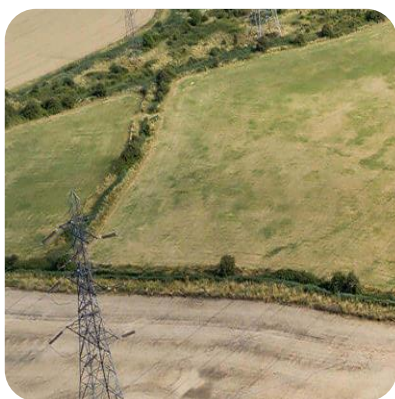




Thurrock Power Ltd Comments on Natural England's Deadline 2 Submission

Deadline 3



1 THURROCK POWER LTD COMMENTS

- 1.1 This document provides the applicant's comments on matters raised in Natural England's Written Representation at Deadline Two (REP2-097).
- 1.2 The table overleaf sets out these comments, with responses to matters raised or references to where in in existing or updated documents these matters are covered.

Subject		Ref.	Matter raised in REP2-097	Thurrock Power Ltd Comment
Habitats Regulations Assessment	Baseline Population Figures Assessed	1	<p>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.</p> <p>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.</p> <p>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.</p>	<p>As previously noted in our responses (PDC-001 and REP2-056), the Applicant maintains its position that its approach to the assessment of impacts on the SPA is correct.</p> <p>The applicant's position is that the loss of habitat is outside the SPA, albeit functionally linked, and the loss of this area of functionally linked land will not cause a material or detectable change in the populations of wintering waterbirds supported by the SPA.</p> <p>We are not aware of other projects where Habitats Regulations Assessment has been undertaken using the approach of assessing a subsection of an SPA or qualifying feature population.</p> <p>However, it is the Applicant's intention to continue discussions with Natural England when the Case Officer returns from leave on 12/04/21 with the aim of agreeing an approach in terms of further assessment of the effects of the causeway on a subset of the SPA population, and hopefully to reach agreement on this point. To that end, the Applicant would welcome evidence of any such precedent set out for other projects or in case law.</p> <p>With regards to the scoping-out of small-scale projects when they become part of the operational baseline, while this is correct it should be pointed out that this does not imply that these projects become ignored at that point – they are still taken into account when considering whether any new projects are acceptable in addition to the existing baseline. Those existing projects would also have been subject to assessment before being consented.</p>
	Function of Inner Estuary Areas	2	<p>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.</p>	<p>While it is acknowledged that different parts of an estuary may provide habitat for birds associated with an SPA at different times depending on weather conditions, this general principle does not make it possible to quantify importance of the Functionally Linked Land at the project site in the absence of evidence that it is favoured by birds during periods of harsh weather conditions.</p> <p>Furthermore, in the event of severe weather conditions during the subsequent lifetime of its presence (i.e. when not in use), the causeway is extremely unlikely to displace waterbirds from the surrounding mudflats under such conditions when birds tend to be increasingly tolerant of active or passive disturbance.</p>
	Significance of the Loss of Functionally Linked Land	3a	<p>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:</p>	<p>The NECR205 report lists projects where effects on functionally linked land (FLL) were not considered to have an Adverse Effect on Integrity (AEOI), and was referenced to establish the principle that effects on FLL do not by definition constitute an AEOI (acknowledged by NE in point 3e below where they state that the loss of FLL for the causeway is "not so extensive as to present a compelling case for an effect on site integrity").</p>
		3b	<p>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</p>	<p>The Applicant refers back to the survey and assessment of wintering birds presented in PDC-033 (Environmental Statement Volume 6 Appendix 9.4 - Foreshore Wintering Bird Surveys 2019-2020) and the HRA (REP2-022).</p> <p>Our position is that the numbers of birds do not represent significant numbers in an HRA context.</p> <ul style="list-style-type: none"> • Avocet: The maximum count of 49 Avocets should be taken in the context of the SPA population of this species which is substantially above the population at designation, and it is not the case that the presence of the causeway in an area used sporadically by up to 49 avocets will cause the loss of 49 avocets from the SPA population. • Redshank: The maximum count of Redshank within the likely impact area of causeway construction and use was two (2) birds recorded on one survey out of 14 surveys conducted between September to March. No other records of Redshank were recorded in the likely impact area. The Applicant maintains that this is not a significant number of birds. • Ringed Plover: The maximum count of Ringed Plover within the likely impact area of causeway construction and use was 18 birds recorded on one survey out of 14 surveys conducted between September to March. No other records of Ringed Plover were recorded in the likely impact area. The 18 Ringed Plover were not recorded on the mudflats but were recorded on adjacent saltmarsh. The Applicant maintains that this is not a significant number of birds. • Dunlin: Within the likely effect area of construction, the highest count of Dunlin, of 124 birds, was very much an outlier when placed in the context of the bird surveys as a whole. The count of 124 birds was recorded in a single hour of a six hour survey on one day, and only one other record of a single dunlin was recorded from the likely disturbance zone during the 2019-20 surveys. The Applicant maintains that this is not a significant number of birds.

