

Thurrock Flexible Generation Plant

Written Summary of Oral submissions: ISH2 Cultural Heritage (28 April 2021)



1 MAIN DISCUSSION POINTS

1.1 Archaeology - Trial trenching

1.2 The Applicant set out its position, reiterating the arguments put forward in earlier submissions which explained that trial trenching on Walton Common was not possible, and would have had a detrimental impact on the Common due to the large, stepped-side trenches which would be required in this location to reach the appropriate archaeological depths within the confines of Health and Safety requirements for evaluating/excavating deeply stratified deposits.

1.3 It is not the case that there have been no pre-determination investigations: geoarchaeological borehole assessments have been used to inform the heritage baseline and geophysical investigations have also been undertaken across the whole application area where possible. These investigations corroborate what is already known of this landscape, in that it was used extensively from the Bronze Age period onwards in terms of salt production, with settlement on the higher ground, as borne out by recent excavations by the LTC project on land in and adjacent to Zone D3. These investigations and known results are sufficient at this stage to allow for a robust assessment of the significance of effect resulting from the proposed Scheme and also to inform future intrusive investigations, all of which has been agreed with Historic England and Thurrock Council within the Outline Written Scheme of Investigation.

1.4 The Applicant has therefore provided sufficient baseline information and undertaken a robust assessment of all available evidence to enable the ExA and SoS to make a decision on its application. The Applicant has taken a risk-averse approach and assumed that there will be a significant impact on archaeological remains as a worst-case scenario, applying the 'Rochdale Envelope', as set out in the ES.

1.5 The Applicant will undertake trial trenching prior to commencement of development, as set out in the agreed Outline WSI, although it is not proposing trial trenching in areas where there will be no ground disturbance resulting from the proposed Scheme. The archaeological works will follow a staged approach with preservation in situ where possible, and by record where not, of any finds and/or features identified during the staged process. The Applicant confirmed that all archaeological works are dealt with in the Outline WSI, which has been agreed by Thurrock Council and Historic England. The Outline WSI includes a staged approach to dealing with any findings of archaeological remains and the Applicant is satisfied that any impact on archaeology is suitably mitigated through the Outline WSI.

1.6 Historic England has suggested that the Applicant should make an application for Section 38 consent to undertake works to the Common. However, the Applicant confirmed its view that such consent is highly unlikely to be granted (as it does not meet the criteria of being of benefit to the Common or of not causing disturbance to the Common) and that it is also unlikely to be resolved before the close of examination (as there are no statutory timescales for determination of a section 38 application). Any works on this Common would not be undertaken for purely archaeological reasons; they would be to facilitate development, and therefore do not meet the criteria for section 38 consent. The Applicant has set out its case in full on these points in submissions (document references PDC-002, REP2-054 and REP3-008) and has responded to the Examining Authority's query on the DEFRA guidance in (appendix 1 to this submission).

1.7 The Applicant notes that while taking the view that section 38 consent could be obtained, Historic England was unable to identify any examples of their approach using Section 38 or refer to any precedent consents, and simply asserted that a case needs to be made. That stance is not reasonable or proportionate. The Applicant's approach complies with the NPS and professional guidance which provides for a staged approach requiring investigation only in so far as is needed to establish significance, with desk based assessment as the first stage, followed by targeted investigations. It does not require trenching as a pre-requisite.

