

Date: 01 April 2021  
Our ref: 341637  
Your ref: EN010092 DL2



## The Planning Inspectorate

**BY EMAIL ONLY**

Customer Services  
Hornbeam House  
Crewe Business Park  
Electra Way  
Crewe  
Cheshire  
CW1 6GJ

T [REDACTED]

Dear Sirs

**NSIP Reference Name / Code: Thurrock Flexible Generation Plant / EN010092**  
**User Code: 20025498**

Thank you for your consultation on the above dated 16 February 2021.

Natural England is a non-departmental public body. Our statutory purpose is to ensure that the natural environment is conserved, enhanced, and managed for the benefit of present and future generations, thereby contributing to sustainable development.

Please note that we have submitted our Written Representation and answers to Inspector's Questions within this letter. We have also taken the opportunity to incorporate our comments on the Thurrock Power Ltd Deadline 2 submission 'Comments on the Natural England Procedural Deadline D submission' (although we appreciate this may technically be premature, it seem helpful to do so to condense the remaining areas of disagreement. In the current circumstances Natural England's available resource does not permit a full Written Representation as might normally be the case. Nevertheless, we have aimed to focus our additional comments set out within this letter to significant outstanding matters only, principally relating to the Habitats Regulations Assessment and its Appropriate Assessment.

This Written Representation should be read in conjunction with Natural England's Relevant Representation (18<sup>th</sup> August 2020), Discretionary Advice Service letter (21<sup>st</sup> October 2020), and our comments on additional submitted information, notably the updated HRA (1<sup>st</sup> February 2021).

### **Written Representation: Summary of Natural England's Outstanding Concerns**

#### **Habitats Regulations Assessment**

Our review of the impacts of the project upon European protected sites – specifically the Thames Estuary & Marshes Special Protection Area and Ramsar site – has been set out within our Relevant Representation and our comments upon the submitted updated HRA report are separately submitted (Deadline D). We have reviewed the applicant's comments upon our Deadline D submission, and a draft Statement of Common Ground shared with us but not yet submitted ('Draft 3, March 2021'). We consider that the outstanding HRA matters can be summarised as follows:

- 1) Baseline population figures use total SPA numbers, however we have argued that alongside this the use of local (i.e. Mucking Flats & Marshes component SSSI) figures is appropriate. Natural England's position is that the use of local metrics is appropriate to avoid the 'death by a thousand cuts' scenario.
- 2) Whether the inner estuary areas offer more sheltered conditions during severe weather. Natural England's position is that the whole of the SPA should not be considered uniform in terms of its ecological function.
- 3) The significance of the loss of the area of functionally linked land. Natural England's position is that consistent with the conservation objectives (see point 5 below), there should be no permanent loss of functionally linked land.
- 4) The interpretation of 'maintain' and 'restore' conservation objectives. Natural England's position is that the decision making of plans and projects should not undermine the conservation objectives of the SPA and Ramsar site.

We expand on each of these points below.

### **Common Land**

We have provided further comments on Common Land as answers to the Inspector's Questions below. Our main position on the project as far as it relates to Common Land can be found within our s16 pre-application advice letter (dated 5<sup>th</sup> November 2020) sent to the PINS Common Land Casework Team. We are not aware of a further representation from TFGP to address concerns raised in that letter but have requested clarification on this.

### **Marine Issues**

Further to our Relevant Representation, we provide an update on the impacts of the project on Swanscombe Marine Conservation Zone MCZ and Upper Thames Estuary rMCZ.

## **Habitats Regulations Outstanding Matters**

As described above, we attempt to condense remaining HRA matters further to our earlier representations which are not repeated here. The Inspector is referred to those representations for our main points of concern. We also note a range of Inspector's questions linked to HRA and related matters connected to the causeway structure. These are addressed to the applicant, so we have not provided additional answers at this stage, however we will be pleased to supplement the advice we have provided to date with specific further advice should this be required.

### **1) The Baseline Population Figures Assessed**

As set out in our comments on the updated HRA (Natural England 'Deadline D' response), we have advised that the HRA should consider an appropriate 'local' population baseline figure to reflect the need to avoid the erosion of the conservation objectives by multiple small scale projects ('death by a thousand cuts'). This position also reflects the 'distribution' conservation objective for this (and many other) European sites. In essence, it is not desirable or acceptable to displace the same number of birds into a smaller overall area. The approach of looking at discrete sub-sections of the SPA therefore respects the need for the relevant species to function across the entire designated area and functionally linked habitat.

In their response to our advice, TFGP hold that their view is correct and there remains a difference of opinion on this matter. We agree that 'whole SPA' numbers should be assessed, but that this only partially serves the purpose of the HRA. In our view, the numbers of birds affected are significant when considering this local analysis, and several of our additional points are not regarded by the applicant to be significant if only 'whole SPA' numbers are used.

