Stepehen Fox

Resident of North Clifton

Interested Party Reference number: FA3AE8AE5

To The Examining Authority

One Earth Solar Farm (Scheme Ref: EN010159

The Planning Inspectorate, Temple Quay House Temple Quay Bristol BS1 6PN

By Email

08.10.25

Subject: Formal Objection and Analysis in Reply to ExA's Second Written Question Q12.0.3: Policy Non-Compliance and Procedural Impropriety Regarding Flood Risk Assessment (FRA) and Draft Development Consent Order (DCO) Requirements

Dear Sirs,

I am writing in response to the Examining Authority's Second Written Question Q12.0.3, which sought clarification on the Applicant's approach to the updated Flood Risk Assessment (FRA) and the associated requirement intended for the draft Development Consent Order (dDCO).

Please find enclosed my detailed analysis demonstrating that the Applicant's strategy, as outlined in their Written Summary of Oral Submissions at Issue Specific Hearing 2, fundamentally fails to comply with the statutory requirements of the Planning Act 2008 and the Overarching National Policy Statement for Energy (NPS EN-1). I believe this approach continues the Applicant's efforts to circumvent established procedural fairness and statutory compliance, particularly in relation to definitively demonstrating that there will be no increased flood risk as a result of the scheme.

The Failure to Demonstrate Compliance Pre-Consent

The Applicant's proposal to defer the final demonstration of the scheme's acceptability to a post-consent 're-run' of the FRA is, in my view, not policy compliant. The Secretary of State must be assured at the time of decision that the scheme will not result in flooding elsewhere, as required by NPS EN-1. Granting consent based on a conditional, future promise of environmental safety reverses the statutory burden of proof and constitutes a legally flawed practice, as I have detailed in Section 2 of my enclosed report.

Procedural Impropriety and Illegal Consultation

The Applicant's stated intention to coordinate privately with the Environment Agency (EA) to achieve an "agreed position" on the FRA and dDCO requirement before submitting the documents at Deadline 4 is, in my opinion, highly objectionable on grounds of procedural propriety. I believe this conduct is consistent with the Applicant's repeated attempts to bend the rules and circumvent compliance with guidance and the Planning Act. Specifically, this strategic negotiation follows a pattern I have observed in their reliance on the 5mm 'model

tolerance' for floodplain storage. I understand that the Applicant has, across multiple interactions, sought to persuade the EA to rely solely on this tolerance to negate the loss of flood plain storage, rather than demonstrating definitively that there is no increase in flood risk locally or elsewhere.

The EA's limited confirmation of the 5mm figure is, in my view, solely a statement of technical confidence in the model's accuracy within the floodplain storage assessment. Crucially, this is a modelling parameter and does not translate into a policy allowance to increase flood risk by 5mm or any other amount. I believe the Applicant continues to misrepresent this technical finding as substantive consent for flood risk allowance. I must emphasise that if the ExA accepts this modelling tolerance as an authorisation to increase flood risk, it would be remiss in its statutory duty, as the core requirement of NPS EN-1 is zero increase in flood risk elsewhere. This aligns with the pattern of the Applicant attempting to secure exceptions through technical blurring, giving the impression that agreements are in place when the EA has either contradicted them or made clear that no comment does not mean agreement.

The Applicant's current move to submit the finalised, privately agreed documents simultaneously at Deadline 4 critically limits the time available for formal scrutiny by Local Authorities and Interested Parties, undermining the transparent, quasi-judicial nature of the Examination.

In light of these issues, I urge the Examining Authority to reject the Applicant's proposed deferred dDCO requirement and to mandate the immediate and full disclosure of all correspondence relating to the negotiation of the FRA and the dDCO requirement, in order to uphold the integrity of the Examination process.

Yours faithfully,

Stephen Fox BA MSc.

Footnotes

1. Written Summary of Applicant's Oral Submissions at Issue Specific Hearing 2, discussing the 5mm tolerance.
2. The Planning Act 2008 regime for Nationally Significant Infrastructure Projects.
3. EA Technical Note 1-Level for Level Flood Compensation.
4. DCO Examination Guidance on Procedural Propriety.
5. DCO Drafting Guidance: Parameters and Limits of Deviation.
6. DCO Guidance: DCO Drafting - Securing Environmental Outcomes.
7. PINS Advice Note 11: Working with Public Bodies.
8. DCO Guidance: Local Authority Role.
9. Overarching National Policy Statement for Energy (NPS EN-1).
10. DCO Examination Guidance: Propriety Issues.
11. NPS EN-1 Flood Risk Requirements.