- 1.8 NPS EN1 requires a proportionate approach and the provision of “no more” detail “than is sufficient to understand the potential impact of the proposal on the significance of the heritage asset”¹. The hierarchy of only moving to intrusive investigations where desk based assessment is insufficient is clearly set out in paragraph 5.8.9 of NPS EN1. The Applicant has followed this process with desk based assessment and proportionate investigations. Sufficient detail to allow the Examining Authority and Secretary of State to understand the impact on the significance of heritage asset, as required by the NPS, is therefore before the Examining Authority.
- 1.9 The Applicant entirely rejects Historic England’s assertion that the value of potential remains cannot be assessed without full trial trenching. The Applicant confirmed that it understands the archaeological landscape of the area very well, including the salt making industry. The Applicant has taken a precautionary approach (under the Rochdale envelope) to its archaeological assessment. It does not believe that any remains within the DCO boundary would be nationally significant or schedulable, as is being suggested by Historic England. The Applicant has seen no evidence or reasoned case produced by Historic England to support that assertion which is contrary to the results of the work, including intrusive borehole sampling, undertaken on the site so far.
- 1.10 Historic England is submitting that the Applicant should have extensively trenched a common which it asserts has intrinsic historic and landscape value prior to any grant of consent necessitating that, and in an area which Historic England has submitted should not be developed. Those submissions are inconsistent. The work done on this site indicates that the results which would guide intrusive investigation (which will be undertaken pre-construction) are at a depth which would require wide, side stepped trenches in marshy land. Trial trenching of the scale sought would cause harm to the common and interfere with any remains in situ, the Applicant fails to see how Historic England considers that to be justifiable in the absence of consent whilst also arguing that the common has an intrinsic value which should be protected.
- 1.11 With reference to the archaeological findings of LTC, including a potential Roman habitation site, the Applicant confirmed that the area of land in question was a different topography than the main site and was on higher ground and so remains were more likely to be found there. The work being done by other projects is validating the Applicant’s work and modelling undertaken for this project by QUEST.
- 1.12 The Applicant is not in any way trying to avoid undertaking the necessary archaeological evaluations and any necessary trial trenching and this will be secured by the DCO. Rather, the Applicant is proposing to do the works post-consent when the interference with the landscape is justified and when the rights of common, including public rights of access, have been transferred to the replacement land and will not be interfered with. This approach has been agreed with Thurrock Council and is confirmed in the draft SoCG between the parties. Thurrock Council have agreed that the information provided to the ExA is adequate and proportionate.
- 1.13 The Applicant notes that there are precedents for the approach of securing intrusive investigation post-consent. These include the Triton Knoll Electrical System DCO and the Rampion Offshore Windfarm DCO. Thurrock Council (via their advisor, Mr Havis) also stated that they agreed with the Applicant that it is not uncommon for trial trenching to happen post-consent and pre-commencement. Thurrock Council also noted that getting trial trenching done now and completed within the DCO examination process would be highly unlikely. All parties are agreed that the Outline WSI is robust and sufficient with regard to terrestrial archaeological remains.

¹ NPS EN1 paragraph 5.8.8

1.14 Outline WSI

1.15 The Applicant confirmed that an updated version of the outline WSI will be submitted at Deadline 4.

1.16 The Applicant noted and welcomed Historic England's agreement that the WSI is robust and acceptable, and that all parties agree that the document provides sufficient safeguards.

1.17 Setting of heritage assets

1.18 It was noted and agreed that previous issues regarding settings had moved on significantly during examination.

1.19 Historic England accepts that there will be no impact to the significance of the Church of St Katherine at East Tilbury and the Rectory, and that the photomontages provided are satisfactory, which was also the view of Thurrock Council (via their representative, Ms Kitts).

1.20 The Applicant agrees with Historic England and Thurrock Council that the harm to the significance of St James' Church, the earthworks at West Tilbury and Bowater's Farm Battery will be less than substantial and that no significant effects are predicted. The Applicant disagreed with the assessment by the other parties of the level of impact on those assets but noted that the overall conclusions (i.e. less than substantial harm and no significant effect) appeared to be agreed. The Applicant notes Historic England's submission that the totality of harm is also 'less than significant'. The Applicant also noted that no additional mitigation was proposed by Historic England or Thurrock Council in relation to those assets.

1.21 The Applicant set out its assessment that, in terms of the setting of St James' Church (which is now a domestic dwelling) and the earthworks, the proposed development will only form a small part of the overall setting and so the significance of those assets is not diminished. The totality of the effect on the West Tilbury Conservation Area as a whole was separately assessed as moderate adverse (and therefore significant), as this takes into account the whole area, rather than assessing each asset individually (which has also been undertaken).

1.22 The Applicant confirmed that impact on experience has been taken into account as part of the overall settings assessment. Experience is an effect that is considered along with others when assessing the impact of a proposed development on the setting of a heritage asset and the consequent harm to the significance of the asset. From St James' Church, the experience includes a wide panoramic view, and the proposed development will only be a small feature in that wider view – where there are other industrial uses as well. The Applicant's view is that the experience of the asset is not diminished beyond a minor adverse effect. The Applicant and Thurrock Council (via their representative, Ms Kitts) are also in agreement that the Church remains a landmark feature within the wider landscape.

1.23 Walton Common

1.24 The Applicant emphasised that while it would always welcome Historic England's views, it is agreed that Walton Common is not a scheduled or designated historic asset and not something that falls within the remit of Historic England. Historic England is therefore not acting as the relevant statutory advisor on this point. The common (and Common land more generally) does not meet any scheduling criteria, and none currently exist regarding common land or indeed (in England) any other category of historic landscape other than Registered Parks and Gardens (of Historic Interest) and Registered Battlefields.

