

IN THE MATTER OF:

LONGHEDGE PLANNING INQUIRY

**INSPECTOR'S QUESTIONS ON (I) SOLAR CAPACITY AND
(II) THE MINISTERIAL STATEMENT ON BMV
AGRICULTURAL LAND**

**RULE 6 PARTY SUBMISSIONS IN
RESPONSE TO INSPECTOR'S
QUESTIONS**

A. INTRODUCTION

1. The Planning Inspector for the Longhedge Planning Inquiry (ref. 3330045), Mr John Woolcock (“**the Inspector**”), has asked the parties for their responses to two sets of without-prejudice questions set out in the Inspector’s Inquiry Note dated 14 June 2024 regarding (i) the correct approach to issues relating to the capacity of the Appellant’s proposed solar farm (“**the Proposed Development**”), and (ii) the relevance of the May 2024 Written Ministerial Statement (“**the WMS**”) on the UK Government’s policy on solar farms and Best and Most Versatile (“**BMV**”) agricultural land.

2. The questions are as follows:
 - (1) Can the potential for the Solar Farm to be a Nationally Significant Infrastructure Project (“**NSIP**”) be prevented by way of condition?

 - (2) If no, would the proposed development then meet the criteria for an NSIP scheme that would require development consent, and if so would that preclude granting planning permission?

 - (3) If yes, would ‘overplanting’¹ no longer be a consideration that was relevant to

¹ ‘overplanting’ is defined in EN-3 as the situation in which the installed generating capacity or nameplate capacity of the facility is larger than the generator’s grid connection.

answering the NSIP question - irrespective of the dc/MEC ratio for a scheme?

- (4) Should overplanting nonetheless be taken into account in considering the planning merits of the proposal?
- (5) If so would the extent of overplanting be a consideration likely to affect the area of land occupied by PV panels?
- (6) If the PV panels in the local context would be likely to result in some harm to relevant planning considerations would there be more harm with more overplanting?
- (7) If so would additional overplanting increase the quantum of harm in the planning balance?
- (8) If overplanting would be likely to utilise the available grid connection more effectively by exporting at the MEC for a greater proportion of the time, would that increase the MWhr / year of renewably generated electricity exported to the grid above that which would be exported from a scheme with less overplanting?
- (9) If so would that increase the quantum of benefit in the planning balance?
- (10) In that scenario would the appropriate planning balance weigh any overall harm from the scheme over the duration of the development, along with any legacy harm, against the overall benefits of the scheme, including the addition to the grid of x MWhr / year of renewably generated electricity for the duration of the development, along with any legacy benefit?
- (11) If so how would that approach to the assessment of overplanting square with Footnote 92 of EN-3?

3. This written statement sets out the Hawksworth and Thoroton Action Group's ("HTAG") combined response to the Inspector's questions. It is structured as follows: the relevant law is outlined in section B, the Appellant's capacity position is summarised in section C, and the Inspector's questions are answered in detail in section D.

B. LEGAL AND POLICY FRAMEWORK

B1. Development consent and planning permission

4. The Inspector's questions relate to the interaction between the planning permission regime under the Town and Country Planning Act 1990 ("**TCPA 1990**") and the development consent regime under the Planning Act 2008 ("**PA 2008**") for NSIPs.

5. Section 31 of the PA 2008 provides:

"Consent under this Act ("development consent") is required for development to the extent that the development is or forms part of a nationally significant infrastructure project."

6. "*Development*" is defined in section 32 of the PA 2008 as follows:

"(1) In this Act (except in Part 11) "development" has the same meaning as it has in TCPA 1990.²

This is subject to subsections (2) and (3) [These exceptions are not relevant to this case]"

7. Development for which development consent is granted must be begun within five years from the date the consent order is granted³, or any shorter or longer period set out in the consent order (s 144(1)(b) PA 2008). Section 155 of the PA 2008 defines when development is taken to begin:

"(1) For the purposes of this Act (except Part 11) development is taken to begin on the earliest date on which any material operation comprised in, or carried out for the purposes of, the development begins to be carried out.

(2) "Material operation" means any operation except an operation of a prescribed description."⁴

8. An order for development consent is obtained by making an application to the Secretary of State (ss 37(1) and (2) PA 2008). The Secretary of State has the function of deciding an application for an order granting development consent (s 103 PA 2008).

² See s. 55 TCPA 1990.

³ s 144 of the PA 2008, read with reg 6 of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015/462

⁴ The only Exclusion from the definition of "material operation" is the measuring or marking out of a proposed road (reg 7 Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015/462)

9. As to the interaction between development consent and planning permission, section 33 of the PA 2008 provides, so far as material, that:

“(1) To the extent that development consent is required for development, none of the following is required to be obtained for the development or given in relation to it —

(a) planning permission;”

10. This is reflected in section 57 of the TCPA 1990 which states:

“(1) Subject to the following provisions of this section, planning permission is required for the carrying out of any development of land.

(1A) Subsection (1) is subject to section 33(1) of the Planning Act 2008 (exclusion of requirement for planning permission etc for development for which development consent required).”

11. The interaction between the TCPA 1990 and the PA 2008 was considered in *R (Durham CC) v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 1394 (Admin), [2023] P.T.S.R. 1735⁵ (“**Durham**”). In *Durham*, the local planning authority (“**LPA**”) granted the developer permission to build a 49.9MW solar farm. The developer then made applications for permission to build another 49.9MW solar farm just over a mile away from the first farm. The LPA refused permission and the developer appealed. During the inquiry, the inspector asked the parties whether the proposal for the second farm, when considered with the first, would require development consent, and if so, whether there would be any implications for the grant of planning permission (*Durham* at [4]). Following submissions from the parties the inspector adjourned the inquiry. Her reasons were summarised by the Judge as follows (*Durham* at [5]):

“a) she had adjourned the Inquiry for a limited period on the understanding that the claimants would issue the present claim for judicial review within a period of two weeks of the receipt of her letter;

b) it was not within her power to make a "definitive ruling" on whether or not the proposed developments comprised an NSIP – this was a matter for the courts;

c) she believed that she had jurisdiction to determine the appeals before her.”

12. The LPA issued a judicial review seeking the following declarations:

“Declaration One: A declaration that the subject matter of the appeal applications comprise a Nationally Significant Infrastructure Project within the meaning of the Planning Act 2008.