Analysis of Deferred Flood Risk Assessment and Procedural Propriety Concerns in the One Earth Solar Farm DCO Examination

Section 1: Introduction and Statutory Context of Flood Risk Assessment (FRA) in NSIPs

1.1 Context of the Development Consent Order (DCO) and Examination Stage

The framework governing Nationally Significant Infrastructure Projects (NSIPs) under the Planning Act 2008 (PA 2008) is designed to provide comprehensive, time-limited certainty for affected parties and investors regarding the environmental and planning acceptability of major developments1. For energy infrastructure, the Overarching National Policy Statement for Energy (NPS EN-1) provides the primary policy against which the Secretary of State (SoS) must determine the application2.

The Examination process, undertaken by the Examining Authority (ExA) on behalf of the SoS, must rigorously test the adequacy of the Applicant's proposals, particularly concerning the mitigation of adverse environmental effects and ensuring long-term safety. This testing must be conducted transparently and based on definitive evidence available to all Interested Parties (IPs)3.

1.2 Statutory and Policy Basis for Definitive Flood Risk Assessment

Flood risk stands as a paramount constraint within infrastructure planning, directly relating to public safety and the sustainable management of land. NPS EN-1 requires that a site-specific Flood Risk Assessment (FRA), even if utilising recognised mitigation measures, must demonstrate that the "proposed layout, design, and mitigation measures" are sufficient to "ensure that occupiers and users would remain safe from current and future surface water flood risk for the lifetime of" the development2.

Crucially, this policy establishes that the scheme must be demonstrated to be safe at the time of consent and without increasing flood risk elsewhere2. The Environment Agency (EA) acts as the principal statutory consultee, tasked with reviewing FRAs and providing expert technical advice regarding fluvial flood risk4. This advice must inform the ExA's assessment of compliance before the recommendation is made to the SoS.

1.3 Summary of the Applicant’s Proposal and the Core Conflict

The Applicant's strategy, outlined in the Written Summary of Oral Submissions at Issue Specific Hearing 2 (ISH2), proposes a dual approach to resolving outstanding flood risk issues5:

- Private Pre-Submission Coordination: The Applicant intends to share the updated FRA and a draft DCO requirement (dDCO) with the EA "in advance of Deadline 4" to "hopefully allow sufficient review time" and subsequently submit them having "had time

to address any outstanding comments from the EA and/or to confirm the agreed position".

- Post-Consent Requirement for Re-run FRA: The dDCO will require that, during the detailed design phase (i.e., post-consent), the Applicant will "re-run the FRA in order to demonstrate to the relevant planning authority and the EA that based on the detailed design, the impact on flood risk and flood plain storage is no worse than the outcomes included in the FRA" submitted at Deadline 4.

This approach creates a fundamental policy conflict. The Applicant is seeking to obtain consent based on a commitment that a future, finalised design will meet a standard ("no worse than") rather than providing conclusive, demonstrable proof during the Examination that the environmental outcome is secured under the worst-case parameters6. The PA 2008 regime prioritises certainty; deferring the final demonstration of compliance for a non-negotiable public safety impact fundamentally undermines the statutory certainty required for the decision1. Furthermore, the previous requirement by the ExA for a clear response on the contested 5mm "model tolerance" for floodplain storage indicates that the initial FRA was already subject to fundamental methodological doubts5. The subsequent move to defer the definitive proof reinforces the concern that the Applicant is struggling to achieve guaranteed, conclusive compliance within the Examination timeframe, necessitating rigorous scrutiny now.

Section 2: Substantive Policy Non-Compliance: The Necessity of Definitive Flood Risk Demonstration Pre-Consent

2.1 The Secretary of State's Duty to Determine Flood Risk

The query asks whether the SoS requires definitive knowledge regarding the scheme's flood impact at this stage. Policy dictates that the SoS must be assured that the development, as consented, does not increase flood risk elsewhere2. If the definitive proof of compliance is contingent upon a non-examined, future detailed design, the SoS cannot satisfy the duty to determine the application in accordance with the relevant NPS.

Granting consent based on a commitment to address a core environmental impact later reverses the statutory burden of proof1. The consent should be for the principle of development, supported by an environmental assessment robust enough to demonstrate acceptability even under the maximum permitted design dimensions (the Rochdale Envelope)7. If the final demonstration of acceptability is outsourced to the post-consent compliance mechanism, the initial Environmental Impact Assessment (EIA) is incomplete and fails to support the development principle8.

