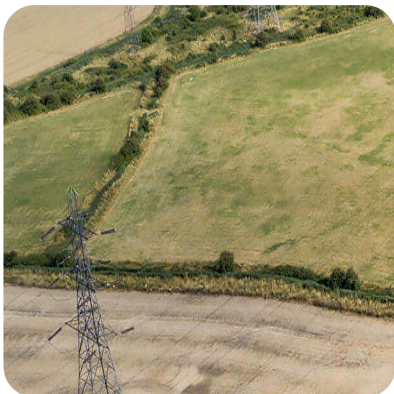


Thurrock Flexible Generation Plant

Written Summary of Oral submissions: Compulsory Acquisition Hearing 1 (28 April 2021)



1 APPLICANT'S INTRODUCTION AND UPDATE

- 1.1 The Applicant summarised its case for powers of compulsory acquisition ("CA") with regard to the tests set out in the Planning Act 2008. Full details of the case for CA are set out in the Applicant's Statement of Reasons (APP-024).
- 1.2 Section 122 of the PA 2008 sets out the purpose for which compulsory acquisition may be authorised:
- (a) firstly, the land must be required for the DCO development, to facilitate or is incidental to the DCO development or is replacement land under s131 or s132;
 - (b) secondly, there must be a compelling case in the public interest for the land to be subject to CA.
- 1.3 On the first point – the Applicant has shown that all the land is required for the development. This is set out in the Statement of Reasons (APP-024) at section 11, which outlines the case for seeking CA powers on a case by case basis and demonstrated via the work plans (REP2-005). The case for the CA of replacement land for the common land being acquired is also set out at section 12 of the Statement of Reasons.
- 1.4 On the second point – the Statement of Reasons sets out the Applicant's case for CA, which has demonstrated a compelling case in the public interest.
- 1.5 In summary, as set out in the Statement of Reasons, the CA and temporary possession proposed is the minimum level of interference reasonably required to facilitate the Project and the land identified to be subject to CA is no more than is reasonably necessary. The purpose of the powers of CA are to enable the delivery of the Project which is needed both locally and nationally, has numerous benefits and has substantial policy support (section 6 of the Statement of Reasons sets out a summary of the need for an benefits of the project and section 9 deals with policy, which is also covered in more detail in the SoC (APP-135)). This justifies the interference with the rights of those persons with an interest in the land proposed to be acquired, which is fully considered in section 13 of the Statement of Reasons.
- 1.6 The need for the Project, suitability of the Order Land and the support for such projects in national policy statements demonstrates that there is a compelling case in the public interest for the land to be acquired compulsorily (the response to FWQ 1.3.28 (REP2-041) contains further details of this). All reasonable alternatives to compulsory acquisition have been explored. The Applicant has clearly set out what each Plot of the Order Land will be used for and why it is required (see section 11 Statement of Reasons). Given the national and local need for the Project and the support for it found in policy, as well as the suitability of the Order Land, the proposed CA is justified, there is a compelling case in the public interest and the tests in section 122 are fully met.
- 1.7 The Applicant summarised how the application demonstrates that all reasonable alternatives to CA (including modifications to the scheme) have been explored. This is set out in paragraphs 7.6 – 7.7 of the Statement of Reasons (APP-024) and also in the response to FWQ 1.3.6 (REP2-041). The main alternative to CA is voluntary agreements.
- 1.8 The Applicant is actively seeking to acquire the land and rights needed for the project by agreement and is making good progress with this. Full consideration of site development alternatives and site selection is set out in chapter 3 of the ES (APP-046). The Applicant has sought to minimise the use of CA and rely on the least disruptive power, including temporary possession rather than CA where no ongoing use of the land is required.

2 UPDATE ON PROGRES OF NEGOTIATIONS

- 2.1 The Applicant gave a brief update on the progress of negotiations:

- Port of Tilbury London Limited: negotiations are progressing and a legal agreement is under discussion.
- RWE Generation UK Limited: negotiations are progressing and a legal agreement is under discussion.
- Cole family: An option is in place but is being varied at this time; that variation is nearly finalised.
- Mott family: negotiations are progressing well and heads of terms for an option have been agreed.
- National Grid: A framework agreement and the terms of protective provisions are under discussion and there is no reason to think that will not be concluded by the end of examination.
- Anglian Water: the statement of common ground has now been agreed and the Applicant does not understand there to be any outstanding objection by Anglian Water.