⁵ Available on BAILII [here](#).

Declaration Two: A declaration that the Defendant does not have jurisdiction or is otherwise entitled to determine the appeal applications made under the Town and Country Planning Act 1990."

13. Hearing the claim in the High Court, Chamberlain J considered the following three issues (*Durham* at [8]):

- (i) ***Can and should the court determine whether development consent under the PA 2008 would be required for the projects taken together?*** This issue was whether only the Secretary of State had jurisdiction to determine the question of whether a project was an NSIP or whether the court could also determine this question.
- (ii) ***Are the projects an NSIP?*** This issue was whether the two 49.9MWH solar farms should be considered as one project constituting an NSIP.
- (iii) ***If the projects are an NSIP, does the Inspector have jurisdiction to consider the appeals?*** This issue was the same one that the Inspector has inquired about in this appeal, i.e. can development be granted planning permission even if it is an NSIP.

14. Chamberlain J held that (i) the court was able to determine whether the projects required development consent as it was a question of “*mixed fact and law*” and “*not the kind of judgment which requires the court to weigh the "planning merits"*” (at [38]), and (ii) the two solar farms were not part of the same project and therefore not an NSIP. Therefore, the third issue, regarding whether planning permission can be granted to an NSIP, did not strictly arise. However, at [49]-[55] Chamberlain J made obiter comments that the inspector would have jurisdiction even if they were a NSIP. Given the relevance to the Inspector’s questions, Chamberlain J’s reasoning is quoted in full below:

49. *Given my conclusions on issues (a) and (b), this issue does not strictly arise. However, given that I have heard argument, I will briefly express my view on it.*

50. *The claimants’ case is that the regimes under the TCPA 1990 and the PA 2008 are mutually exclusive. They say that the position is as set out in the Encyclopedia of Planning Law and Practice (looseleaf ed), vol 4, para 2–5638: “where development consent is required under the Act , planning permission under the Town and Country Planning Act 1990 is neither required nor capable of being granted .” (Emphasis added.) In my view, this is wrong, for four reasons.*

51. *First, it is clear that Parliament intended that development consent under the PA 2008 should not be granted unless it was required: section 55(3)(c). There is nothing equivalent in the TCPA 1990. Section 336(1) of the TCPA 1990 provides that “planning permission” means “permission under Part III or section 293A but does not include permission in principle”. Parliament could have provided*

that planning permission can only be granted for projects for which it is required in accordance with section 57, but it did not do so.

52. Second, section 33 of the PA 2008 does two separate things. Section 33(1) provides that, where development consent is required in relation to development, various other permissions, consents, notices and authorisations are not “required to be obtained ... or given” (emphasis added). These latter words reflect the fact that some of the things that are not required—eg planning permission granted under the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015/596) (section 33(a)) or notice under section 35 of the Ancient Monuments and Archaeological Areas Act 1979 (section 33(g))—are “given” rather than “obtained”. Sections 33(2) and (4) provide that, to the extent that development consent is required for development, it cannot be authorised pursuant to certain specified statutory procedures. There is no prohibition on the grant of planning permission.

53. Third, it is true that, in general, Parliament is unlikely to empower a public authority to undertake a resource-intensive function, such as deciding whether to grant planning permission, if the permission will have no effect. By the same token, however, it is unlikely that parties would commit the time and expense involved in making a planning application in cases where it is clear that implementing it would be unlawful under section 160 of the PA 2008.

54. Fourth, the facts of the present case are a good example of a situation in which the planning permissions sought would be far from useless even if—contrary to my conclusion—the two solar farms, taken together, were an NSIP. In that case, parts of the permissions could be lawfully implemented, provided that the generating capacity of the whole did not exceed 50 megawatts.

55. I would therefore hold that the local planning authority's power to grant planning permission, and the inspector's jurisdiction to entertain the appeals, are not dependent on the projects not being an NSIP.

15. These comments were considered by Fordham J in R (*Galloway*) v *Durham CC* [2024] EWHC 367 (Admin) (“*Galloway*”)⁶, which concerned a judicial review of an LPA’s grant of planning permission for a solar farm and there was again an issue as to whether it crossed the 50MW capacity threshold so as to require development consent. Importantly, Fordham J applied the case of *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30, [2022] 1 WLR 5077 (“*Hillside*”), which was not referred to by Chamberlain J. In *Hillside* at [46], the Supreme Court held that whether a planning permission can be partially implemented depends on the interpretation of the permission:

“it is a question of interpretation whether the permission authorises a number of independent acts of development, each of which is separately permitted by it, or whether it is to be construed as a permission for a single scheme which cannot be disaggregated in this way”.

16. This is clearly relevant to Chamberlain J’s fourth point regarding the partial implementation of an NSIP pursuant to a planning permission, but was not cited by Chamberlain J.

⁶ CD 5.9, also available on BAILII [here](#).

17. In *Galloway*, Fordham J applied *Hillside* to hold that the planning permission for the solar farm before him could not be partially implemented if it was for development over the 50MW capacity threshold:

*[66] In my judgment, whether [Chamberlain J's fourth point] could apply – on the particular "facts of the present case" – would depend on the legally correct interpretation of the Planning Permission. If, on its correct interpretation, it allows the project to be 'built-out in part' then it could lawfully be implemented by constructing something smaller. Sometimes, planning permission will expressly speak of development "up to" a number of units. But sometimes, "multi-unit developments" – as is typically the case with a "housing estate, comprising multiple units" – are "an integrated scheme which cannot be severed" (see *Hillside* §71). I interpose (as to *Durham* §51) that, as I see it, Parliament did not use a 'statutory preclusion', because it was disapplying (1990 Act s.57(1A)), for an NSI Project, a requirement which otherwise brings planning permission into play (s.57(1)). **On the facts of the present case, the correct interpretation of the July 2023 Planning Permission is – in my judgment – for an integrated and non-severable scheme. If this authorised solar farm did exceed the Statutory Capacity Threshold, I do not see how the Developer could simply choose to build a smaller solar farm on part of the fields (eg. the blue areas nearest to the village).***

