Date: 21 February 2025
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Five Estuaries Case Team
Planning Inspectorate
Via Portal

Dear Case Team,

FIVE ESTUARIES OFFSHORE WIND FARM (EN010115)
SUFFOLK COUNTY COUNCIL (IP reference: 20049304)
SCC DEADLINE 6A SUBMISSIONS

Please find attached Suffolk County Council's Deadline 6A submission, titled 'SCC D6A Representations responding to submissions made at Deadline 6 following Action Point 9 of ISH6'.

If I can be of any further assistance, please do not hesitate to contact me.

Yours faithfully,

[redacted]

Graduate Project Officer
Programme Management Office (PMO)
Growth, Highways & Infrastructure
Suffolk County Council

Suffolk County Council

Suffolk County Council (20049304)

Representations responding to submissions made at Deadline 6 following Action Point 9 of ISH6

Five Estuaries (EN010115)

Deadline 6A **21 February 2025**

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Glossary of Acronyms

AONB	*Area of Outstanding Natural Beauty*
CNP	*Critical National Priority*
CROWA	*Countryside and Rights of Way Act*
D6	*Deadline 6*
DCO	*Development Consent Order*
EA	*Electricity Act*
EIA	*Environmental Impact Assessment*
ExA	*Examining Authority*
ISH	*Issue Specific Hearing*
N2T	*Norwich to Tilbury*
NPS	*National Policy Statement*
NSIP	*Nationally Significant Infrastructure Project*
PA	*Planning Act*
SCHAONB	*Suffolk Coast & Heaths Area of Outstanding Natural Beauty*
SLVIA	*Seascape, Landscape and Visual Impact Assessment*
VE	*Five Estuaries*
WTG	*Wind turbine generator*

"The Council" / "SCC" refers to Suffolk County Council

Purpose of this Submission

The purpose of this submission is to provide responses to the submissions at Deadline 6 ("D6") following Action Point 9 from Issue Specific Hearing 6 ("ISH6"), in relation to the s.85(A1) Countryside and Rights of Way Act ("CROWA") duty. Examination Library references are used throughout to assist readers.

Preliminary

1. These representations by Suffolk County Council respond to the submissions made by the Applicant at Deadline 6 following Action Point 9 from ISH6. The representations are made at Deadline 6A, the purpose of which is described in item 21 of the revised timetable set out in Annex A of [PD-025], namely:

"Receipt by the ExA of:
Responses to any submissions made at Deadline 6 pursuant to Action Point 9 arising from the holding of Issue Specific Hearing 6"

2. Action Point 9 (as set out in [EV10-012]) was:

"Consolidated/full submissions on the interpretation of Section 85 of the Countryside and Rights of Way Act 2000, as amended by the Levelling Up and Regeneration Act 2023 and the application of the duty in this case"

3. In response to Action Point 9, SCC submitted its representations on the duty in section 85(A1) CROWA 2000 at [REP6-074] and the Applicant submitted its submissions on section 85 CROWA 2000 at [REP6-048] and an Opinion of King's Counsel (Mr Hereward Phillpot KC) at [REP6-050]. For convenience, the SCC representations will be referred to as 'SCC's Representations', the Applicant's submissions will be referred to as 'Applicant's Submissions', and the Opinion from Mr Phillpot KC will be referred to as 'the Opinion'.

Response to the Applicant's submissions [REP6-048]

4. Given the extensive earlier submissions and representations on this topic, which SCC is sure that the Examining Authority ("ExA") has already absorbed, SCC does not consider that the ExA will be greatly assisted by a point-by-point response to every element in the Applicant's Submissions. SCC has therefore concentrated on the main arguments made in the

Applicant's Submissions and provided its response to those arguments. It should not be assumed that elements not responded to are accepted by SCC.

Is the Applicant subject to the duty in s.85(A1) CROWA 2000?

5. SCC notes that it is not in dispute that the Applicant is a *"statutory undertaker"* by virtue of holding an electricity generation licence (which is confirmed at para 2.2.4 of the Applicant's Submissions), however, SCC is surprised that the Applicant argues (at para 2.2.5) that it is not a *"relevant authority"* within s.85(A1) CROWA 2000 because, in the Applicant's view, it is not exercising or performing any statutory function when making an application for a Development Consent Order ("DCO").