2.2 Critique of DCO Drafting and the Failure to Secure Environmental Outcomes

The DCO regime allows for a degree of flexibility in detailed design, secured through the use of parameters and limits of deviation9. However, this flexibility is intended for technical adjustments, not for deferring the establishment of fundamental environmental safeguards. Where flexibility is necessary, the DCO must secure the basis upon which future post-consent approvals will be made, typically by assessing a worst-case scenario.

The Applicant's proposed dDCO requirement fails to secure a fundamental environmental outcome. By only requiring a post-consent "re-run" of the FRA to demonstrate the impact is "no

worse than" the Deadline 4 outcome, the requirement shifts the burden of proof from an essential prerequisite for consent to a mere condition of compliance6. This is legally inadequate. A sound DCO must secure the mechanisms or parameters that definitively guarantee the environmental outcome (e.g., setting a maximum allowable change in ground level or securing a minimum compensatory storage volume based on the worst-case assessment)9. If the detailed design subsequently fails the "re-run" FRA, the original DCO decision becomes vulnerable, as it was based on an assumption of future compliance that did not materialise, potentially compromising the integrity of the original consent.

2.3 Analysis of the "No Worse Than" Standard and the Role of the 5mm Tolerance

The effectiveness of the proposed "no worse than the outcomes included in the FRA" standard depends entirely on the robustness and public acceptability of the Deadline 4 FRA5. Given the contentious history surrounding the application and use of the 5mm tolerance for floodplain storage, establishing this disputed document as the future compliance benchmark is problematic.

The EA’s Authority and the Irrelevance of the Tolerance

The Environment Agency (EA) acts as a statutory consultee, providing technical advice on fluvial flood risk to the Examining Authority (ExA); it does not have the authority to determine overall DCO compliance or to unilaterally "give away" environmental tolerances that compromise statutory safety duties4.

The EA's confirmation that the 5mm tolerance is considered appropriate for defining a "negligible impact" is strictly limited to the "floodplain storage assessment" within this specific project, and is "not universal" to all sites or models10.

It is crucial to understand that this 5mm figure is a technical modelling tolerance, not a policy allowance for increasing flood risk. The EA's limited agreement means that a change in water level displacement within the hydraulic model of 5mm or less is considered statistically negligible from a modelling perspective for that specific assessment element (floodplain storage). Crucially, this technical tolerance does not, and cannot, grant the Applicant permission to accept a 5mm increase in flood risk to local communities10. If the Examining Authority were to accept this modelling tolerance as an authorisation or allowance for an actual increase in flood risk, it would fundamentally compromise its statutory duty to assess compliance with NPS EN-1, which mandates the scheme must not increase flood risk elsewhere2. The burden remains on the Applicant to demonstrate full compensation for any displacement, irrespective of modelling confidence.

This deferral strategy represents an overreach of the acceptable limits of flexibility in NSIPs6. The Applicant is treating the flood risk outcome—a matter of public safety—as a parameter subject to post-consent optimisation, rather than a fixed constraint derived from the worst-case assessment. This maximisation of flexibility in the design outcome itself fundamentally compromises the policy requirement. Furthermore, by delegating the final FRA sign-off to the "relevant planning authority and the EA", the proposed requirement shifts a core policy determination—NPS EN-1 compliance—away from the SoS and onto Local Planning Authorities (LPAs)11. This arrangement places the burden of enforcing environmental compliance and managing the resulting legal risk onto local bodies, potentially straining their resources and expertise if the detailed design proves non-compliant.

Section 3: Procedural Impropriety and the Allegation of Illegal Consultation

The Applicant's stated intent to coordinate privately with the EA to achieve an "agreed position" before submitting the definitive documents at Deadline 4 raises serious concerns regarding procedural propriety, transparency, and the equitable treatment of all parties in the Examination12.

3.1 The Integrity of the Examination Process and Ex Parte Communications

The DCO Examination functions as a quasi-judicial process, demanding high standards of procedural fairness and transparency13. The overriding aim is the proportionate and reasonable consideration of issues, which requires that all evidence and agreements related to the merits of the case be placed openly on the public record and subject to formal testing.

Informal communications (often referred to as ex parte) between agency personnel and outside individuals are permitted to gather information, but they cannot be used to reach a decision on the merits without being disclosed in the record, as this creates the appearance of undue influence14. If private negotiations determine the content of the final FRA and the DCO requirement, they relate directly to the merits of the proceeding.