The applicant comments that 'death by a thousand cuts' is addressed by the in-combination HRA test, and whilst this is relevant to a point, once small scale projects become a part of the operational baseline, they are scoped out of the in-combination test. Therefore, this does not wholly address the concerns that we have expressed.

## **2) The Function of Inner Estuary Areas**

Whilst we are not aware of any formal evidence or reference describing the shelter provided by inner estuary areas, this feature should be self-evident when considering many estuary systems at a landscape scale. Outer areas are typically more exposed to severe weather conditions by their open nature, being further from sheltering landforms. Anecdotal evidence should be enough to support the movement of intertidal bird assemblages to seek the most favourable conditions available to them, and Natural England's advice is that this general function is also characteristic of the Thames Estuary & Marshes SPA.

## **3) The Significance of the Loss of Functionally Linked Land**

In their response to our Deadline D representation, the applicant references our research report NECR205 'Functional linkage: How areas that are functionally linked to European sites have been considered when they may be affected by plans and projects - a review of authoritative decisions', noting case studies where losses of functionally linked land were permitted where small numbers of birds were affected. It is important to note that each example holds case specific details and circumstances, and no one case is directly comparable to another. The TFGP does not highlight any specific cases which might be compared with the project under consideration here, and so we would offer the following general observations that:

- The significance of the loss depends on its use by interest features, and in this case, we have argued that for some species birds are present in (locally) significant numbers;
- The conservation objectives (supplementary advice package) state that the extent of habitat outside the SPA should be maintained (noting point 4 below);
- The concern for precedent setting in this stretch of the Thames for growth of riverside access;
- The losses in this case are neither very small (to be dismissed as not significant) - at 0.35ha for the longest-term loss to the causeway - nor are they so extensive as to present a compelling case for an effect on site integrity;
- The area is located towards the upper foreshore where available food resources begin to diminish as the tide covers the mudflats. Such areas represent the last available feeding opportunities until the tide recedes, carrying arguably greater energetic importance.

## **4) The Interpretation of 'Maintain' and 'Restore' Conservation Objectives**

In response to Natural England's reference to 'maintain' and 'restore' objectives, the applicant comments at reference 1g on these matters. By way of a further comment, we advise that:

- It remains to be seen whether the loss of mudflat habitat (to the causeway) should be viewed as 'short-medium term', and whether this may amount to a reduction in the 'extent' objective.
- On the issue of the 'restore' objective for redshank, dunlin and ringed plover, our view on the significance of the numbers of birds affected is set out within our Relevant Representation (noting the above comments regarding an appropriate baseline).
- Regarding the 'extent' objective and whether this 'cannot be used to protect all potentially functionally linked land everywhere outside the site boundary regardless of whether that land makes a significant contribution to the maintenance of the SPA populations or not' and 'afford[ing] equal protection', we note the following:

- We agree that there must be a 'strength' criterion to the understanding of whether any 'potential' FLL is 'actual' FLL. Our view as expressed is that the numbers of birds affected are significant locally (see previous comments).
  - We disagree that our position affords equal protection – there remains flexibility in the provision of mitigation land compared to habitat within the European site (which would be compensation instead).
- The matter of whether the loss of mudflat is 'a very small percentage of the available habitat' depends again on the question of the baseline and whether 'available habitat' has in mind the whole resource of the SPA and the entire FLL resource, or the more locally specific context which we have argued for in our representation. The developer's response also appears to confuse the two tests of HRA when it refers to 'would not result in a significant effect on integrity'. The tests of 'significance' and 'integrity' should be separated and handled within screening and appropriate assessment stages respectively.

### Marine Issues

Further to our Relevant Representation, Natural England can confirm that as noted by the sediment plume modelling, and the distance from the application site, that we are satisfied that the Swanscombe Marine Conservation Zone (MCZ) will not be adversely affected by the proposals. For avoidance of doubt, the Upper Thames Estuary rMCZ did not progress to notification and so no longer is of relevance to the project and its examination.

### Conclusion

We have aimed to progress outstanding matters within the time and resources available under current circumstances. We recognise that ideally, we would have been able to agree a Statement of Common Ground with the applicant, however this has unfortunately not been possible to achieve for our delayed Deadline 2 submission. We do wish to acknowledge efforts made by the developer to progress these matters, and we anticipate further discussions if possible to reach further agreement ahead of the Issue Specific hearing 1, where at the present time we would like to reserve the right to participate.

Kind regards,

██████████

Senior Adviser  
West Anglia Area Team  
Natural England

██████████ [@naturalengland.org.uk](mailto:██████████@naturalengland.org.uk)

## Appendix 1 Examining Authority's Written Questions

Natural England answers to selected ExA Written Questions as set out in its letter of 16<sup>th</sup> February 2021 are set out below.