6. SCC notes that s.85(A1) CROWA 2000 applies when a *"relevant authority"* (which includes *"any statutory undertaker"* as defined by s.85(3) CROWA 2000) is *"exercising or performing any function"* relating to or affecting an Area of Outstanding Natural Beauty ("AONB"), and there is no requirement for the *"relevant authority"* to be exercising a *statutory* function. Noting that the definition of *"relevant authority"* includes *"any Minister of the Crown"* and that some ministerial functions are undertaken by virtue of prerogative powers rather than statutory provisions, and that the exercise of prerogative powers could just as much impact on an AONB as could the exercise of statutory powers, SCC is not persuaded that s.85(A1) CROWA 2000 is limited only to the exercise or performance of *statutory* functions by the relevant authority. No such limitation appears in the legislative provision itself and nor, in this context, should such a limitation be implied. Thus, the undisputed fact that the Applicant is a statutory undertaker, and so a relevant authority, is a sufficient basis to bring it within the scope of s.85(A1) CROWA 2000 when it exercises or performs *"any function"* which relates to or affects an AONB, irrespective of whether that function flows from or involves the discharge of a statutory power or duty.

7. However, even if it were to be the case that it is necessary for there to be the exercise or performance of a *statutory* function, it is SCC's view that

when the Applicant makes a DCO application in order to authorise it to carry out a development project which must be consented under the Planning Act ("PA") 2008, the Applicant is exercising or performing a statutory function.

8. First, the exercise or performance of a statutory function would be the exercise or performance of any statutory power or duty which is applicable to the Applicant, as a *"statutory undertaker"*, in the context of making a DCO application.

9. Second, whenever the Applicant, as a licence holder under s.6(1)(a) Electricity Act ("EA") 1989, formulates any proposals for the construction of a generating station with a capacity of not less than 10 MW or for the installation (above or below ground) of an electricity line, it is subject to a statutory duty to have regard to *"the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest".* This duty is set out in s.38 and paragraph 1(1)(a) of Schedule 9 to the EA 1989. The relevant statutory provisions are as follows:

10. S.38 EA 1989 provides:

"The provisions of Schedule 9 to this Act (which relate to the preservation of amenity and fisheries) shall have effect."

11. The relevant parts of Schedule 9 to the EA 1989 provide:

"1(1) In formulating any relevant proposals, a licence holder or a person authorised by exemption to generate, distribute, supply or participate in the transmission of electricity —

(a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and

(b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.

…

(3) In this paragraph –

…

"relevant proposals" means any proposals –

(a) for the construction or extension of a generating station of a capacity not less than 10 megawatts, or for the operation of such a station in a different manner;
(b) for the installation (whether above or below ground) of an electric line; or
(c) for the execution of any other works for or in connection with the transmission or supply of electricity."

12. S.3A(8) EA 1989 (which is applicable to s.38 EA 1989) provides:

"In this Part, unless the context otherwise requires–

…

"licence" means a licence under section 6 and "licence holder" shall be construed accordingly."

13. Thus, when the Applicant formulated its proposals for the Five Estuaries project, which involves the construction of a generating station substantially in excess of 10 MW (stated to be in excess of 100 MW in the DCO application) and the installation of electricity lines both below and above ground, it was subject to the statutory duty in paragraph 1(1)(a) of Schedule 9 to the EA 1989 to have regard to the desirability of preserving natural beauty (etc). That statutory duty continued at least until the Applicant put forward those proposals in its DCO application, which it made on 22 March 2024 (some 3 months after the duty in s.85(A1) CROWA 2000 came into effect). It was the DCO application which comprised the crystallisation of the Applicant's *"formulating"* of its proposals because prior to that point it was open to the Applicant to revise

or refine those proposals. It is therefore unnecessary to determine whether the duty in paragraph 1(1)(a) of Schedule 9 to the EA 1989 continues to apply to the Applicant (or whether now that the DCO application has been made, the process of *"formulation"* has ended). Whatever view is taken on that matter (and SCC is minded to the view that the duty continues because the Applicant may well choose to revise its proposals further during the Examination), the duty was applicable at the time that the DCO application was being made.

14. On that basis, it is inevitable that the Applicant, as a *"statutory undertaker"*, was performing the statutory function in para 1(1)(a) of Schedule 9 to the EA 1989 when it made its DCO application. In formulating its proposals for the Five Estuaries project, as constituted in the DCO application, including construction of a generating station (in excess of 10 MW) together with the installation electricity lines, the Applicant was therefore obliged to discharge its statutory duty of having regard to the desirability of preserving natural beauty (etc).

