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6 October 2020

Our Ref: PoTLL/TFGP/EX/1  
Your ref: EN010092

Dear Ms Williams,

## **Planning Act 2008**

### **Application for the Thurrock Flexible Generation Plant Development Consent Order**

#### **Response to Rule 6 Letter (IP No. 20025544)**

1. Further to the Examining Authority's ('the ExA') letter of 21 September 2020, issued pursuant to Rule 6 of the Infrastructure Planning (Examination Procedure) Rules 2010 (as amended) ('the Rule 6 Letter') in respect of the application ('the Application') for development consent for the Thurrock Flexible Generation Plant project ('the Project'), this letter sets out Port of Tilbury London Ltd's ('PoTLL') initial response to the Rule 6 Letter.

#### Introduction

2. As set out in PoTLL's Relevant Representation ('RR'), PoTLL has a number of fundamental concerns in respect of the Environmental Statement ('ES') that has been provided by the Applicant, to the extent that PoTLL considers that it is in fact inadequate for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ('the EIA Regulations'). PoTLL was therefore disappointed to see that the Rule 6 Letter makes no procedural decision and provides no written statement in respect of requiring the Applicant to provide further environmental information to ensure that the ES can be made adequate.
3. This is particularly noted in the context that the Principal Issues listed in Annex D, and the requested contents of Statements of Common Ground with Interested Parties set out in Annex E to the Rule 6 Letter, make numerous references to the adequacy of the assessments in the ES and the mitigation measures contained within it.

#### Statutory context

4. PoTLL notes that:
  - under Regulation 2 of the EIA Regulations "further information" is defined as *"additional information which, in the view of the Examining authority, the Secretary of State or the relevant authority, is directly relevant to reaching a*



*reasoned conclusion on the significant effects of the development on the environment and which it is necessary to include in an environmental statement or updated environmental statement in order for it to satisfy the requirements of regulation 14(2)";*

- under Regulation 20(1) of the EIA Regulations, where an Examining Authority is examining an application for an Order granting development consent and paragraph (2) applies, the Examining Authority must *"issue a written statement giving clearly and precisely the reasons for its conclusion; send a copy of that written statement to the applicant; and (c) suspend consideration of the application until the requirements of paragraph (3) and, where appropriate, paragraph (4) are satisfied"*; and
- Regulation 20(2) applies if the applicant has submitted an ES and the Examining authority is of the view that *"it is necessary for the statement to contain further information"*.

5. Regulation 14(2) of the EIA Regulations requires that an environmental statement includes:

- *a description of the likely significant effects of the proposed development on the environment; and*
- *any additional information specified in Schedule 4 of the EIA Regulations relevant to the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected, which includes:*
  - *a description of the likely significant effects of the development on the environment resulting from the construction and existence of the development;*
  - *a description of the likely significant effects on the factors identified in Regulation 5(2) - this includes 'land', 'water' and 'material assets'; and*
  - *a description of the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the environment (similar language also being used in Regulation 14(2)(c).*

6. Furthermore, PoTLL notes that Regulation 14(3) of the EIA Regulations states that an Environmental Statement '**must**' be based on the most recent scoping opinion adopted (so far as the proposed development remains materially the same).

7. Regulations 3 and 10 of the EIA Regulations set out that a scoping opinion is an opinion by the Secretary of State (in this case) as to the 'information to be provided in an environmental statement'. Such 'information' required by the scoping opinion would therefore affect the 'description of the likely significant effects of the proposed development on the environment' that is required by Regulation 14(2)(b).

8. As such, any failure of an ES to be based on the most recent adopted scoping opinion is not only a direct breach of Regulation 14(3), but also leads to a further consequential breach of Regulation 14(2).