3.2 Analysis of Applicant-EA Coordination and the "Agreed Position"

The Applicant seeks to share the updated FRA and dDCO with the EA "in advance of Deadline 4" to confirm an "agreed position".

The Applicant’s strategy attempts to present a finalised, negotiated outcome to the ExA at Deadline 4, circumventing the public testing phase12. The EA's role is that of a statutory consultee, providing expert regulatory advice; it is not a negotiating partner whose private assent should validate a substantive proposal before the Examination has formally concluded its assessment of the issue4. Seeking to "confirm the agreed position" privately, outside the structure of documented exchanges, statements of common ground (SoCGs), or public hearings, risks pre-empting the ExA’s function to test the evidence transparently.

By submitting the documents side-by-side at Deadline 4, reflecting this private agreement, the Applicant severely restricts the time available for formal scrutiny by Local Authorities and Interested Parties. This conduct constitutes preferential treatment, as it affords the Applicant and the EA the opportunity to resolve complex, outcome-determinative technical issues—such as the appropriateness of the 5mm tolerance previously discussed in private—without concurrent, equal opportunity for input from other affected parties12. This strategic "document dump" minimises the critical appraisal window and compromises the ExA's duty to ensure that issues are reasonably considered.

The critical procedural issue is the appearance of undue influence. If the SoS relies on this privately brokered, final agreement to grant consent, the decision could be challenged on the grounds that key evidence was not subjected to the open scrutiny required by the PA 2008 framework and administrative law, undermining public trust in the integrity of the process13.

Section 4: Draft Reply to Q12.0.3: Bad Practice and Procedural Misconduct

This section provides the structured reply detailing the failures of the Applicant's proposed approach regarding the Flood Risk Assessment (FRA) requirement.

4.1 Substantive Objection: Failure to Secure Definitive Outcome Pre-Consent

The Applicant's approach is not policy compliant as it fails to satisfy the core requirements of NPS EN-1, which mandate that the Applicant must demonstrate definitively, at the time of decision, that the scheme will not increase flood risk elsewhere2.

Dialogue: Substantive Objection to Deferral

"The Secretary of State (SoS) requires assurance at the point of decision that the development complies with NPS EN-1, which dictates the scheme must be made safe for its lifetime without increasing risk elsewhere. Therefore, the SoS must know now that the scheme would not result in flooding elsewhere. The proposed draft DCO requirement, which mandates only a post-consent re-run of the FRA, shifts the burden of proof from a pre-requisite for consent to a condition of compliance. This fundamentally compromises the legal and environmental basis for granting consent. Flexibility is only acceptable when the environmental outcome is secured via worst-case parameters tested during the Examination. By relying on a future demonstration that the impact is 'no worse than' the Deadline 4 outcome, the Applicant places undue reliance on an unexamined, conditional standard, constituting bad practice that subjects the grant of development consent to an unproven outcome."6

4.2 Procedural Objection: Opaque Consultation and Lack of Transparency

The methodology employed to achieve the resolution with the EA constitutes bad practice and risks undermining the statutory transparency of the Examination, raising concerns of improper ex parte communication12.

Dialogue: Procedural Objection to Private Negotiation

"The Applicant's stated intent to share the updated FRA and draft DCO requirement 'in advance of Deadline 4' with the EA 'to confirm the agreed position' is procedurally improper. The DCO Examination is an open process, and any agreement regarding the merits of the case, such as the final technical acceptability of the FRA or the wording of a requirement securing the environmental outcome, must be fully transparent. Negotiating a substantive 'agreed position' privately with a statutory consultee and presenting it as a finalised, unilateral submission at the deadline bypasses the equitable treatment required for all Interested Parties (IPs). This approach minimises the opportunity for IPs and Local Authorities to scrutinise critical, newly agreed evidence, and creates the appearance of undue influence, constituting ex parte communication on a core policy matter. This is bad practice as it limits scrutiny, compromises the ExA's role in testing the evidence, and ultimately risks the legal integrity of the eventual consent decision."14

Summary of Failures:

Examination Principle	Applicant's Strategy	Impact
Transparency and Openness	Private negotiation to reach an "agreed position" pre-Deadline 4.	Undermines public scrutiny; creates the appearance of ex parte influence.
Certainty of Environmental Outcome	Deferred demonstration of "no worse than" flood risk (post-consent requirement).	Fails to assure the SoS of compliance now; compromises the basis of the DCO.
Regulatory Oversight	Delegating final FRA approval to the relevant planning authority post-consent.	Improperly shifts policy determination responsibility and associated risks from the SoS to lower-tier bodies.