3 COMMON LAND – SECTIONS 131 AND 132

- 3.1 The Applicant advised that the majority of the land proposed to be deregistered (10.1ha) forms part of Walton Common (registered as parcel CL228) and is part of the area required for the main development site (plots 01/13 and 01/16). A description of the land is at paragraph 12.3 of the Statement of Reasons. There are grazing rights but they are not actively used. There are also public rights of access pursuant to s193 Law of Property Act 1925, which are subject to the Commons Regulation (West Tilbury) Provisional Order Confirmation Act 1893. The replacement land (plot 01/07) to be provided is larger (11.6ha) than the land to be deregistered.
- 3.2 The recent change request submitted by the Applicant includes the addition of a small area of common land (464sqm) which is proposed to be deregistered (part of Tilbury Fort Common) to create a new access for AILs.
- 3.3 All of the existing common and replacement land is owned by the Coles. There are rights of common but none are actively exercised. These parties and the West Tilbury Common Conservators have all been consulted on the Applicant's proposals and none of these parties object to the proposed works.
- 3.4 Inclusion of the common land in the DCO is a fall-back and has been done on a precautionary basis. An option for lease is in place and the separate s16 Commons Act application is being made so that the proposed development can take place in accordance with the agreed terms in the option for lease. However, if voluntary acquisition is not successful for any reason, the CA powers are required so that the Applicant can take ownership of the land. The Applicant's response to FWQ 1.3.30 in REP2-041 sets out the approach to the twin tracking of the Commons Act application with the CA powers sought in the DCO.
- 3.5 The Applicant summarised the application of section 131. Section 131(4) states that replacement land has been, or will be, given in exchange for the land being compulsory acquired and that replacement land has been, or will be, vested in the prospective seller of the existing special category land and subject to the same rights, trusts and incidents.
- 3.6 The Applicant noted that its response to FWQ 1.3.16 and section 12 of the Statement of Reasons sets out the reasons why the exemptions in s131 and s132 apply and special parliamentary procedure is not required. . Section 131(12) defines "replacement land" as land which is:

- (a) Not less in area than the order land (the area proposed to be acquired) – paragraph 12.20 of the Statement of Reasons sets out the applicant’s case on this point;
 - (b) No less advantageous to the persons entitled to the rights of common or other rights – paragraphs 12.21 - 12.24 of Statement of Reasons address this; and
 - (c) No less advantageous to the public – paragraph 12.25 Statement of Reasons sets out the Applicant’s submission on this test.
- 3.7 Section 132(3) applies if the order land, when burdened with the order right, will be no less advantageous that it was before to the persons in whom it is vested, other person, if any, entitled to rights of common or other rights and the public.
- 3.8 Section 132(4) applies if replacement land has been, or will be, given in exchange for the order right and that replacement land has been, or will be, vested in the persons in whom the order land is vested and subject to the same rights, trusts and incidents.
- 3.9 The Applicant submits that s132(3) would apply, but in the event that the SoS disagrees, we would rely on s132(4) in the alternative.
- 3.10 S132(3): The proposed access rights have been selected to reflect existing use and create no new impediment to use by rights holders. The installation of the gas pipeline once complete will have no impact on users of the common.
- 3.11 S132(4): as the area of permanent exchange land in Zone E covers the permanent loss of common land (10.5 hectares) and provides an additional 1.1 ha, which would fully mitigate for any impact caused by the acquisition of the rights. Also if additional land is required, a further area of approximately 1 hectare has been identified to the north and immediately adjacent to Zone E, which would bring the replacement area available to mitigate the rights acquired to 2.1 hectares.
- 3.12 The Applicant was asked how the section 16 application made separately from the DCO interacts and how the two processes would work where two Secretaries of State have been asked to determine the same issue. The Applicant explained that it did not consider that there was any option but to apply under both processes having regard to the drafting of section 139 of the PA 2008 which imposes an unusually restrictive approach to commons in the context of the DCO regime.
- 3.13 It is correct that common land can be deregistered under the PA 2008 but that only applies where the land is compulsorily acquired. The Applicant has and is seeking to vary (to extend) an option to lease this site. As the Applicant has explained and is commonly done in DCOs, compulsory powers over the main site are sought only as a fall back measure should the voluntary deal not function as intended. In those circumstances, the Applicant considers that seeking deregistration in the DCO as anything more than a fall back would be vulnerable to challenge on the basis of being a sham use of the powers as the Applicant does not wish to acquire the freehold, save in that fall back scenario.
- 3.14 Article 33 of the DCO would protect the common right holders where the freehold is compulsorily acquired by ensuring that the Applicant cannot acquire the current common compulsorily (which can remove existing rights over it) unless and until the replacement common has been acquired and is ready to be used as a replacement.
- 3.15 The Applicant’s assumption/intention is that the DCO powers will sit in the background as an ultimate fall back and the section 16 application will be granted and implemented. The inclusion in the DCO is however required to have confidence in the deliverability of the DCO.
- 3.16 The Applicant explained that it has spoken to the Planning Inspectorate regarding the process for the section 16 application and the interaction with the DCO. As the DCO process does not allow for conjoining of the applications they will be determined in parallel.