18. As discussed further below, Fordham J went on to quash the grant of planning permission on the basis that the Council had not considered the material consideration of whether the solar farm was over the 50MW capacity threshold.
19. In this regard, and importantly, Fordham J also confirmed in *Galloway* that there are (at least) two lawful methods of calculating the 50MW capacity threshold:

"63. Secondly, and independently, I cannot accept premise (1) (§60 above). That is, independently, fatal. I have not been persuaded that the Combined-Panels Method is a 'legal litmus test' for identifying the capacity of a solar farm. The position is as I have explained it (§§12-21 above). I was shown no statutory definition, case or commentary supporting the Combined-Panels Method as the sole legally-correct 'interpretation' of capacity. Mr Harwood KC did not persuade me that the Combined-Inverters Method, prospectively favoured by Central Government (and now adopted in policy EN-3 from November 2023) is contrary to law. Nor did Mr Hardy or Mr Barrett persuade me that the Combined-Panels Method is contrary to law and the Combined-Inverters Method is the sole legally-correct 'interpretation' of capacity. The picture is that there are two recognised methods of measurement, in the reasonable 'application' of the Statutory Capacity Threshold, each of which has an important Accompanying Proviso. All of which means that premise (1) has failed. This is, independently, fatal to the line of challenge."

20. Another relevant part of *Hillside* is that the Supreme Court held a planning permission cannot authorise development if it becomes physically impossible to carry out the development in full (*Hillside* at [45], [68], [72], and [100] – “the **Pilkington Principle**”). Although Fordham J did not mention this in his discussion, the *Pilkington Principle* was relied

on by the Claimant in *Galloway* to argue that the planning permission for the solar farm was unlawful as it purported to grant planning permission for a generating station over 50WH, which was impossible to lawfully implement in full (at [61], point (4)).

B1. Enforcement: carrying out NSIP development without development consent

21. Under section 160 of the PA 2008, a person commits a criminal offence “*if the person carries out, or causes to be carried out, development for which development consent is required at a time when no development consent is in force in respect of the development*”. It is notable that this provision goes significantly further than the enforcement regime under the TPCA 1990. Under the TPCA 1990, it is not an offence to carry out development without planning permission. Instead, if it appears to an LPA that development has been carried out with the required permission, then it may issue an enforcement notice (s 172 TPCA 1990). It is only if a developer disobeys the enforcement notice that an offence is committed (s 179 TPCA 1990). In contrast, under the PA 2008 the act of development itself is an offence if it is carried out without development consent. Therefore, if the local planning authority considers that development consent is required for development, but the developer has not applied for it, then it may prosecute the developer, or apply to the High Court for an injunction restraining the development under section 171 of the PA 2008.

B2. National Policy Statements

22. Section 5 of the PA 2008 provides the Secretary of State with a power to designate a statement as a ‘national policy statement’ (“**NPS**”). Section 104 of the PA 2008 provides that the Secretary of State must decide any NSIP application in accordance with any relevant NPS unless this would:
- (i) lead to the UK being in breach of its international obligations;
 - (ii) be in breach of any statutory duty that applies to the Secretary of State;
 - (iii) be unlawful;
 - (iv) result in adverse impacts from the development outweighing the benefits; or,
 - (v) be contrary to regulations about how its decisions are to be taken.
23. The NPS titled “*Overarching National Policy Statement for Energy (EN-1)*” (“**EN-1**”) at [1.2.1]

also states that: “*in England, this NPS, in combination with any relevant technology specific NPSs, may be a material consideration in decision making on applications that fall under the Town and Country Planning Act 1990 (as amended)*”. That NPSs may also be material considerations in determining applications under the TCPA 1990 was also confirmed in *R (Corbett) v Cornwall Council* [2014] P.T.S.R. 727 at [4].

24. In *R (Scarisbrick) v Secretary of State for Communities and Local Government* [2017] EWCA Civ 787 (“**Scarisbrick**”) at [19], the Court of Appeal set out the approach to interpreting NPSs in the context of a challenge to a development consent order. In summary, the relevant principles are:

- (i) The approach to interpreting the NPS is the same as that for other planning policy, as set out by the Supreme Court in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13 (in particular the judgment of Lord Reed at [17] to [19]).
- (ii) Statements of policy are to be interpreted objectively in accordance with the language used, read in its proper context: *Tesco v Dundee City Council* at [18].
- (iii) The interpretation of planning policy is an objective issue of law for the court, not an issue of fact and degree for a LPA’s planning judgment: *Tesco v Dundee City Council* at [18].

B3. Overplanting

25. The ‘National Policy Statement for Renewable Energy Infrastructure (EN03)’ (“**EN-3**”) addresses ‘overplanting’, explaining its utility in the context of the degradation of solar capacity over time (emphasis added):

“2.10.55 The installed generating capacity of a solar farm will decline over time in correlation with the reduction in panel array efficiency. There is a range of sources of degradation that developers need to consider when deciding on a solar panel technology to be used. Applicants may account for this by overplanting solar panel arrays.”⁹²

26. Footnote 92, attached to the above paragraph, defines overplanting (emphasis added):

“Overplanting” refers to the situation in which the installed generating capacity or nameplate capacity of the facility is larger than the generator’s grid connection. This allows developers to take account of degradation in panel array efficiency over time, thereby enabling the grid connection to be maximised across the lifetime of

the site. Such reasonable overplanting should be considered acceptable in a planning context so long as it can be justified and the electricity export does not exceed the relevant NSIP installed capacity threshold throughout the operational lifetime of the site and the proposed development and its impacts are assessed through the planning process on the basis of its full extent, including any overplanting.”

27. In *Galloway* at §17, Mr Justice Fordham stated: “Overplanting means installing 'spare' solar panels for necessary future use, as a 'back-up' so as to address light-induced degradation of solar panels”. Due to the Appellant’s position in this inquiry, HTAG wrote to Department for Energy Security and Net Zero on 30 April 2024 to seek clarification on the meaning of overplanting. On 22 May 2024, the Minister of State for Energy Security and Net Zero replied that the NSP only permits overplanting for panel degradation (emphasis added):

We do not believe that there is a lack of clarity in the guidance and would like to assure you that the text was consulted on extensively and has been designated in Parliament, where no issues were raised.

