek to take that step.

(a) The DML is part of the DCO

1.9.12 Whereas the DML is part of the DCO, and the conditions attached to it are simply DCO provisions that happen to be in a Schedule entitled 'Deemed Marine Licence', the Applicant has not sought to remove the need for any environmental permit or other prescribed consent or authorisation administered by the Environment Agency and incorporate equivalent provision within the dDCO.

- 1.9.13 Had the Applicant wished to use the DCO for that purpose, it would have required the consent of the Environment Agency (see PA 2008 s. 150, and Regulation 5 of, and Schedule 2 to, the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015). The same is not true in respect of Marine Licences, which are not amongst the list of prescribed consents and authorisations.
- 1.9.14 In any event, the dDCO does not seek to remove the need for any environmental permit that would otherwise be required.
- 1.9.15 That is important having regard to the rationale for the creation of an appeal on the merits in Schedule 20A as set out on behalf of the Applicant in section 1.4 of [REP5-106] and in response to ExQ1 DCO.1.149 and DCO.1.160 [REP2-100]. In summary:
- 1.9.16 Both the ‘requirements’ under the DCO and the ‘conditions’ under the DML are all part of the DCO – a statutory instrument that would be granted so as to permit the construction of the proposed development.
- 1.9.17 Some of that development happens to sit within the UK marine licensing areas, where a marine licence would normally be required in addition to development consent. In this case, however, a marine licence would be deemed to be granted pursuant to the DCO. The DML, however, is not a marine licence. It is a schedule to the DCO and the ‘conditions’ are simply DCO provisions that happen to be contained in that same schedule.
- 1.9.18 There is no difference between the DML and the remainder of the DCO in terms of the practical and public interest considerations that arise when considering discharge of the conditions and the requirements. The subject matter is not intrinsically different, and in some instances (e.g. approval of the CPMMP) it is identical. The same is not true in respect of environmental permits administered by the Environment Agency (see further below).
- 1.9.19 In those circumstances there are no good public interest considerations that would justify the DCO treating the ‘conditions’ and the ‘requirements’ differently in terms of whether an appeal on the merits should be available against a refusal or failure to discharge.
- 1.9.20 The same rationale does not apply in the case of environmental permits administered by the Environment Agency. They do not form part of the DCO and are subject to a separate and distinct statutory regime that reflects the specific issues that arise in respect of the control of regulated activities (see further below). Any attempt to use the DCO to introduce a right of appeal in respect of conditions on such a permit (there is no concept of ‘discharging’ such a condition, as explained below in respect of the second

reason) would therefore involve modification of the relevant legislation and different considerations would arise.

(b) Different considerations arise in respect of conditions on Environment Agency permits

- 1.9.21 The framework for the environmental permitting regime administered by the Environment Agency is contained in the Environmental Permitting (England and Wales) Regulations 2016 (“the 2016 Regulations”), supplemented by the DEFRA Environmental Permitting: Core Guidance (March 2020) (“the Core Guidance”).
- 1.9.22 The regime applies to regulated facilities, which have that status because unless made subject to this additional strict system of regulation (additional to development control and, where relevant, marine licensing) they could harm the environment or human health.
- 1.9.23 Where the regulator grants a permit, it can impose any conditions it sees fit (Schedule 5, Part 1, paragraph 12(2) to the 2016 Regulations). Importantly, however, it has a duty to impose conditions in order to secure the obligations that apply to the class of regulated activity (see paragraph 7.8 of the Core Guidance). That reflects the qualitatively different nature of the environmental permitting regime, and the correspondingly different type of conditions to which permits are made subject. Conditions attached to such permits are generally concerned with compliance, with any approvals addressed at the initial application stage rather than via condition. Hence conditions on permits are to be complied with, rather than ‘discharged’ as is often the case with requirements on DCOs or conditions imposed on marine licences.
- 1.9.24 Those differences can also be seen in the specific provisions contained within Regulations 15, 16 and 18 of the 2016 Regulations in relation to conditions imposed on permits. Pursuant to Regulation 15(1), for example, a condition imposed on a permit may require the operator to carry out works or do other things in relation land which the operator is not entitled to do or carry out without obtaining the consent of another person. In those circumstances Regulation 15(2) the person whose consent is required must grant the operator such rights as are necessary to enable the operator to comply with the condition. Compensation is payable in those circumstances pursuant to Schedule 5, Part 2.
- 1.9.25 It is also reflected in the scope for the regulator to vary or revoke a permit of its own volition under Regulations 20 and 22.
- 1.9.26 The environmental permitting and marine licensing regimes are not therefore directly comparable. Those differences help to explain why the

former regime falls within the category of prescribed consents or authorisations whereas the latter does not.