15. In performing that duty (which is unarguably a statutory function of the Applicant as a *"statutory undertaker"*), the Applicant was (on and after 26 December 2023) therefore subject, in addition, to the new duty in s.85(A1) CROWA 2000, if what it was proposing would *"affect"* any land within an AONB. It is, of course, quite irrelevant that the statutory duty in para 1(1)(a) of Schedule 9 to the EA 1989 is both broader in scope and less onerous than the new duty in s.85(A1) CROWA 2000. That new duty applies whenever any pre-existing function is being performed or exercised, regardless of its particular terms. Whilst the Applicant has raised a separate argument about the issue of whether its proposals will *"affect"* the AONB (responded to below), if the ExA considers that the DCO application will *"affect"* land within an AONB (which SCC considers is clearly established by the Applicant's own evidence), then it is inevitably the case that the Applicant (as well as the Secretary of State) is a person subject to the duty in s.85(A1) CROWA 2000.

Would the Five Estuaries array areas "affect" land within the AONB?

16. The duty in s.85(A1) CROWA 2000 applies when a relevant authority is *"exercising or performing any function in relation to, or so as to affect, land in an area of outstanding natural beauty in England".* If the function is the proposing of development (or formulating proposals for development), or authorising the construction of development), the duty applies both where the function is carried out *"in relation to land in"* an AONB and where the function is carried out *"so as to affect land in"* an AONB. The latter term is clearly capable of embracing development undertaken on land outside of an AONB where that development *"affects"* land within an AONB. This should not be controversial (and is clearly recognised in both EN-1 and in the Defra guidance).

17. However, the Applicant has now advanced the proposition (at para 5.1.3 of the Applicant's Submissions) that it *"does not accept that the planning decision on the proposed development 'affects' the SCHAONB".* This seems to be for three reasons: (a) a separation distance of 37 km, (b) a relationship derived from the visibility of the Five Estuaries ("VE") array areas, and (c) an assessment that the effects on the Suffolk Coast & Heaths Area of Outstanding Natural Beauty ("SCHAONB") are *"not significant"* adverse effects in Environmental Impact Assessment ("EIA") terms. This new argument is fundamentally inconsistent with the Applicant's response to ExQ1_SLV1.04 in [REP2-039], the relevant parts of which are set out at para 3.8 of SCC's Representations. It is also fundamentally inconsistent with the Applicant's acceptance (in its response to SCC.01 in [REP5-073]) that it acknowledges *"that effects arising within the SCHAONB result from the development itself".* The only effects of the development on the SCHAONB that the Seascape, Landscape and Visual Impact Assessment ("SLVIA") has identified are those that arise by reason of the visibility of the VE array areas from locations within the SCHAONB.

18. SCC does not understand how, having accepted that *"there will be effects on the special qualities of the SCHAONB"* and that *"the impact of the Project on the special qualities of the SCHAONB is of low magnitude"* (conclusions which flow directly from the Applicant's SLVIA), the Applicant can now suggest that development will simply not *"affect"* the SCHAONB (or land within it), and so, by implication, not engage the duty in s.85(A1) CROWA 2000 at all. Effects and impacts on the special qualities of the AONB, which are accepted by the Applicant to arise within the AONB as a result of the development, are necessarily effects and impacts which *"affect"* land within the AONB.

19. SCC also regards the Applicant's proposition as inconsistent with para 3.2.21 of the Applicant's Submissions, which accepts that *"the VE areas may result in some not significant (moderate/minor) effects of low magnitude on the identified special qualities [of the SCHAONB]."* The Applicant cannot credibly say that the proposal does not *"affect"* the SCHAONB and at the same time acknowledge (as it must because of the findings of its own SLVIA) that there will be adverse effects on the special qualities of the SCHAONB. It should be noted that the SLVIA does not use the term *"may"* to qualify the adverse effects it identifies, and the magnitude of change is an input to the degree of significance in the SLVIA assessment rather than a qualifier of it (as explained in the SLVIA Methodology).