In the Energy Policy Statement EN-3 guidance, overplanting is countenanced where reasonable, to address panel degradation. Unreasonable overplanting, or overplanting for any other reason, would not be supported. It will be a matter of planning judgement for the decision maker in any case to decide what the purpose of the overplanting is and whether it is reasonable.

B4. Directions by the Secretary of State

28. An alternative route for development consent to be required is under section 35(1) of the PA 2008, which provides that “*The Secretary of State may give a direction for development to be treated as development for which development consent is required*”. Section 35(2) provides, materially for this case, that the Secretary of State may give a direction only if:

- (i) the development is a project (or proposed project) in the field of energy, transport, water, waste water or waste;
- (ii) the development will (when completed) be wholly within England;
- (iii) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with one or more other projects (or proposed projects) in the same field.

B5. Size of solar farms

29. EN-3 at §2.10.17 provides guidance on typical solar farm sizes:

2.10.17 *Along with associated infrastructure, a solar farm requires between 2 to 4 acres for each MW of output. A typical 50MW solar farm will consist of around 100,000 to 150,000 panels and cover between 125 to 200 acres. However, this will vary significantly depending on the site, with some being larger and some being smaller. This is also expected to change over time as the technology continues to evolve to become more efficient. Nevertheless, this scale of development will inevitably have impacts, particularly if sited in rural areas.*

B6. Solar and BMV Agricultural Land

30. Paragraph 180b and footnote 53 of the National Planning Policy Framework (NPPF) states that:

“Planning policies and decisions should contribute to and enhance the natural and local environment by: recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland.”

Footnote 62: Where significant development of agricultural land is demonstrated to be necessary, areas of poorer quality land should be preferred to those of a higher quality. The availability of agricultural land used for food production should be considered, alongside the other policies in this Framework, when deciding what sites are most appropriate for development

31. EN-3 states:

“2.10.29 While land type should not be a predominating factor in determining the suitability of the site location applicants should, where possible, utilise suitable previously developed land, brownfield land, contaminated land and industrial land. Where the proposed use of any agricultural land has been shown to be necessary, poorer quality land should be preferred to higher quality land avoiding the use of “Best and Most Versatile” agricultural land where possible. Best and Most Versatile agricultural land is defined as land in grades 1, 2 and 3a of the Agricultural Land Classification.

2.10.30 Whilst the development of ground mounted solar arrays is not prohibited on Best and Most Versatile agricultural land, or sites designated for their natural beauty, or recognised for ecological or archaeological importance, the impacts of such are expected to be considered and are discussed under paragraphs 2.10.73 – 92 and 2.10.107 – 2.10.126.

2.10.31 It is recognised that at this scale, it is likely that applicants’ developments will use some agricultural land. Applicants should explain their choice of site, noting the preference for development to be on suitable brownfield, industrial and low and medium grade agricultural land.

2.10.32 Where sited on agricultural land, consideration may be given as to whether the proposal allows for continued agricultural use and/or can be co-located with other functions (for example, onshore wind generation, storage, hydrogen electrolyzers) to maximise the efficiency of land use.”

32. The Planning Practice Guidance (“**PPG**”) on “Renewable and low carbon energy” states:

“What are the particular planning considerations that relate to large scale ground-mounted solar photovoltaic farms?

[...]

Particular factors a local planning authority will need to consider include:

[...]

- *where a proposal involves greenfield land, whether (i) the proposed use of any agricultural land has been shown to be necessary and poorer quality land has been used in preference to higher quality land; and (ii) the proposal allows for continued agricultural use where applicable and/or encourages biodiversity improvements around arrays. See also a speech by the Minister for Energy and Climate Change, the Rt Hon Gregory Barker MP, to the solar PV industry on 25 April 2013 and written ministerial statement on solar energy: protecting the local and global environment made on 25 March 2015.”*

33. As noted in the Appellant’s Additional Statement of Case (CD 7.6.1) at §§3.3-3.6, these provisions were considered by the High Court in *Bramley Solar Farm Residents’ Group v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2842 (Admin) (“**Bramley**”). In *Bramley*, the High Court upheld the inspector’s grant of permission for a solar farm on extending to 85 hectares of agricultural land, of which 53% comprised BMV. The inspector had dismissed a suggestion that permission should be refused because of the appellant’s failure to consider alternative sites which would avoid use of BMV (*Bramley* at §29).
34. However, *Bramley* was decided before the WMS on “*Solar and protecting our Food Security and Best and Most Versatile (BMV) Land*” made on 15 May 2024 (“**the BMV WMS**”). This places renewed emphasis on protecting BMV land from solar development. After quoting paragraph §2.10.29 from EN-3 above, it states (emphasis added):

“[W]e are concerned that as large solar developments proceed at pace, more of our ‘Best and Most Versatile’ (BMV) land could be used for solar PV instead of food production. I am therefore setting out further detail about how our policy on balancing these competing priorities is intended to be applied.

[...]

*As is outlined in the National Policy Statement, **the starting position for solar PV developers in taking forward Nationally Significant Infrastructure Projects is that applicants should seek to minimise impacts on the best and most versatile agricultural land (defined as land in grades 1, 2 and 3a of the Agricultural Land Classification) and preferably use land in areas of poorer quality.***

[...]

*... due weight needs to be given to the proposed use of Best and Most Versatile land when considering whether planning consent should be granted for solar developments. **For all applicants the highest quality agricultural land is least appropriate for solar development and***

*as the land grade increases, **there is a greater onus on developers to show that the use of higher quality land is necessary.** Applicants for Nationally Significant Infrastructure Projects should avoid the use of Best and Most Versatile agricultural land where possible.”*

35. The WMS also states that “*the National Policy Statement and from today this WMS are likely to be important and relevant considerations in the decision-making process*”.

C. THE APPELLANT’S CAPACITY POSITION

36. The Appellant has set out its position on capacity in its note dated 16 April 2024 in response to a request from the Inspector (“**the Capacity Note**”, CD 7.5.7). In the Capacity Note, the Appellant claims that its proposal complies with the guidance on capacity in EN-3. The Capacity Note states that the proposal is below the NSIP Capacity Threshold as the combined AC inverter capacity of the Solar Farm is 49.9MW (CD 7.5.7, p 1). However, in footnotes 2 and 3 it states no specific capacity for individual inverters has been provided:

“2. The exact specification of the inverters will be finalised at the procurement stage due to the technology continually advancing, but in no circumstances will exceed the combined total of 49.9MWac as referred to in footnote 3.