### Further information required – PoTLL issues

9. Building on what it stated in its RR, PoTLL considers that in the statutory context referred to above, the ES submitted for the Project fundamentally fails to meet these requirements in respect of its impact on PoTLL's land and Tilbury2 as a material asset within its statutory undertaking, as set out in brief below.
10. Despite the Project including marine aspects, there is no assessment of the impact on navigation caused by it; both on the river Thames generally, but also specifically in relation to the approaches to PoTLL's assets at Tilbury2 and the existing Port of Tilbury. This is the case despite the Project Scoping Opinion *specifically* requiring one to be carried out as part of the EIA process (see item 4.3.11). We note that the lack of a Navigation Risk Assessment has also been highlighted in the Port of London Authority's RR. There is therefore no assessment of impacts on navigation at all and this will be directly relevant to the Interested Parties' understanding and being able to respond to the likely significant effects of the development. This compounds the absence of any meaningful preliminary environmental information on likely navigation impacts at the pre-application statutory consultation stage. Such an assessment is also necessary for the proper examination, reporting and conclusion on the likely significant effects of the development on the environment and its inclusion in the ES is necessary in order to satisfy the requirements of Regulations 14(2) and (3) of the EIA Regulations.
11. Despite no agreement, proper consideration of alternatives and opposition from PoTLL in the absence of any detail as how the access could work alongside its port operations, the Project's terrestrial transport movements seek to rely on being able to utilise road infrastructure within Tilbury2 to access the location of the majority of the development site, both for construction HGVs and for transporting construction workers. However, this is infrastructure that is and will be relied on and used by PoTLL and its customers in order to access and egress the nationally significant infrastructure project that is Tilbury2 whilst in operation. The potential impacts of this are described further in PoTLL's RR at paragraphs 36-38. It is noted that the Applicant has not engaged with PoTLL in any way to seek to characterise these movements within the Port, and thus what any potential consequential and additive impact to those movements could be.
12. As such, any potentially imposed use of that road infrastructure would have a direct impact and effect on the land use of Tilbury2 by PoTLL. No assessment of this effect or any other effect on the land use and on the safe, efficient and economic operation of Tilbury2 has been undertaken by the Applicant within the ES. This is the case despite item 4.4.7 of the Project Scoping Opinion requiring the ES to include an assessment of impacts on local businesses/commercial operations, such assessment to include 'the Port of Tilbury'. There is therefore no assessment of impacts on the Tilbury2 land use and on its safe, efficient and economic operation - having the same consequential procedural effects and failings in performance against Regulations 14(2) and (3) of the EIA Regulations as is set out in paragraph 10.
13. PoTLL also considers that the Applicant, in considering such effects and related effects on the local highway network outside of Tilbury2, has not properly set out the Applicant's measures to avoid, prevent, reduce or, if possible, offset any identified significant adverse effects on the local highway and the Tilbury2 network in respect of construction worker travel movements. Neither has the Applicant provided an adequate description of the physical characteristics of the whole development (as required by paragraph 1(b) of Schedule 4 of the EIA Regulations,

referred to by Regulation 14(2)). This is for the reasons set out in paragraphs 39-41 of PoTLL's RR, i.e. that the Construction Worker Travel Plan is based on a set of assumptions where there is no evidence base that demonstrates they can work; and includes references to potential car parking that is not provided for or safeguarded within the Order Limits for the Project. This is information underpinning the assessment of effects and the mitigation required - having the same consequential procedural effects and failings in performance against Regulations 14(2) of the EIA Regulations as is set out in paragraph 10.