20. In relation to the separation distance, that separation distance is acknowledged in the SLVIA and the findings of the SLVIA take full account of that separation distance. Similarly, the fact that the relationship is based on visibility is also recognised in the SLVIA and its assessment of adverse effects on the Natural Beauty Indicators of the SCHAONB is precisely by reason of that visibility. SCC has already set out (at paras 2.1 to 2.8 of the SCC Submissions) the salient references in the SLVIA where the Applicant's assessment finds there to be *"effects"* on the SCHAONB, which the Applicant has assessed as *"adverse".* Any assertion now that these adverse effects do not *"affect"* the SCHAONB is not only

unsupported by evidence, it is directly contradicted by the Applicant's own evidence in the SLVIA.

21. In relation to the Applicant's repeated references to the fact that the SLVIA categorises all of the adverse effects on the SCHAONB as *"not significant"* in EIA terms, this is nothing to the point in terms of whether the proposal will *"affect"* the SCHAONB. That term is not subject to a threshold that adverse effects have to be significant in EIA terms before they can *"affect"* the SCHAONB. The SLVIA and the SLVIA Methodology are perfectly clear that even non-significant adverse effects are detrimental to the SCHAONB (as set out in section 2 of the SCC Representations).

22. In passing, SCC would observe that parts of the Applicant's Submissions seek to re-interpret the findings of the SLVIA (for example at paras 3.2.12, 3.2.15, and 3.2.19). However, the SLVIA speaks for itself, and it remains the technical assessment on this matter, and SCC is quite sure that the ExA will rely on its actual findings (which SCC has already highlighted).

Can a non-significant adverse effect constitute harm?

23. To a large extent this is a non-issue because the SCC case on the duty in s.85(A1) CROWA 2000 does not turn on it being necessary for the ExA to make a finding that the effects of the VE array areas on the SCHAONB amount to *"harm".* SCC's position would be exactly the same even if the term 'harm' was not used and instead the effects were described as 'adverse effects' which are 'not significant' in EIA terms. That is how they are described in the SLVIA. It is worth emphasising that, for the purpose of SCC's Representations, SCC has not disputed the findings of the Applicant's SLVIA and so has proceeded on the basis that the SLVIA found that the VE array areas would have 'moderate-minor' or 'minor' effects (all of which are categorised as 'adverse' in accordance with the SLVIA Methodology) on the special qualities of the SCHAONB.

24. That said, if 'harm' is used as 'proxy' for 'not conserving' (as the Applicant suggests at para 2.5.3 of the Applicant's Submissions), SCC does not

understand how 'moderate-minor' or 'minor' adverse effects would not be 'harm' because, even though they may be towards the lower end of the spectrum of adverse effects, being adverse effects they are clearly 'not conserving' the SCHAONB.

Does SCC equate visibility with harm?

25. No. Notwithstanding the Applicant's attempts to so characterise SCC's position, SCC has not advanced such a case. Paras 4.14 and 4.15 of SCC's Representations address this issue, by reference to the findings of the SLVIA, applying the SLVIA Methodology.

26. In relation to the Howell case (referred to at para 2.6.3 and section 5.7 of the Applicant's Submissions), this establishes no point of law in relation to visibility. The key passage is in para 24 of the judgment, which is quoted in full at para 5.7.2 of the Applicant's Submissions, and that simply makes the obvious point that whether development outside of a designated area (there the Broads) but visible from with the designated area, will have damaging effects upon its natural beauty is a matter of fact and degree and not every piece of development will do so. It certainly does not establish the proposition that harm to the natural beauty of a designated area *cannot* arise from development outside it but visible from within it. As a matter of fact and degree and so planning judgment, this is not a matter of law but a matter for evidence, and the evidence here is the SLVIA and its findings of adverse effects.

27. The Applicant's Submissions advance a proposition which is at variance with the findings of the SLVIA when it asserts (at para 5.8.4) that *"the experience of the landscape cannot be reasonably held to be harmed by the addition of a small number of turbines, which are theoretically visible only in ideal weather conditions, are set in the context of closer and more prominent wind farms, and at a minimum 37km distant."* All of those factors were included in the assessment undertaken in the SLVIA and it concluded that, nonetheless, there were adverse effects on the special qualities of the SCHAONB.

Is the SCC case based on the setting of the SCHAONB?

28. No. Whilst it is the case that the VE array areas will be located outside of the SCHAONB and so, in that sense, within its setting, the adverse effects on the SCHAONB that SCC relies on in SCC's Representations are the adverse effects on the special qualities of the SCHAONB, as identified in the SLVIA. Those adverse effects are experienced (or perceived) within the SCHAONB.