*3. **No specific capacity for individual inverters has been given in the planning application** but the total combined capacity cannot exceed the MEC of 49.9MWac, excluding any capacity to overcome reactive power consumption within the solar farm between the inverters and the connection point, per EN-3 footnote 91. Footnote 3 of this document applies to both 565W and 610W columns in the table above.”*

37. The Capacity Note provides a table with two sets of capacity figures based on using solar panels with ratings of 565W and 610W. This is copied below

	Site Specific Figures for Longhedge Original Layout 565W ¹	Site Specific Figures for Longhedge Appeal Layout 610W	EN3 guidance/reference
Application Site Area (redline boundary in acres)	233	222	n/a
Application Site Buildable Area (acres)	166	157	125 to 200 acres for 50MW (EN-3 para 2.10.17)
Solar Panels (maximum number)	147368	128752	100,000 to 150,000 for 50MW (EN-3 para 2.10.7)
Candidate panel power rating (Watts)	565W	610W	n/a
Inverters ² (number of)	28	26	n/a
Maximum Export Capacity (legal grid limit, MWac)	49.9	49.9	n/a
Total maximum inverter capacity (MWac)	49.9 ³	49.9	n/a
MWdc	83.26 ⁴	78.54	n/a
dc/MEC ratio	1.67	1.57	n/a
Development density (Application Site Buildable Area (acres)/MWdc)	2.79	2.82	2 to 4 acre/MWdc (EN-3 para 2.10.17)

38. As with inverters, the Appellant has not specified the solar panel that will be used and in footnote 1 it states: “No specific panel power rating has been given in the planning application, but these two examples are indicative of panels that might be used. This footnote applies to both 565W and 610W columns in the table above.”. As can be seen from the above, the Appellant has stated that the export capacity for the site is 49.9MW.
39. This Appellant’s figures shows that on the Appeal Layout, using a rating of 610MW, the Appellant has overplanted by 28.64MW (78.54MW – 49.9MW). Given that the development density is given as 2.82 acres per MWdc, HTAG calculates that this results in overplanting of 80.7 acres and 46,949 panels.
40. HTAG’s calculation of these latter figures, made on the basis of the Appellant’s solar expert, Mr Jean-Christophe Urbani’s evidence,⁷ below:

	Site specific figures for Longhedge appeal layout 610MW	Notes
Appellant’s Figures		
Solar panels (maximum number)	128,752	
Candidate panel power rating (watts)	610W	
MWdc	78.54MW	128,752 x 610 = 78,538,720
Development density (application site buildable area (acres)/MWdc)	2.82	
HTAG Figures		
NSIP Capacity Threshold (MWdc)	49.9MW	
Excess Capacity over the threshold (MWdc)	28.64MW	78.54MW-49.9MW
Solar panels (under the NSIP Capacity Threshold)	81,803	49,900,000/610 = 81,803
Overplanting by number of panels	46,949	128,752-81,803 = 46,949
Overplanting by number of acres	80.7	2.82 x 28.64

41. As for the purpose of overplanting, the Appellant’s evidence is clear that they have overplanted not just to compensate for degradation in panels (as supported by EN-3) but

⁷ Mr Urbani’s figure is considerably lower than that put forward in the Appeal Statement (c.139,568) and that agreed in the Statements of Common Ground (150,304).

also to maximise the output of a solar farm during the day (which is not supported by EN-3). Mr Urbani, in his evidence states (CD 7.10.2, Appellant Planning Proof Appendices, p 4):

“The output of a solar panel is determined under carefully controlled laboratory settings, which are very different from the real operating conditions. These laboratory conditions are called Standard Test Conditions (STCs). They assume 1000 W/m² solar irradiance, AM1.5 spectrum, and a cell temperature of 25°C. AM1.5 spectrum refers to a 1.5-atmosphere thickness (air mass or AM) corresponding to a solar zenith angle of around 48° (zenith angle is the angle to the sun relative to a vertical line).

*These STCs reflect an idealised scenario that is rarely achieved in reality by a solar farm, **and therefore to accommodate this difference in PV module nameplate power rating and real power delivered, solar designers generally oversize the amount of DC capacity compared to the AC. This is known as overplanting. This results in a DC to AC ratio that is greater than 1. This DC to AC ratio of more than 1 allows the maximum inverter capacity to be used more often during the day and more energy to be produced – for example in the early morning and late afternoon as showed in the graph at Figure 1.**”*

42. In response to a request from the Inspector, Mr Urbani provided a note with a breakdown of how overplanting is proposed to be distributed between degradation, connection losses and additional capacity (‘Longhedge DC Sizing Breakdown Note’ dated 28 June 2024, “**Breakdown note**”). Mr Urbani estimates that the DC overplanting is 60% greater than maximum 49.9MW_{ac} (Breakdown note at [5]). Mr Urbani states this 60% is broken down as follows (at [10]):

- (i) 13% is to account for the fact that a PV module has an output power defined under the Standard Test Conditions (STC) (irradiance = 1000W/m² – Cell temperature = 25dec C- Air Mass =1.5) which differs from the actual meteorological conditions of the site,
- (ii) 25 to 35% to account for module degradation,
- (iii) 12 to 22% to maximise the number of hours of production at the maximum authorized power capacity (49.9MW_{ac}) and the maximization of the energy production.

43. This means that up to 58% of the overplanting is for purposes other than to account for

module degradation.⁸

44. The Appellant’s Planning Witness Proof of Evidence (CD 7.10 at 9.2) states that “*the Council and Appellant have agreed that the generating capacity can be suitably controlled by condition. A condition has been included in the draft conditions list prepared between the Council and Appellant which ensures that the generating capacity shall be restricted to a maximum of 49.9MW measures as the AC installed capacity*”. Condition 6 produced for the roundtable discussion states:

6. The installed electrical generating capacity of the development hereby approved shall be restricted to a maximum of 49.9 megawatts (MW) measured as the AC export capacity.