#### Further information required – other issues

14. The issues highlighted above relate to those matters of most relevance to PoTLL, but PoTLL also notes the RRs submitted by Historic England, Natural England and Essex County Council, which raise serious concerns as to the adequacy of the assessments undertaken by the Applicant, alongside other substantive queries on assessments raised by the Environment Agency and the MMO.
15. PoTLL notes in particular that:
  - Essex County Council highlights the lack of construction waste and minerals assessments in the ES, both of which are suggested as needing to be dealt with in the Scoping Opinion, with no indication being given that a different approach has been agreed with Essex County Council as the appropriate stakeholder (as is permitted by paragraph 3.1.3 of the Scoping Opinion for the Project). This also fails paragraph 1(d) of Schedule 4 of the EIA Regulations which requires an ES to include an *estimate, by type and quantity of expected residues and emissions (such as... 'quantities and type of waste produced...)* and paragraph 4 which requires a description of the factors specified in regulation 5(2) (which as noted above, includes material assets, but also includes soil) likely to be significantly affected by the development;
  - Historic England highlights that there has been no *'field assessment of much of the area proposed for development'*, there has not been any *'evaluation work'*; no *'adequate understanding of the potential impact of below ground archaeological deposits, or their significance'*; and that the ES *'does not fully address the impact upon the significant of [an] asset through a development within their setting'*. The ES is therefore missing key descriptions of the baseline and a proper assessment of the effects on heritage assets – having the same consequential procedural effects and failings in performance against Regulations 14(2) of the EIA Regulations as is set out in paragraph 10; and
  - Natural England raises a number of issues, but notes in particular that further assessment of the impacts on Avocet birds, which were identified in the supporting appendices, is needed. This is raised in a HRA context, but is also relevant in an ES context, as a type of ecology potentially impacted by the Project that has not been assessed. The ES is therefore missing key descriptions of the baseline and a proper assessment of the effects on ecology – having the same consequential procedural effects and failings in performance against Regulations 14(2) of the EIA Regulations as is set out in paragraph 10.
16. It is clear overall, therefore, that the Project's ES is generally insufficient and inadequate, with the issues from PoTLL's perspective only being some of the issues with the ES.

### Impact of inadequacy

17. PoTLL considers that the matters highlighted above are not a case of different parties having different views on the assessments provided or the conclusions reached, it is simply a fact that the Applicant has not provided the information that is required by the EIA Regulations and pursuant to the Project Scoping Opinion, particularly in respect of the PoTLL issues that have been highlighted.
18. As such, PoTLL does not consider that these are matters that can simply be fixed through ExA and Interested Party probing and submissions as part of the Examination process, as appears to be suggested through the Rule 6 Letter. These are procedural matters that need to be resolved through the Applicant first submitting the information that is missing, to enable the Examination (including Interested Parties) then to consider an ES that is adequate before the examination commences.
19. In respect of the PoTLL issues identified above we consider, in summary, that the Applicant should be required by the ExA to submit the following information before the examination commences to enable the ES to be considered adequate:
  - a Navigation Risk Assessment to assess the effects of the proposed causeway on navigation;
  - an assessment of the impact of the Project on the land use and on the safe, economic and efficient operation of Tilbury2, including in particular construction traffic movements within the site including construction worker shuttle movements; and
  - information to enable the assessment of the construction worker shuttle movements to be robust through showing that the assumptions set out in the Outline Construction Worker Travel Plan, which underpins those assessments, can actually be delivered.
20. In the context of the other ES issues highlighted above, the need for the above information may enable other Interested Parties to request other further information that may be required at the Preliminary Meeting Part 1.

### Impact on consideration of the Application

21. In light of the statutory context set out above, PoTLL acknowledges that until the Preliminary Meeting is completed, the ExA cannot be considered to be 'examining' the application for the Project and that therefore Regulation 20(1) and the various procedural requirements in Regulation 20(3) and (4) would not apply as such, as the 'start day' under section 98 of the Planning Act 2008 would not have occurred.
22. Furthermore, PoTLL recognises that invoking Regulation 20 of the EIA Regulations can cause difficulties in developing an Examination timetable, as the 6 month 'clock' for the Examination does not pause during any suspension that is triggered by the EIA Regulations.
23. As such, PoTLL considers that, to enable an adequate ES to be considered by the Examination and for a fair and proper Examination to take place, whilst ensuring that the Examination timetable itself is minimally impacted, the Examination should not formally be started until the Applicant has submitted the further environmental information required to make the ES adequate, as set out above.