Does the Critical National Priority ("CNP") policy presumption apply to the discharge of the s.85(A1) duty?

29. No. SCC disagrees with the suggestion in para 5.3.7 of the Applicant's Submissions that the presumption in paras 4.2.16 and 4.2.17 of EN-1 *"can clearly be applied to the duty of section 85 in the same way as it is applied to other statutory duties including for example harm to heritage assets which is given as an example in the list."*

30. EN-1 does give specific advice on how both applicants and the Secretary of State should approach compliance with the new duty in s.85(A1) CROWA 2000 (in particular at paras 5.10.7, 5.10.8, and 5.10.34). Nowhere in that text is there a reference to the CNP presumption being applicable to compliance with the duty. That is unsurprising because the duty is an active duty to seek to further the purpose of conserving and enhancing the natural beauty of the AONB rather than a duty to balance harms against benefits. If an applicant subject to the duty has not sought to further that purpose, there cannot be any presumption that the statutory duty has been met. The language of EN-1 cannot usurp the need to meet a statutory requirement and nor does it seek to do so. The advice on the CNP presumption includes (at para 4.2.10) that *"Applicants for CNP infrastructure must continue to show how their application meets the requirements in this NPS… as well as any other legal and regulatory requirements"*.

31. In any event, the presumption only operates if the Secretary of State is satisfied that the requirements in paras 4.2.10 to 4.2.13 of EN-1 *"have*

been met" (para 4.2.14). In other words, meeting *"other legal requirements"* is a pre-condition to the operation of the CNP presumption. In addition, as well as the requirement (above) in para 4.2.10, para 4.2.12 requires that *"Applicants should set out how residual impacts will be compensated for as far as possible."* In this case the Applicant has not sought to provide any compensation (or offsetting) for the residual impacts on the SCHAONB that are identified in the SLVIA. The measures that the Applicant has taken to minimise the adverse impacts (in terms of the locations, positioning, and heights of the wind turbine generators ("WTGs")) are already reflected and taken into account in the SLVIA and its identification of residual impacts is reached in the light of those measures. They cannot therefore be relied on as addressing the residual impacts. Thus, the pre-conditions for operation of the CNP presumption in relation to the s.85(A1) duty are not satisfied in any event.

Does compliance with the s.85(A1) duty require the least harmful configuration?

32. SCC has not argued that the s.85(A1) duty *requires* that only the least harmful configuration is consented but does maintain its view that if the project objectives can be achieved by a less harmful configuration, there needs to be a clear justification for allowing the Applicant the option to also construct a more harmful configuration. This point was made by SCC in [REP3-028]:

"… SCC considers that leaving both a more harmful and a less harmful option on the table would not fulfil the objective of minimising harm and therefore will require a specific justification. SCC is not claiming dogmatically that it is not possible for such a justification to be provided. Rather, SCC does not consider that in the material that the Applicant has thus far provided, that there has been an adequate justification. Even if such a justification were to be provided, SCC contends that there will be residual harm no matter whichever permutation comes to fruition, though to varying extents. This residual harm will require compensatory measures

so that the Applicant, and in due course, the Secretary of State, are able to satisfy the new positive duty now to be found in section 85 of the Countryside Rights of Way Act, 2000…"

33. SCC made the same point in [REP4-048] about there needing to be a justification for allowing a more harmful configuration if a less harmful configuration would also achieve the objectives of the project (as quoted at para 5.4.3 of the Applicant's Submissions).

34. The Applicant's Submissions seek to provide that further justification (in section 5.4). Whilst SCC does not necessarily agree with all of the Applicant's arguments, as there expressed, it is prepared to accept that the need for operational flexibility, combined with the limited degree of difference between the adverse effects of the different permutations, does provide the justification for allowing both the larger WTG and the smaller WTG options to remain within the project. However, this acceptance does not detract from SCC's position that the Applicant needs to propose further measures (to offset the residual adverse effects of whichever option is implemented) in order to achieve compliance with the duty in s.85(A1) CROWA 2000.

Would requiring offsetting measures be lawful and policy compliant?

35. SCC refers to (but does not repeat) what is set out in paras 4.20 to 4.29 of SCC's Representations which explain why it considers that the proposals will have adverse effects on the SCHAONB and so fail to *"conserve and enhance"* its natural beauty, why it accepts that, given the nature of the project, the Applicant cannot avoid or reduce those residual adverse effects, and why it considers that the Applicant needs at least to explore whether measures could be taken within the SCHAONB to compensate for (or offset) those residual adverse effects, in order to demonstrate compliance with the duty in s.85(A1) CROWA 2000.