- 1.9.27 For those reasons the absence of any provision within the dDCO to create a right of appeal in relation to any approvals that might be required under a permit administered by the Environment Agency is unsurprising, and does not have any material bearing on the justification for the provisions in Schedule 20A.



SIZEWELL C PROJECT –
WRITTEN SUBMISSIONS ARISING FROM
ISSUE SPECIFIC HEARING 14

NOT PROTECTIVELY MARKED

APPENDIX A: DRAFT LEGAL OPINION

NOT PROTECTIVELY MARKED



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By email

Dear Sir or Madam

NNB Generation Company (SZC) Limited - Deed of Obligation

1. INTRODUCTION

1.1 We have acted as English legal advisers in connection with:

1.1.1 the agreement made pursuant to section 1 of the Localism Act 2011 and section 111 of the Local Government Act 1972 dated [•] 2021 and made between (1) NNB Generation Company (SZC) Limited as applicant (the "**Applicant**"), (2) East Suffolk Council and (3) Suffolk County Council, (referred to as the "**Deed of Obligation**").

1.2 This document has been submitted to confirm that, in our opinion, the Deed of Obligation contains legal, valid, binding and enforceable obligations.

1.3 We are solicitors qualified in England and Wales. We express no confirmation or opinion as to any law other than English law as applied by English courts and reported and in effect on the date of this document and assume that to the extent that the laws or regulations of any jurisdiction other than England may be relevant, such laws and regulations do not prohibit, and are not inconsistent with, the entering into and performance of the Deed of Obligation. No opinion is expressed as to matters of fact.

2. CONFIRMATIONS

2.1 Capacity of the Applicant and validity of the Deed of Obligation

Based on the Deed of Obligation and other documents referred to in paragraph 3.1 and subject to the assumptions and the qualifications contained in paragraph 3.2 and to matters not disclosed to us, it is our opinion that:

2.1.1 **Status:** The Applicant is a company duly incorporated with limited liability under English law.

Herbert Smith Freehills LLP and its subsidiaries and Herbert Smith Freehills, an Australian Partnership, are separate member firms of the international legal practice known as Herbert Smith Freehills.

Herbert Smith Freehills LLP is a limited liability partnership registered in England and Wales with registered number OC310989. It is authorised and regulated by the Solicitors' Regulation Authority of England and Wales. A list of the members and their professional qualifications is open to inspection at the registered office, Exchange House, Primrose Street, London EC2A 2EG. We use the word partner of Herbert Smith Freehills LLP to refer to a member of Herbert Smith Freehills LLP, or an employee or consultant with equivalent standing and qualifications.



- 2.1.2 **Capacity:** The Applicant has the power and legal capacity to enter into and perform its obligations under the Deed of Obligation.
- 2.1.3 **Authority:** The Applicant has taken all necessary corporate actions to authorise the execution, performance and delivery of the Deed of Obligation.
- 2.1.4 **Due Execution:** The Deed of Obligation has been duly executed.
- 2.1.5 **Validity:** The obligations of the Applicant under the Deed of Obligation constitute legal, valid, binding and enforceable obligations of the Applicant.

3. ASSUMPTIONS AND QUALIFICATIONS

- 3.1 For the purposes of providing the confirmations in this document, we not examined any documents or made any enquiries save for:
 - 3.1.1 an *[original]* of the *[signed]* Deed of Obligation;
 - 3.1.2 copies of the Certificate of Incorporation and the Memorandum and Articles of Association of the Applicant (together the "**constitutional documents**") *[certified as being a true, complete and up to date copy by the Secretary of the Applicant]*;
 - 3.1.3 *[copies of minutes of a meeting of the board of directors of the Applicant approving the execution and delivery by the Applicant of the Deed of Obligation which we assume was passed at a properly convened and conducted meeting of the board and remains in full force and effect]*;
 - 3.1.4 *[copies of the minutes of (and resolution from) a general meeting of the Applicant [certified as being a true, complete and up to date copy by [the Secretary] of the Applicant] which we assume was validly passed at a properly convened and conducted meeting of the shareholders and remains in full force and effect]*;
 - 3.1.5 *[the results of a search of the Companies House Service operated by the Registrar of Companies in England and Wales in respect of the Applicant carried out on [•] October 2021, at [•] [am/pm]]*; and
 - 3.1.6 *[the results of a search of the Insolvency and Companies List, at the Royal Courts of Justice, was carried out (by us or by GlobalX (a trading name of LegalinX Limited) on our behalf) in relation to the Applicant on [•] October 2021]*.
- 3.2 The confirmations are based upon the following assumptions and qualifications (which may or not be the case):
 - 3.2.1 **Documents:** it is assumed that all documents (including scanned, electronic and copy documents and the constitutional documents) examined by us (i) are authentic, complete and accurate and all signatures and seals (if any) thereon are genuine and (ii) are and remain up-to-date, and have not been terminated or rescinded;
 - 3.2.2 **Filings and Records:** it is assumed that the public files, documentation and information available from the Registrar of Companies and the Insolvency and Companies List at the Royal Courts of Justice are complete, accurate and up-to-date and contain details of all relevant moratoria applications filed, administration applications filed, or appointments recorded in or orders made.
 - 3.2.3 **Directors:** it is assumed that the directors of the Applicant have acted in good faith and have complied with their duties under all applicable laws in relation to the approval of and entry into the Deed of Obligation.