24. This could be done by ensuring that the Preliminary Meeting is not completed until that information has been submitted to the ExA, whether through delaying the date of the proposed Part 1 of the Preliminary Meeting, or if discussion of the points raised in this submission at Part 1 is considered necessary, by delaying Part 2 of the Preliminary Meeting or continuing rather than concluding and closing the Preliminary Meeting at the end of the Proposed Part 2 of the Preliminary Meeting.
25. PoTLL notes that similar decisions were made by the ExA in respect of the proposed Rail Central DCO, where the Preliminary Meeting was deferred to facilitate the submission and agreement of traffic and highway information by the Applicant and Interested Parties.
26. In any procedural decision made by the ExA, PoTLL considers that the Applicant will need to engage with it, and with relevant Interested Parties, in developing the further environmental information required to ensure that the ES can be considered as adequate – it is noted that the Applicant has at least begun to do this at a basic level in respect of the navigation issue; but that PoTLL already has some concerns as to the proposed risk assessment methodology. Facilitating this engagement will enable the Examination to start on a fair and equitable basis and with at least an adequate baseline and hopefully a commonly agreed basis for that information.
27. As such, any dates or time periods for submission of information will need to account for time to be given for the Applicant to undertake that engagement and the statutory process under the EIA Regulations for advertisement and consultation on the further environmental information to be carried out.

#### Alternative approaches

28. Alternatively, PoTLL considers that it is open to the ExA as an alternative approach to begin the Examination following the Preliminary Meeting Part 2 but then, in its Rule 8 letter, to make a Regulation 20(1) statement and require the Applicant to submit the further environmental information required, suspend the Examination, and require the Applicant to meet the requirements of Regulation 20(3) and (4).
29. If, however, the ExA considers that the information required is not 'further information' and/or that the Preliminary Meeting and start of Examination should not be delayed, PoTLL considers that the information required to make the ES adequate is an important part of the Examination and should therefore be considered as 'any other information' for the purposes of the EIA Regulations; and that accordingly the Applicant should be required to submit that information early enough in the process that it can be fully considered and taken into account prior to the preparation and submission of PoTLL's Written Representation.
30. In consideration of the draft timetable at Annex C to the Rule 6 Letter, PoTLL therefore suggests that submission of this information should be provided for at the suggested Deadline 1.
31. As noted above, PoTLL would expect that the Applicant would seek to engage meaningfully with PoTLL in order to inform the information to be submitted and that any procedural decision from the ExA should require the Applicant to undertake this and the equivalent advertisement and consultation that would be required by the EIA Regulations.

### DCO protective provisions

32. As noted in PoTLL's RR, PoTLL is concerned that the draft DCO for the Project submitted with the Application does not include any protective provisions ('PPs') for the benefit of PoTLL.
33. PoTLL further notes that part 4 of PINS' Advice Note 15 sets out that bespoke PPs should be included in a DCO application if agreed, or if not, the relevant standard PPs. It goes on to say that where the Applicant is not proposing to include draft PPs for a statutory undertaker it should explain why this is the case in its Consultation Report.
34. At page 167 of the Applicant's Consultation Report [APP-026], the Applicant states that *"Protective Provisions have been considered during ongoing consultation between the Applicant and POTLL. Given that the Applicant is only seeking rights to use an existing route through POTLL's land as an access, protective provisions are not considered to be necessary. The Applicant would, however, be happy to discuss this further with POTLL as part of the ongoing engagement"*.
35. PoTLL can confirm that no specific discussions have been undertaken in respect of the potential inclusion or scope of any PPs. Furthermore, it is considered that this response is indicative of the Applicant's lack of understanding of the potential full impact of the Project on PoTLL; the lack of a robust approach to dealing with the interaction of the Project with Tilbury2, a statutory undertaking, and ensuring that suitable protections are in place for it; and a lack of informed understanding due to the absence of adequate baseline and assessment.
36. Indeed, in the absence of a full assessment of the impacts of the proposed access and of any serious level of engagement with PoTLL on the issues that arise, it may be the case that even the protection of PPs would be insufficient to prevent serious detriment to PoTLL's statutory undertaking, i.e. in that event that the principle of the access proposed to be taken is unacceptable, notwithstanding any protection on points of detail afforded by the PPs. PoTLL is therefore not able at this point in time to say that protection through PPs will be sufficient to avoid serious detriment and that therefore access through its site is acceptable in principle (albeit that, as stated in PoTLL's RR, it does not object in principle to the Project *as a whole*).
37. In any event, it is noted that PPs seek to protect statutory undertakings not just from the effects of land-related powers contained within a DCO, but also from the effects of any other powers that are granted by it, principally powers to construct, operate and maintain the proposed plant. As set out in PoTLL's RR, the construction of the Project would have a direct impact on its statutory undertaking through the interaction of construction traffic with the road and rail traffic of Tilbury2. It is therefore not just land powers that are relevant and so the Applicant's response in its Consultation Report in relation to PPs is misconceived.
38. At the very least, therefore, pending a full assessment of impact being undertaken by the Applicant, PPs for the benefit of PoTLL should be brought forward by the Applicant for discussion with PoTLL, so that if in due course it can be demonstrated by the Applicant that the effects of the Project on PoTLL's undertaking are in principle acceptable, the PPs can then form a framework and contain a detailed mechanism for managing those effects and rendering them the minimum possible in the event that development consent is granted and the Project is implemented. PPs are therefore necessary to protect the undertaking from negative impacts arising