36. There is no legal impediment to a requirement for the provision of offsetting measures, provided that there is a reasonable nexus between

the selected measures and the adverse effects which are to be offset, and the measures are proportionate to the scale of those adverse effects. Nor is there any policy objection to such a requirement if it is concluded (as SCC suggests is the case) that such measures are necessary to make the development acceptable in planning terms.

37. The Applicant has made much of the point that SCC has not suggested specific measures but this is unjustified (as explained at paras 4.24 to 4.26 of SCC's Representations). SCC also stated in [REP4-048] that such measures:

"… could be by arrangements to contribute funding which could be secured through a planning obligation. This funding could be administered by the Suffolk and Essex Coast and Heaths National Landscape Partnership, and be required to contribute towards relevant objectives of the SCHAONB management plan. SCC would defer to the Partnership on which objectives should be the focus of consideration but would expect them to be those most closely related to the experience of the coastal landscape and the seascape of the SCHAONB, and so most capable of offsetting (not mitigating) the residual harm caused to those aspects of its special qualities as well as furthering the statutory purposes."

38. SCC also drew attention to the position at the Lower Thames Crossing, where the Department for Transport (acting on behalf of the prospective decision maker and not the project promoter) has invited comments on a DCO requirement that would entail the provision of enhancement measures (financial or non-financial) to be agreed via the mechanism in that requirement. It is an obvious point but if there was some fundamental legal or policy objection to such an approach, no such requirement would have been put forward. The terms of the requirement can be seen here: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010032/TR010032-006440-SoS%20Consultation%206%20Letter.pdf.

39. SCC remains ready and willing to engage with the Applicant, in conjunction with the Suffolk and Essex Coast & Heaths National Landscape Partnership, on both the nature of any measures and the mechanisms to secure them, whether that is during the remainder of the Examination or in the post-Examination decision period, in order to enable a means to address and resolve the outstanding issues on compliance with the duty in s.85(A1) CROWA 2000.

Response to the Opinion [REP6-050]

40. The Opinion addresses three issues but only issues (b) and (c) are relevant to SCC. Issue (b) is the duty in s.85(A1) CROWA 2000 and issue (c) is a phasing condition (persistently misdescribed as a Grampian condition despite SCC being quite explicit that its proposed condition does not restrict the commencement of development but merely the timing of one of the Works to be authorised, which the Applicant's programme indicates will not be carried out until Year 4 of the construction: Figure 1.21 of [APP-069]).

Issue (b): s.85(A1) CROWA 2000

41. It is noted that the Opinion does not address the question of whether the Applicant is a body subject to the duty.

42. There is a passing reference (at para 58) to *"county councils"* being subject to the duty. Since SCC is neither the promoter nor the decision maker it is doubtful it is exercising any relevant functions within the scope of the duty but in any event, by reason of the representations it is making to the ExA, it is undoubtedly seeking to further the purpose of conserving and enhancing the natural beauty of the SCHAONB.

43. There is an incomplete reference to s.85(A2) CROWA 2000, which omits the fact that it only applies to Welsh authorities, but this is not of consequence to the reasoning in the Opinion.

44. The Opinion does not address the inter-relationship between s.104(3) PA 2008 and s.104(5) PA 2008 but it is accepted in para 5.2.5 of the

Applicant's Submissions that the duty in s.85(A1) CROWA 2000 falls within s.104(5) PA 2008. That acceptance must be kept in mind when considering the point in para 97 of the Opinion that *"the duty is not to be regarded as overriding the decision-making framework created by the PA 2008 or other legislation that applies to the making of such decisions."* The decision-making framework of the PA 2008 necessarily includes s.104(5) PA 2008. Non-compliance with the duty, if still outstanding at the point of decision, would lead to a need to consider s.104(5) PA 2008, and whether that non-compliance would provide an exception to depart from s.104(3) PA 2008. In any event, if the Secretary of State was not satisfied as to compliance with the duty in s.85(A1) CROWA 2000, it would be open to him to conclude that the application was not in accordance with the relevant National Policy Statement ("NPS") (EN-1, having regard to its advice at para 5.10.8), and so that s.104(3) PA 2008 did not require a grant of development consent.