Consideration of the Longevity of Mudflat Loss	3c	The conservation objectives (supplementary advice package) state that the extent of habitat outside the SPA should be maintained (noting point 4 below)	<p>The Applicant's position, as set out in our previous response (REP2-056) is that this should not imply that no loss is acceptable of any FLL, and instead should be interpreted in the context of maintaining sufficient extent of habitat to maintain the designated populations of birds.</p> <p>We would also, as before, refer to the NECR205 report on the consideration of functionally linked land, which includes examples of projects where no LSE was concluded when small losses of or disturbance to FLL occurred.</p>
	3d	The concern for precedent setting in this stretch of the Thames for growth of riverside access;	As noted above under item 1, the in-combination assessment of future projects should account for this.
	3e	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 Applicant maintains its position that the loss of 0.35 ha mudflat outside the SPA boundary is not significant, but we would refer back to Item 1 where the Applicant is proposing to discuss this matter further with NE.
	3f	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.	The Applicant maintains that its surveys demonstrate that the use of the mudflats by Redshank, Ringed Plover and Dunlin is sporadic regardless of the tidal period. Avocet use of the site is more consistent but again our position is that the effects of the causeway would not result in an AEOL.
The Interpretation of 'Maintain' and 'Restore' Conservation Objectives	4a	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.	It is acknowledged by all parties including Natural England that the effects of the causeway can and will be fully reversed upon decommissioning. On this basis the Applicant has put forward its reasoning for considering the effects of the causeway to be temporary in response to a question from the ExA (REP2-041, Question 1.11.14).
	4b	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).	We refer back to responses to Item 1 and Item 3b above.
	4c	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).	<p>The Applicant's position is that the area of FLL lost to the causeway is small and will not result in significant loss of birds in the wintering populations and will therefore not adversely affect integrity of the SPA. If that is the conclusion of the HRA, then loss of a small extent of FLL should not be viewed as undermining conservation objectives.</p> <p>We also refer back to responses to Item 1 and Item 3b above.</p>
	4d	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.	We refer back to responses to Item 1, Item 3b and Item 4c above.
	4e	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	This was an error of terminology in REP2-056.
Marine Issues	5	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.	The Applicant welcomes the agreement on impacts on Swanscombe MCZ and the clarification on notification of the Upper Thames Estuary rMCZ.
Conclusion	6	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	As referred to in Item 1 above, the Applicant intends to maintain discussions with NE on the HRA in the hope of reaching agreement on the points of difference, and to progress the SoCG.

Responses to FWQs 1.3.13 and 1.3.15	7	<p>Walton Common is subject to Section 15 of the Countryside and Rights Act 2000. 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.</p> <p>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.</p> <p>The access rights on Walton Common are complex. Two Acts provide rights of Access:</p> <p>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.</p> <p>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.</p> <p>This benefit will have been extended to the wider public as explained above by s15 of the Countryside and Rights of Way Act.</p> <p>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.</p>	<p>The Applicant agrees with Natural England that the access rights over the Common are complex. The Applicant would refer the ExA to its responses to these questions (REP2-041), which set out the Applicant’s position on the access rights.</p>
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