from the Applicant's proposals and the serious detriment that has the potential to be caused as a result of the various powers that are sought.

39. As such, the fact that there are currently no PPs for PoTLL's benefit within the draft DCO is a serious deficiency that needs to be rectified as soon as possible. In the context that the Applicant has not engaged with PoTLL on this issue to date, PoTLL requests that the ExA makes a procedural decision to direct the Applicant to use all best endeavours to resolve this serious deficiency.
40. This is particularly the case in the context that the construction phase assessments in the ES rely on the fact that access is proposed unilaterally by the Applicant to be taken through Tilbury2. If this cannot be agreed with PoTLL, or compulsory acquisition powers are not granted on the basis of serious detriment being shown, then one of the fundamental bases of the application will be fatally undermined.
41. PoTLL notes that the draft timetable issued at Annex C to the Rule 6 Letter provides for the next iteration of the draft DCO to be submitted to the Examination by the Applicant at Deadline 3, which is 21 December 2020. It is understood that whilst this will help the Applicant take account of its responses to the ExA's First Written Questions and Written Representations that are received at Deadline 2, PoTLL considers that the Applicant needs to engage with PoTLL as soon as possible to resolve this issue and in any event prior to the preparation and submission of Written Representations in order to avoid unnecessary work and additional submissions by PoTLL.
42. PoTLL therefore requests that:
  - the ExA makes a procedural decision to direct the Applicant to use all best endeavours to resolve this serious deficiency in relation to PPs; and
  - a Procedural Decision is made in the Rule 8 Letter, requiring the Applicant to provide an update on the status of negotiations in relation to PPs for the benefit of PoTLL by Deadline 1; or
  - a specific First Written Question is asked of the Applicant (and PoTLL) requesting an update on the position in relation to PPs for the benefit of PoTLL, including requesting that the Applicant provides a copy of the current draft of those PPs; this would lead to a response by PoTLL at Deadline 2.

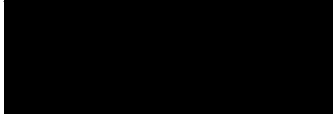
#### Attendance at Preliminary Meeting

43. Further to the above points, I can confirm that PoTLL wishes to speak at Part 1 of the Preliminary Meeting on 20 October, and that we and our representatives have completed the Involvement Form on the PINS website accordingly. For the avoidance of doubt, I can confirm that this comprises the following:
  - John Speakman of PoTLL; and
  - Robbie Owen, Jan Bessell and Matthew Fox of Pinsent Masons LLP, our legal representatives.
44. Given the matters raised in this letter, it is intended that PoTLL and its advisers will speak in respect of Items 3, 4, 6 and 8 of the proposed Preliminary Meeting Part 1 agenda.



45. If you have any questions on any of these matters, please do not hesitate to contact our legal advisers: [robbie.owen@pinsentmasons.com](mailto:robbie.owen@pinsentmasons.com) and [matthew.fox@pinsentmasons.com](mailto:matthew.fox@pinsentmasons.com).

Yours sincerely



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