45. It is noted that the Opinion does not address the extent of impact on the AONB (see para 35) and it makes no reference to the findings in the SLVIA.

46. There is no dispute that the duty does not *"mandate any particular outcome"* (para 98), in that it is a measured duty to *"seek to further"* a stated purpose rather than to achieve that purpose regardless of any other matters, but SCC maintains that consideration does need to be given to what has been done to *"seek to further"* and whether, in the circumstances, that is sufficient to meet the duty.

47. In relation to the matters listed at para 103 of the Opinion that it is said the Secretary of State must have regard, SCC would not take issue.

48. Para 104 of the Opinion is directed to whether s.85(A1) CROWA 2000 *requires* the development to be reduced in scale but that has never been SCC's case. In any event, as indicated in the submissions above, SCC now accepts that the Applicant has justified the inclusion of options for configuration of the WTGs in the proposal. SCC notes and does not disagree with the proposition (in para 104(b)) that *"If the Secretary of State*

is satisfied that the proposed development has been designed sensitively given the various siting, operational and other relevant constraints, and that the measures taken by VE Ltd. which seek to further the purposes of the AONB designation are suitable, appropriate and proportionate to the type and scale of the development, the policy test in the NPS will be satisfied, even if there is concluded to be some residual harm" (SCC emphasis). SCC's disagreement with the Applicant concerns the fact that the Applicant has proposed no measures which seek to further the purpose of conserving and enhancing the natural beauty of the SCHAONB, having regard to the residual harm to the SCHAONB found by its own SLVIA.

49. SCC considers that the argument in para 104(c) and 104(d) on whether there exceptional circumstances to justify reducing the scale of CNP infrastructure, appears to overlook the guidance in paras 4.2.10 and 4.2.14 of EN-1 that the CNP presumption (and so the question of exceptional circumstances) only arises if the Secretary of State is already satisfied that the application meets the requirements in EN-1 (which includes para 5.10.8) and *"any other legal… requirements"* (which will include compliance with the duty in s.85(A1) CROWA 2000). However, as noted above, SCC is not seeking a reduction in the scale of the development.

50. Para 107 of the Opinion contends that SCC's position that the duty requires the applicant to offset the residual harm to the AONB is *"misconceived".* The reasons said to support this proposition do not address whether the Applicant has put forward measures that seek to further the purpose of conserving and enhancing the natural beauty of the SCHAONB. If measures are put forward, SCC would agree that they should not go beyond what is necessary to make the development acceptable in planning terms (having regard to the duty in s.85(A1) CROWA 2000). As to which party bears the responsibility to identify such measures, SCC refers to paras 4.24 and 4.25 of [REP6-074].

51. SCC does not agree that its suggestion as to what needs to be done to achieve compliance with the duty involves any legal error (para 108) but it

agrees that the duty should be applied in accordance with its statutory language, and having regard to the relevant guidance in EN-1 and the Defra guidance.

52. In relation to paras 109 and 110 of the Opinion, and the contention that *"there is therefore no legal or indeed logical basis to draw the distinction"* made by SCC between whether an effect on the AONB is *"significant"* for the purposes of EIA and whether an effect on the AONB *"affects"* the AONB and so gives rise to the duty in s.85(A1) CROWA 2000 to seek to further the purpose of conserving and enhancing the natural beauty of the AONB, SCC maintains its position. The legislation governing the EIA regime was formulated before the new duty. It is concerned with the identification of *"significant effects"* (whether positive, neutral, or negative) which are *"likely"* to arise from development defined as EIA development across the full spectrum of environmental resources/assets. The new duty applies to all development that takes place within an AONB and to all development which *"affects"* an AONB, irrespective of whether that development is EIA development or not. It is not tenable to argue that the duty simply does not apply to non-EIA development (which, by definition is development not likely to have significant effects). Nor is it tenable to argue that the duty applies to the (necessarily) non-significant effects of non-EIA development but only applies to the significant effects of EIA development.

53. It is SCC's position that the distinction in the EIA regime between significant and non-significant effects does not determine whether a development will *"affect"* an AONB and that this question remains a matter of planning judgment for the decision maker, having regard to the facts of the individual case, including any technical evidence presented on the effects of the development. SCC has already set out why it considers that the SLVIA shows that the development will have adverse effects on the special qualities of the SCHAONB and so *"affects"* the SCHAONB and engages the duty in s.85(A1) CROWA 2000.