- 3.2.4 **Other parties:** it is assumed that each party to the Deed of Obligation other than the Applicant has the power and legal capacity to enter into, perform and exercise its rights under the Deed of Obligation and the Deed of Obligation has been duly authorised, executed and, where applicable, delivered by all of the parties thereto other than the Applicant in accordance with all applicable laws;
- 3.2.5 **Solvency:** it is assumed that the Applicant was solvent at the time of the execution and delivery of the Deed of Obligation; no step has been taken to obtain a moratorium in relation to the Applicant or to wind up the Applicant or to place the Applicant into administration and that no receiver has been appointed over or in respect of the assets of the Applicant, nor has any analogous procedure or step been taken in any jurisdiction; no recognised main insolvency proceeding has been recognised in Great Britain; the Applicant did not become insolvent as a result of entering into the Deed of Obligation and that the Applicant has not entered into any composition or arrangement with its creditors (or any class of them); This opinion is subject to all insolvency and other laws affecting the rights of creditors (whether secured or unsecured) generally;
- 3.2.6 **Misconduct or breach etc:** it is assumed that no party to the Deed of Obligation (and no individual employed by or acting on behalf of any such party) is, or will be, engaging in criminal, misleading, deceptive or unconscionable conduct or seeking to conduct any relevant activity in a manner or for a purpose not evident on the face of the Deed of Obligation which might render the Deed of Obligation (or any part thereof) or any matter contemplated thereby or any associated activity illegal, unlawful, void or unenforceable and no party will, by reason of the matters contemplated by the Deed of Obligation, be in breach of any of their respective obligations under any agreement, licence, authorisation, consent or similar document. It should be noted that this document is not designed to and is not likely to reveal fraud, misrepresentation, bribery or corruption by any person.
- 3.2.7 **Validity/enforceable obligations:** although we consider that obligations of the Applicant under the Deed of Obligation constitute legal, valid, binding and enforceable obligations, it is not certain that those obligations will necessarily be legal, valid or binding or will be enforced in all circumstances in accordance with their terms, since the existence, effect and enforcement of legal obligations is subject to principles of law, equity, court's discretion, issues of public policy and procedure of general application.

4. ADDRESSEES AND RESPONSIBILITY

- 4.1 This document is addressed to you personally and is provided solely in connection with the Deed of Obligation. It may not be relied upon by (or disclosed to) any other entity or person without our prior written consent save that this document may be disclosed to the Planning Inspectorate in their role as Examining Authority in respect of the Applicant's application for the Development Consent Order and other third parties interested and participating in the examination of the Applicant's application and their legal advisers provided that in each case:
- 4.1.1 such disclosure is made during the course of the examination of the Applicant's application under the Planning Act 2008 for the Development Consent Order for information purposes only and not for the purposes of reliance; and



- 4.1.2 we do not assume any duty or liability to any person to whom such disclosure is made and no such person to whom this document is disclosed may rely on it without our prior written consent.
- 4.2 This document is given by Herbert Smith Freehills LLP which assumes liability for and is solely responsible for it.
- 4.3 Notwithstanding the provision of this document, we expressly reserve the right to represent the Applicant (if it so requests) in relation to any matters affecting the Deed of Obligation at any time in the future (whether or not you retain separate advisers on any such matter), and the fact that we have provided this document to you shall not be deemed to have caused us to have any conflict of interest in relation to the giving of any such advice. The provision of this document to you does not create or give rise to any client relationship between this firm and you.
- 4.4 This document and any non-contractual obligations arising out of or in connection with it are governed by and shall be construed in accordance with English law. This document is given on condition that the courts of England have exclusive jurisdiction to settle any dispute or claim arising out of or in connection herewith (including any non-contractual disputes or claims).

Yours faithfully,

Herbert Smith Freehills LLP