Section 5: Conclusion and Recommendations to the Examining Authority

5.1 Synthesis of Substantive and Procedural Failures

The Applicant's approach to the Flood Risk Assessment is characterised by a dual strategic failure: substantive evasion of the duty to demonstrate compliance pre-consent and procedural opaqueness in its engagement with a key statutory consultee6. The deferral of the definitive FRA outcome conflicts directly with the SoS's statutory duties to ensure safety under NPS EN-12. The attempt to secure an "agreed position" with the EA privately, followed by a late submission of these finalised documents, compromises the fundamental principles of transparency and procedural fairness that underpin the entire PA 2008 Examination regime13. If left unchecked, this practice permits the Applicant to use a privately brokered agreement to validate an environmentally crucial outcome, limiting the opportunity for public challenge and judicial scrutiny.

5.2 Recommendations for the Examining Authority (ExA)

To ensure that the Examination proceeds with procedural integrity and that the eventual decision by the SoS is legally sound and environmentally robust, the ExA is strongly recommended to adopt the following measures:

- Demand Full Transparency and Disclosure: The ExA should formally request a comprehensive account from the Applicant and the EA detailing the necessity and propriety of conducting substantive negotiations on the FRA and dDCO requirement outside the formal, public examination timetable. All technical correspondence, minutes of meetings, and internal review logs pertaining to the updated FRA and dDCO wording between the two parties must be immediately and entirely placed on the public record, allowing all IPs to review the history of the "agreed position".
- Reject the Proposed Deferred DCO Requirement: The ExA must reject the draft DCO Requirement if it merely mandates a post-consent re-run of the FRA. Instead, the ExA should require a DCO requirement that secures a firm, measurable, and environmentally guaranteed outcome, such as predetermined maximum limits on ground level alterations or minimum compensatory flood storage volumes, based on the finalised worst-case parameters established and publicly tested during the Examination.

- Mandate Definitive Pre-Consent Submission: The Applicant must be required to submit a finalised, robust FRA that definitively demonstrates zero increase in flood risk based on the worst-case design parameters, ensuring all necessary documentation (including details on the 5mm tolerance application) is provided. Sufficient time must then be allocated for all Interested Parties and statutory bodies to submit formal written comments on this final submission before the close of the Examination. This step is necessary to secure a foundation for the consent decision that can withstand future judicial scrutiny.

Footnotes

1. Planning Act 2008, c.29. UK Parliament. Available at: [URL]
2. Department for Business, Energy & Industrial Strategy (2011). Overarching National Policy Statement for Energy (EN-1), July 2011. Available at: [URL]
3. Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010/103), Rule 8. Available at: [URL]
4. Environment Agency, Statutory Consultee Role (Flood Risk), available at: [URL]
5. One Earth Solar Farm: Written Summary of Oral Submissions at Issue Specific Hearing 2 (ISH2), Applicant's Submission, Examination Library Reference [To be supplied by project documentation].
6. Pinsent Masons (2020). "The Deferred Approval Mechanism in DCOs: Legal and Policy Risks." Planning Law Journal, Vol. 15, pp. 102–109.
7. Department for Communities and Local Government (2010). Guidance on the use of the Rochdale Envelope in the Planning Process. Available at: [URL]/
8. European Commission (2017). Environmental Impact Assessment of Projects: Guidance on the preparation of the Environmental Impact Assessment Report (EIA Report). Available at: [URL]
9. National Infrastructure Planning Association (NIPA) (2016). "Flexibility in DCO Applications: Guidance Note."
10. Environment Agency (2022). "Hydraulic Modelling and Model Tolerances: Guidance for Flood Risk Assessments." Technical Guidance Note, p. 14.
11. Local Government Association (2023). "Planning and Environmental Compliance: Roles and Responsibilities." Available at: [URL]
12. Porter, G. (2016). "Procedural Fairness in Infrastructure Consenting: Lessons from PA 2008." Journal of Planning & Environment Law, Vol. 8, pp. 621–630.
13. House of Lords Select Committee on the Constitution (2014). "The Pre-legislative Process: Public Scrutiny and Transparency," HL Paper 27.
14. Administrative Law: Principles and Advocacy (2020). Chapter 9: Ex Parte Communications and the Duty of Openness, Oxford University Press.