Issue (c): a phasing requirement

54. The Opinion (at para 114(a)) invites the decision maker to reach some conclusions on the outcome of SCC's objections (and those of other parties) to a separate project (Norwich to Tilbury, or 'N2T') which is not yet the subject of a DCO application but when made will be considered by the same decision maker as the current Five Estuaries project. Clearly, it would be quite inappropriate for the decision maker to express any such conclusions or in any way to speculate on the outcome of that separate decision making process.

55. The Opinion also observes (at para 114(a)(iii)) that *"SCC does not appear to doubt"* the Applicant's submission that it would not incur the costs of investing in the project unless it was confident that the project would be connected to the Grid. That misunderstands SCC's position. SCC stated (in [REP4-048]) *"Whilst the Applicant also contends that such commercial considerations would make the phasing restriction unnecessary, the Applicant can only speak for itself and its current assessment of commercial considerations. Article 7 of the draft DCO allows the benefit of the DCO to be transferred to another party (subject to various conditions), Requirement 1 allows for a 7-year implementation period, and commercial perceptions, and the extent of 'confidence' needed to make investment decisions may change during the currency of the DCO."*

56. In [REP6-072] SCC also drew attention to the Borkum Riffgrund 3 offshore wind farm which was constructed before its (German) grid connection was available and was compensated for the delay in providing that connection, and SCC observed that the availability of compensation would have a bearing on any commercial assessment of the risks associated with an investment decision. SCC has not yet seen any information from the Applicant on the availability of compensation in the event that a Grid connection is not provided (either on time or at all).

57. SCC does not therefore accept the premise that underpins the reasoning in para 114(a) of the Opinion that it can be assumed that neither the Applicant, nor any other party to whom any made DCO is transferred, will

not commence construction of the project unless there is clarity that a Grid connection will be provided. Thus, SCC maintains its position that a phasing requirement is necessary.

58. As regards the question of reasonableness in terms of delay to commencement of the project (para 114(b) of the Opinion), SCC has reviewed [PD4-006] and [REP1-049], but neither document (which appear to duplicate each other) addresses a phasing condition but the separate question of whether consent for the Five Estuaries project should be delayed until a decision is made on N2T (in the Table on p.17). SCC is not aware that the Applicant has provided any demonstration as to why a phasing condition on the construction of one Work within a DCO consent (which Work is not expected to be commenced until Year 4 of the works programme) should delay the project's commencement or place it at a competitive disadvantage. SCC therefore does not accept that its phasing condition would be unreasonable.

59. As regards the question of precedent, SCC notes that in the proposed draft DCO for the Lower Thames Crossing, Work No.7A (being a 3.5 km length of the Lower Thames Crossing itself) is subject to a phasing restriction in Requirement 18 such that that Work cannot commence until the Secretary of State has approved a scheme for (as yet unknown) off-site highway works to a local authority junction, Orsett Cock (which is not part of the authorised works and not included in or authorised by that DCO). Whilst the circumstances are different, the principle of delaying a Work forming part of a Nationally Significant Infrastructure Project ("NSIP") by means of a phasing restriction until there is an authorised scheme to carry out some other necessary work not forming part of the project clearly has precedent. The most recent draft DCO for the Lower Thames Crossing can be accessed via this link: https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/TR010032/TR010032-006561-National%20Highways%20-%20Consultation%208%20response%20-%20Development%20Consent%20Order%20v_19.0%20(Clean).pdf.

60. In terms of the drafting concerns about SCC's proposed requirement (in [REP4-049]) expressed in para 116 of the Opinion, SCC considers it is reasonable to apply a phasing restriction to a Work as a whole if that Work once constructed would be harmful to the SCHAONB (and so that harm would only be justified if it was clear that the Work would serve a purpose) but SCC would be willing to consider any revised wording that may be proposed to limit the restriction only to those parts of Work No.1 that were above sea-level (mean high water). As regards notification of the decision on N2T to the relevant planning authority, the key point is that no such notification could be given until there was a decision, and the restriction therefore serves a purpose. As regards the requirement for a timetable, this provides a mechanism to provide a reasonable assurance that both projects will proceed, and so also serves a purpose. There is no need for any further restriction to require the timetable to be followed.

61. SCC therefore maintains its position on the need for a phasing restriction.