This condition is imposed to limit the generating capacity of the site based on the submitted information and to accord with the National Policy Statement for Renewable Energy Infrastructure (EN-3), and for the avoidance of doubt having regard to Rushcliffe Local Plan Part 1: Core Strategy (2014) and Rushcliffe Local Plan Part 2: Land and Planning Policies (2019)].

D. RESPONSE TO INSPECTOR’S QUESTIONS

D1. Q1: Whether the Proposed Development can be kept under the NSIP Capacity Threshold by means of a suitably worded planning condition?

45. The answer to this question depends in part on the scope of the power to make planning conditions. This is located in section 70(1) of the TCPA 1990, which provides that a local planning authority:

“(a)... may grant planning permission, either unconditionally or subject to such conditions as they think fit[.]”

46. This power is subject to tests set out in *Newbury DCC v Secretary of State for the Environment* [1981] AC 578 (“**Newbury**”), where the House of Lords held that conditions must comply with the following tests:

- (i) They must be imposed for a planning purpose and not for an ulterior one.
- (ii) They must fairly and reasonably relate to the development permitted.
- (iii) They must not be so unreasonable that no reasonable authority could have imposed them.

⁸ ((22+13)/60)*100 = 58.33

47. This is reflected in the NPPF at §§55-58. The PPG on the 'Use of Planning Conditions' states:

What should a local planning authority do to ensure that the tests in national policy have been met?

Paragraph 55 of the National Planning Policy Framework makes clear that planning conditions should be kept to a minimum, and only used where they satisfy the following tests:

- *necessary;*
- *relevant to planning;*
- *relevant to the development to be permitted;*
- *enforceable;*
- *precise; and*
- *reasonable in all other respects.*

These are referred to in this guidance as the 6 tests, and each of them need to be satisfied for each condition which an authority intends to apply. See also guidance on the use of model conditions.

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48. The above shows that, subject to the 6 tests, there is a wide power to impose conditions which would seem to encompass imposing a condition for the purpose of keeping a development below the NSIP Capacity Threshold. Additionally, section 15 of the PA 2008 defines the NSIP Capacity Threshold for a new generating station by reference to when it is "constructed"; therefore, if a condition ensures that a solar farm is under 50MW at the point of construction then it appears it will not be a NSIP. There is no case law or guidance that suggests otherwise.

49. Given the above, the HTAG's position is that, in principle, an appropriately worded condition conforming with the 6 tests could ensure that the Proposed Development would remain under the NSIP Capacity Threshold and not require development consent. However, the condition agreed by the Appellant and LPA, quoted above, does not achieve this. This is because it is defined by reference to "export capacity" which is not the proper method of measuring capacity: Fordham J confirmed in *Galloway* (para [63]) that capacity may be measured lawfully by reference to Combined-Panels or Combined Inverters; and EN-3 makes clear that, while capacity can be calculated by reference to Combined-Panels or by reference to Combined-Inverters, government policy is that capacity should be measured by the Combined-Inverters Method. In addition, HTAG submit that overplanting is not unconstrained in national policy. Indeed, it is still a critical consideration where overplanting, as here, is proposed for unjustified purposes. Paragraph 2.10.55 and footnote 92 of EN-3

require that overplanting is justified on the basis of panel degradation but this is not the reason for the Appellant's proposed overplanting (as set out in Mr Urbani's evidence cited above).

50. A suitably worded condition should therefore be made with reference to the Combined-Inverters Capacity of the proposal. However, as HTAG has argued in its statement of case (CD 7.8, p 5), the Appellant has provided insufficient information for the Inspector to impose such a condition. As set out above, the Appellant has not specified the capacity of the inverters that it proposes to use and so it is unclear on what basis it proposes 26 inverters. It is very difficult to draft a precise condition given the absence of this information. Notwithstanding this, in an attempt to assist the Inspector, HTAG suggested the following condition:

3) No development shall take place before details of all solar panels and inverters, including drawings, model numbers and capacity, have been submitted to and approved in writing by the local planning authority. The development shall be implemented and operated throughout its lifetime in accordance with the approved details.

To ensure that the development remains within its approved capacity of 49.9MW AC, the following criteria shall be strictly adhered to:

- The number of inverters shall not exceed 26.*
- The maximum combined capacity of the inverters shall not exceed 49.9MW.*
- The maximum combined capacity of the solar panels shall not exceed 60MW.*
- Upon completion of the installation of the solar panels, and prior to the first export of electricity from the site, a signed and dated certification report confirming that the above criteria have been fully adhered to by the installer shall be submitted to the Local Planning Authority.*

Reason: To ensure that the capacity of the development hereby permitted does not exceed the statutory capacity threshold of up to 50 MW AC that a local planning authority is empowered to approve under Section 15 of the Planning Act 2008.

51. The Appellant has refused to agree to this condition. HTAG accepts that this condition is not perfect (for example it uses the Appellant's figure of 26 inverters), but it is the best that can be achieved given the Appellant's failure to provide the necessary information. Given that the Appellant's current proposal appears to cross the NSIP Capacity Threshold, a similar condition is clearly necessary.
52. HTAG also wishes to make clear that even if the Appellant provides further information and a suitably worded condition can be drafted, this does not mean there are no longer any issues relating to capacity at the site. As noted and discussed further below, the Appellant's

evidence suggests that there is unjustified overplanting which could occur regardless of whether the scheme is an NSIP.

D2. Q2: Would the proposed development then meet the criteria for an NSIP scheme that would require development consent, and if so would that preclude granting planning permission?