The process and timing for each are not however aligned with one another, unless one decision maker were to liaise with the other to bring this about in terms of timing.

- 3.17 Both the DCO and section 16 determination processes will be looking at the same issues and tests and the Applicant acknowledged that a decision in one process on those may create a perception of pressure on the decision maker in the other to reach the same conclusion. The Applicant notes however that it is not uncommon in the DCO process for other consents by other bodies to be required for DCO projects and the DCO being granted is not considered or seen as pre-determining those processes.
- 3.18 On timing, the Applicant submitted that where the DCO process is ahead, it is not expected that the Secretary of State would wait for the commons decision to issue a DCO decision in the same way as planning consents can be and routinely are granted ahead of commons consent decisions. The Applicant noted that everyone who is being consulted on the commons application was consulted on the DCO application and that there is no recorded public use of this common so lack of public representations is not unexpected.
- 3.19 Where the section 16 is determined first, the Applicant understands that the commons decision, if for grant, would effectively be held as a minded to grant pending grant of the DCO as the underlying development justifying the deregistration and exchange.
- 3.20 The Applicant notes the Examining Authority's comment that the DEFRA guidance on common land applications is required to be taken into account in this process. The Applicant has addressed those tests extensively in the report prepared for the common land application and has submitted a copy of that along with this summary.
- 3.21 The Applicant agreed in the hearing to consider if all submissions made to the commons application process could be submitted to the DCO process. This would ensure that the ExA could have the comfort of considering any additional points raised in that process in the DCO process and the Applicant (and others) would have an opportunity to respond. The commons application representation period closes on 27 May 2021. The Applicant will need to be provided with copies of all representation by the Planning Inspectorate before it could collate and assemble these for submission. It is therefore likely that this would be submitted for deadline 5. The Applicant would propose to respond by deadline 6, but would do so in a proportionate way so as to minimise any duplication of points already in front of the Examination.
- 3.22 In relation to the commons application, it will be a matter for the Planning Inspectorate to consider whether and how it may wish to take into account submissions in the DCO process in its considerations. If the DCO decision has been made before the commons application decision point then the Secretary of State's decision on the commons aspect will clearly be a consideration in that decision.

4 PROTECTIVE PROVISIONS FOR STATUTORY UNDERTAKERS

- 4.1 The Applicant advised that it had not had any comments on the generic provisions and that everyone that made representations now has bespoke provisions, as follows:
- Anglian Water: agreed.
 - National Grid: discussions are ongoing and there is no reason to think that will not be concluded by the end of examination.
 - Port of London Authority: now agreed.
 - Network Rail: generally agreed in principle other than the separation distance of the level crossing and the site access junction on Station Road.
 - Port of Tilbury London Limited: discussions are ongoing.

- RWE: discussions are ongoing.
- Environment Agency: discussions are ongoing on minor outstanding points.

5 AFFECTED PARTIES' SUBMISSIONS

- 5.1 The Applicant noted RWE's submissions that its site is operational land and the s127 test is therefore engaged with regard to detriment to their undertaking. The Applicant notes that the test is 'serious detriment' not any detriment. The Applicant understands that RWE's case is that despite the power station being decommissioned the land is held for power purposes but submitted that the key question is whether what the application is seeking to do can be made compatible with the continuing interests of RWE. The Applicant agreed that in principle, the conclusion that a site like the Tilbury B which has been used for generation for decades should be considered to be held for power purposes unless there is a good reason to move away from that.

6 FUNDING

- 6.1 The Applicant undertook to respond in writing on the principle of a guarantee of funding article having regard to examples in the DCOs for Cleve Hill, Wrexham and Immingham. The Applicant has included a proposed funding article in version 5 of the dDCO also submitted at this deadline.
- 6.2 The Port of Tilbury raised a point concerning the funding statement reference to capacity market contracts stating that this creates the potential for delay in delivery and a potential blight effect on the Port's plans. The Applicant responded that the blight point had been responded to in substance in ISH1 on traffic and transport and there would in practice be no significant issue in resolving the causeway issue if Port expansion plans come forward (see the Applicant's summary of oral submissions to ISH 1). The funding statement states that capacity market contracts 'may' be sought. The Applicant's parent company has a contract with Statkraft which would replicate the capacity market contract without needing to go through that process. It is therefore not definitive that capacity market contracts will be required.