### **1.3.13 Applicant & Natural England**

**Please confirm whether Walton Common benefits from any public access rights under the Countryside and Rights of Way Act 2000. If so, please specify.**

Walton Common is subject to Section 15 of the Countryside and Rights Act 2000. The excerpt is provided below. This section deals with rights of access that are already in place on common land prior to the commencement of the CROW Act. It does not replace those rights with CROW Access, and further, those rights are not subject to the Exceptions and Restrictions in Schedule 1 and 2 of the Act.

However, s15 does impact on those rights. The effect that Section 15 has is to extend the rights of access named in these previous enactments from the inhabitants of the neighbourhood or locality to the wider public. This adds clarity to legislation as it is not always obvious who the locality are.

*Rights of access under other enactments.*

*(1) For the purposes of section 1(1), land is to be treated as being accessible to the public apart from this Act at any time if, but only if, at that time—*

*(a) section 193 of the **M1** Law of Property Act 1925 (rights of the public over commons and waste lands) applies to it,*

*(b) by virtue of a local or private Act or a scheme made under Part I of the **M2** Commons Act 1899 (as read with subsection (2)), members of the public have a right of access to it at all times for the purposes of open-air recreation (however described),*

*(c) an access agreement or access order under Part V of the National Parks and Access to the **M3** Countryside Act 1949 is in force with respect to it, or*

*(d) the public have access to it under subsection (1) of section 19 of the **M4** Ancient Monuments and Archaeological Areas Act 1979 (public access to monuments under public control) or would have access to it under that subsection but for any provision of subsections (2) to (9) of that section.*

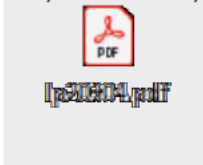
*(2) Where a local or private Act or a scheme made under Part I of the **M5** Commons Act 1899 confers on the inhabitants of a particular district or neighbourhood (however described) a right of access to any land for the purposes of open-air recreation (however described), the right of access exercisable by those inhabitants in relation to that land is by virtue of this subsection exercisable by members of the public generally.*

### 1.3.15 Natural England

**Please provide further details of the access rights referred to over Walton Common in NE's RR [RR-022] including their extent, origin, details of any schemes of management or regulation, and the identity of the conservators referred to.**

The access rights on Walton Common are complex. Two Acts provide rights of Access:

- 1) The Commons Regulation (West Tilbury) Provisional Order Confirmation, was passed on 29 June 1893, and regulated under the Commons Act 1876. The West Tilbury Commons are made up of several commons which includes Walton Common. The remaining commons are The Green, Hall Hill, Fort Road, Parsonage, and Tilbury Fort Commons. A copy of the Order is appended.



Section 3 of the Order made provision for the Benefit of the Neighbourhood and gave a "... Right of free access to the commons and a privilege of playing cricket and other games, and of enjoying reasonable recreation, thereon subject to such bylaws and regulations as may from time to time be made by the Conservators and confirmed by the Secretary of State. The conservators may also set aside a portion or portions of the common for cricket and other games.

This benefit will have been extended to the wider public as explained above by s15 of the Countryside and Rights of Way Act.

- 2) The West Tilbury Commons are also subject to s193 of the Law of Property Act. This gives the public the right to air and exercise which has been interpreted in case law as meaning the right to walk or to ride a horse. These access rights can be limited by an Order of Limitation, which as above, would require the approved by the Secretary of State. Natural England is not aware that there is an order of limitation in place.

The common is managed by seven conservators. The following details are the contact details of two of the conservators. Natural England has spoken to [REDACTED] but has not met with the remaining conservators.

#### *Contact Details*

Clerk [REDACTED] C/O The Old Bakery, The Green, Essex, RM18 8TU

Cllr [REDACTED] Civic Officers, New Road, Grays, Essex, RM17 6SL

[REDACTED] [@thurrock.gov.uk](mailto:[REDACTED]@thurrock.gov.uk)

[REDACTED]  
[REDACTED]

### 1.7.30 Applicant/Statutory Bodies

**Please can the Applicant seek to agree suitable draft wording with the relevant statutory bodies for the Deemed Marine Licence included in Schedule 8 of the dDCO [PDC-009].**

We have reviewed the Deemed Marine Licence and confirm that we have no specific comment to make on this document.

#### **1.14.1 Applicant/NE/MMO/EA**

**Please can the EA, NE, the MMO and the Applicant work together to provide suitable draft wording for further requirements and/or for additional/modified conditions in the Deemed Marine Licence to address the various matters raised in the RRs.**

We have reviewed the submitted Deemed Marine Licence and have no further requirements or additional / modified conditions to propose. We note the condition that the MMO will need to consult with Natural England when they receive the method statement prior to works commencing.