53. There are two parts to this question: (i) would the Proposed Development meet the criteria for an NSIP scheme that would require development consent, and (ii) if so would that preclude granting planning permission?
54. Regarding (i), as to the substantive issue of whether the Proposed Development is over the threshold, as discussed above, the Appellant has not provided the Inspector with all of the necessary information to properly determine whether the Proposed Development is under the NSIP Capacity Threshold. However, HTAG considers that the best inference from the evidence that the Appellant has provided indicates that the combined-inverter capacity is in excess of the threshold. As noted in the HTAG's statement of case (CD 7.8, p 2), the Appellant has a concurrent appeal within the same LPA ("**the Kingston Appeal**", ref. 3329235), for a solar development with a claimed capacity of 49.9MW. In the Kingston Appeal, the proposals are for 91,936 solar panels, and 17 inverters of an undisclosed capacity. The drawings of the panels in both these cases are identical, except that a written description indicates different measurements for the panels. Neither set of measurements conforms to the drawings.
55. The proposals in this appeal are for 139,568 panels and 26 inverters. The Appellant has not explained why 50% more infrastructure is required to deliver 49.9MW on this site, despite this being raised by HTAG in their statement of case. This need for explanation is particularly strong given that the Appellant advises that the Appeal Site was chosen for its good levels of solar irradiation. Additionally, the capacity of typical inverters for utility scale solar development, such as the appeal proposals, ranges from c.3MW to 4.6MW. For example: the Sineng 4.4MW inverter, the Sungrow 3.15MW – 4.4MW inverter, the Solar Tech AG 4.6MW inverter. These typical inverters indicate a site capacity of between 82MW (26 inverters x 3.15MW) and 120MW (26 inverters x 4.6MW), well in excess of the NSIP Capacity Threshold. This shows that a condition would be necessary.

56. Regarding (ii), HTAG submits that if the Proposed Development meets the NSIP Capacity Threshold then it cannot be granted planning permission. This is for two reasons.

57. The **first reason** is that Chamberlain J's obiter analysis is materially wrong, as intimated in Fordham J's judgment in *Galloway* (at para [66]), and that planning permission cannot ever be granted to an NSIP, regardless of whether the permission purports to be severable and implementable in part. To recap, in *Durham*, Chamberlain J stated planning permission can be granted to a proposal for a solar farm for over 50MW and can still be useful, as the permission can be partially implemented such that the development remains under the 50MW NSIP threshold. This is wrong for the following reasons.

(i) **First**, section 31 PA 2008 states that development consent is required "*for development to the extent that the development is or forms part of a nationally significant infrastructure project*". Development which partially implements a planning permission purporting to allow more than 50MW still "*forms part*" of an NSIP, even if it is not yet complete. This can be further seen from the fact that the "*development*" of an NSIP begins with the first material operation; development does not begin when the development crosses the NSIP Capacity Threshold. Partial implementation of a permission which exceeds the NSIP threshold would not be permissible absent development consent.

(ii) **Second**, if Chamberlain J was right that development only required development consent once it actually crossed the 50MW threshold during construction, then enforcement action against development occurring without development consent would be rendered futile as it could only be taken once the development had crossed the NSIP threshold, rather than in anticipation of this. Applicants could always avoid the need for development consent by obtaining planning permission for what would otherwise be a NSIP, and then partially implementing the permission to stay under the relevant threshold.

(iii) **Third**, Chamberlain J made an error in *Durham* at [51]-[52] when he reasoned that planning permission can be granted to an NSIP as there is nothing in the TCPA explicitly precluding a grant of planning permission to development which does not require it. This misunderstands the way that planning permission works under the TCPA 1990. Under the TCPA 1990, planning permission authorises development for which such permission is required. If there is no requirement, there can be no permission; it is nonsensical to speak of obtaining planning permission for something

for which there is no requirement for planning permission. Section 57(1) TCPA 1990 and section 33 of the PA 2008 provide that planning permission is not required for development requiring development consent. Therefore, planning permission cannot authorise development forming part of an NSIP and cannot be granted to it. This is what Fordham J was referring to in *Galloway* at [66] when he stated that: “*I interpose (as to Durham §51) that, as I see it, Parliament did not use a 'statutory preclusion', because it was disapplying (1990 Act s.57(1A)), for an NSI Project, a requirement which otherwise brings planning permission into play (s.57(1))*”.

- (iv) **Fourth**, in *Hillside* the Supreme Court held that planning permission cannot authorise development if it becomes physically impossible to carry out the development in full, a point pursued by the claimant in *Galloway*. Analogously, HTAG submits that planning permission cannot authorise development if it would be impossible to lawfully implement the scheme in full pursuant to the permission alone. It is not possible to lawfully build a scheme in excess of 50MW under a planning permission; therefore, a planning permission which purports to authorise this is invalid and unlawful.
- (v) **Lastly**, Parliament intended the PA 2008 to be a more streamlined means of planning control for NSIPs, whilst also providing adequate checks on large projects which have different impacts to those considered under the TCPA 1990. The PA 2008 should not be interpreted so as to frustrate and evade this regime in the way envisaged by Chamberlain J. The correct interpretation is that there is a binary choice: development either forms part of an NSIP or it does not. If it does not form part of an NSIP, then it can be authorised by planning permission. If it does, then planning permission is not required and cannot be obtained. Instead, the development can only be authorised by a development consent order. A developer commits an offence as soon they begin development as part of a scheme that could lead to an NSIP without such consent. This is the case even if they have planning permission as such a permission cannot authorise an NSIP.

58. However, even if HTAG is wrong that planning permission can never be granted to an NSIP, then the particular NSIP in this case cannot be granted permission on the basis of a **second, alternative, reason**. This is the same reason that Fordham J’s gave in *Galloway* as to why the Solar Farm in that case could not be granted planning permission. That is, the

Appellant's proposal is for an integrated and non-severable solar farm that cannot be partially implemented. If the combined AC capacity of the inverters exceeds the NSIP Capacity Threshold, then the developer cannot simply choose to build a smaller solar farm pursuant to the permission.

59. Before turning to the Inspector's other questions, there is an important point regarding the effect of the Inspector's determination on the issues under Q2. This point is that the Inspector's determination of whether the proposal crosses the NSIP Capacity Threshold is not legally binding on the LPA or any other party. Whilst under section 57(5) of the TCPA 1990, the Inspector's decision on a planning appeal is final, the question of whether development constitutes an NSIP is an objective question which falls to be considered under the PA 2008, either by the Court or the Secretary of State). This means that even if the Inspector decides that the development is under the NSIP threshold and grants the scheme permission, the LPA, if it thought otherwise, could still prosecute the developer for commencing the development without development consent, or seek an injunction from the High Court.

D3. Q3: If the Solar Farm is under the NSIP Capacity Threshold, would it be the case that 'overplanting' would no longer be a consideration that was relevant to answering the NSIP question - irrespective of the dc/MEC ratio for a scheme?

60. EN-3 states that the NSIP Capacity Threshold in section 15 of the PA 2008 should be calculated using the Combined-Inverter Method. This does result in an odd position whereby, for the purposes of the statutory threshold, it does not matter how many solar panels are planted, so long as the inverter capacity is always 49.9MW. For example, a solar farm could propose a farm with 200MW DC capacity measured by the Combined-Panel Method, but if the AC capacity was 49.9MW it would still not be an NSIP. In HTAG's view, this oddity can be overcome in two ways.
61. First, if the Inspector considers that the overplanting is such that the Solar Farm should be considered an NSIP, notwithstanding the position on AC capacity, then he could write to the Secretary of State inviting them to exercise their power under section 35 of the PA 2008 to direct that the Appellant's proposal is considered an NSIP and requires development consent.

62. Second, overplanting's impact on other aspects of the scheme (e.g. the harm to BMV agricultural land or other material considerations) should be taken into account and weighed in the balance. This takes us to the Inspector's next set of questions regarding overplanting's role in the overall planning merits.

D4. Q4-11: What is the role and impact of overplanting on the planning balance?

63. Questions 4-11 are conveniently answered together. HTAG submits that the impact of overplanting should clearly be taken into account as part of the planning merits. The impacts are addressed in detail, to the extent possible, in the witness evidence presented to the inquiry. However, some general points may be usefully made here.
64. Overplanting will obviously result in more panels and greater acreage for the overall site. This will result in the following harms:
- (i) Greater landscape harm (because the Solar Farm would take up a greater area and therefore be more visible);
 - (ii) Greater harm on the BMV agricultural land (because more of the agricultural land will be taken up by the development);
 - (iii) Greater harm to the setting of the Hawksworth and Thoroton Conservation area and listed buildings (because the greater the scale of the Solar Farm, the greater its impact on the setting and listed buildings).
65. The harm caused to BMV agricultural land is particularly significant given the WMS that the Inspector has asked about. The WMS, quoted above, makes clear that developers are required to clearly justify their use of BMV agricultural land and should preferably use land in areas of poorer quality. In this case, the proposed development would result in the loss of 34.4 hectares of BMV Land, with the remainder on Grade 3b land, which is predominantly in arable production (CD 7.8, p 16). The Appellant has not explained why sites on non-agricultural land or land of poorer quality were not considered. The Appellant has sought to rely on *Bramley* to justify its position (CD 7.6.1, §3.4), but this decision pre-dates the WMS and does not therefore reflect the latest government policy, which emphasises food production and protection of BMV land. . The WMS states "*there is a greater onus on developers to show that the use of higher quality land is necessary*" and the Appellant has failed

to discharge this onus by providing an explanation for its use of BMV land.

66. Taking the harms of overplanting into account in the planning balance as a whole is supported by EN-3 at §2.10.56, which states:

“2.10.56 AC installed export capacity should not be seen as an appropriate tool to constrain the impacts of a solar farm. Applicants should use other measurements, such as panel size, total area and percentage of ground cover to set the maximum extent of development when determining the planning impacts of an application.”

67. Whilst this refers to ‘export capacity’, HTAG submits that this logic applies equally to the combined-inverter capacity of a scheme. In the context of a scheme that proposes a large and policy non-compliant additional solar panel/DC capacity unjustified on the basis of provision for degradation (see below), the Inspector should be particularly mindful of ensuring that the Appellant’s overplanting does not result in unjustifiable planning harms. Clearly overplanting will have an impact on the total area of the site and increase the harms set out above.
68. In this case, the Appellant’s overplanting is clearly excessive and in breach of the NPS. The meaning of ‘overplanting’ and what it can be used for depends on the interpretation of the EN-3, which is an objective issue of law (see *Scarisbrick* above). It is not sufficient for the Appellant’s interpretation to be ‘reasonable’; it must be the correct, objective interpretation as a matter of law. HTAG submits that properly interpreted footnote 92 of EN-3 only permits overplanting to allow for degradation. This is for the following reason:
- (i) EN-3 states overplanting *“allows developers to take account of degradation in panel array efficiency over time, thereby enabling the grid connection to be maximised across the lifetime of the site”*. It makes no mention of overplanting for other purposes.
 - (ii) In *Galloway* at §17, Mr Justice Fordham stated: *“Overplanting means installing 'spare' solar panels for necessary future use, as a 'back-up' so as to address light-induced degradation of solar panels”*.
 - (iii) It is clear why EN-3 limits overplanting to combat the impact of degradation: if applicants/appellants were able to overplant in order to maximise grid capacity then there would be no limit to the amount of overplanting permissible, with the consequential planning harms identified above.

69. As outlined above, the NPS is a material consideration even if the appeal is considered under the TCPA. The Inspector has asked whether increasing the utilisation of the available grid connection more effectively by overplanting should be considered a planning benefit. It is submitted that whatever benefit is provided is outweighed by the planning harms. The Inspector is therefore invited to apply the policy stated in EN-3 to find that the Appellant's overplanting is unjustified and refuse the Solar Farm planning permission.

E. CONCLUSION

70. In summary, the Appellant submits that:

- (i) **Q1:** In principle the proposal could be kept under the NSIP Capacity Threshold by means of a condition, but the Inspector has been provided with insufficient information to do this and the Appellant's proposed condition does not achieve this as it focuses on export, rather than AC, capacity,
- (ii) **Q2:** The Appellant's evidence suggests that the combined AC capacity of the Solar Farm will exceed the NSIP Capacity Threshold when it is constructed.
- (iii) **Q2:** If the Solar Farm crosses the NSIP Capacity Threshold, then it cannot be granted planning permission, either because (i) no NSIP can ever be granted planning permission, or, alternatively, (ii) the Appellant's proposal is not severable and cannot be partially implemented.
- (iv) **Q3:** Although overplanting of DC panels does not strictly impact the statutory test of capacity under the PA 2008, the Inspector could write to the Secretary of State to invite them to consider whether the proposal should require development consent. Alternatively, overplanting leads to planning harms which are a material consideration under the TCPA 1990.
- (v) **Q4-11:** Up to 58% of the Appellant's overplanting is for a purpose other than to account for degradation and is therefore in breach of what is permitted by EN-3. Additionally, this excessive overplanting leads to a variety of planning harms. These are both material considerations for the Inspector.

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