1.25 The Applicant notes that it has seen no evidence whatsoever to support Historic England's assertion that this common is an intact feature from the medieval period which creates a sense of place that should be preserved. In contrast, the Applicant drew the ExA's

attention to pages 17-20 of document ref REP2-054, which sets out the history of Walton Common. The common was not formed as a bounded entity until the period of the tithes. In medieval times, the land was split into East Tilbury Marsh and West Tilbury Marsh and the common in its current form did not exist. The Applicant referred to the Essex Historic Grazing Marsh project, which confirmed that Walton Common has not been deemed to be of historic significance and has not been categorised as a historic grazing marsh (illustrated in Figure 6 of document ref REP2-054).

- 1.26 The commons in this area have been bisected by the railway which has disrupted the setting and linkages of the 18th century commons. The loss of part of Walton Common will be compensated through the provision of replacement land, which will restore the inter-link between Walton Common and Parsonage Common and be safer to access as no crossing of the railway is required.
- 1.27 The Applicant also noted that Historic England's objection to the deregistration and replacement of Common land was introduced post-submission of the application and not raised at scoping stage or at any point in the consultation process (and the Applicant confirmed that Historic England has been consulted and has responded at all relevant stages of the application). The Applicant suggested that it is irregular for a statutory consultee to raise a fundamental objection so late in the process (i.e. during the DCO examination). If Historic England thought that further assessment was required on the significance of Walton Common as a non-designated heritage asset then this could have been raised prior to the start of examination, but was not.
- 1.28 Issues in relation to the historic landscape are within the remit of Thurrock Council and they have not raised any concerns in relation the Applicant's assessment of Walton Common. The Applicant considers Historical England's submissions that the common has not been appropriately assessed by an expert and that the common is nationally important to be fundamentally inconsistent (in addition to inaccurate as the Applicant's expert has fully assessed the common). It is unclear to Applicant on what reasonable basis Historic England can argue the common has intrinsic value that must be protected whilst also arguing that the value of the common needs further specialist assessment, Historic England have prejudged the outcome of an assessment they submit has not been undertaken in asserting that there is a historic value to the common. The Applicant confirmed for the avoidance of doubt that the significance of Walton Common has been fully assessed by a suitably qualified expert and that this is set out in the Applicant's Environmental Statement at and in document REP2-054.

2 UPDATE ON STATEMENTS OF COMMON GROUND

- 2.1 The Applicant gave the following update on statements of common ground (SOCG):
 - (a) Historic England – a draft SOCG is being progressed but is not yet finalised.
 - (b) Thurrock Council – the aspects of the draft SOCG relating to heritage assets have been agreed and the Applicant is not aware of any reason why this will not be signed by the close of the examination.

Appendix 1- Applicant's comments on DEFRA guidance

- 1 The Examining Authority requested the Applicant's submissions on the application of the Common land consents policy as published by the Department for Environment, Food & Rural Affairs² (the "DEFRA guidance") and 'Guidance on carrying out works on common land' (sheets 1a to 12) published by the Planning Inspectorate³ to its position that section 38 consent for archaeological trial trenching on Walton Common was unlikely to have been granted for pre-consent works. This appendix sets out that submission.
- 2 Section 38(2)(c) of the Commons Act 2006 specifically provides that "the digging of ditches and trenches" falls within the definition of restricted works which are prohibited without consent being obtained. Trenching is not included as an exempt work under the The Works on Common Land (Exemptions) (England) Order 2007. Planning Inspectorate guidance provides that "Restricted works are any that prevent or impede access to or over the land, e.g. fencing, buildings, structures, ditches, **trenches**, embankments"⁴ (*emphasis added*). It is understood that Historic England accept that consent would be required for the Applicant to carry out trial trenching on Walton Common.
- 3 Section 39 of the 2006 Act sets out that in determining an application for consent under section 38, the decision maker must have regard to
- (1)...(a) *the interests of persons having rights in relation to, or occupying, the land (and in particular persons exercising rights of common over it);*
- (b) *the interests of the neighbourhood;*
- (c) *the public interest;*
- (d) *any other matter considered to be relevant.*
- (2)*The reference in subsection (1)(c) to the public interest includes the public interest in—*
- (a) *nature conservation;*
- (b) *the conservation of the landscape;*
- (c) *the protection of public rights of access to any area of land; and*
- (d) *the protection of archaeological remains and features of historic interest.*
- 4 The Applicant submits that the key principles to be considered under the DEFRA guidance in relation to section 38 works are that:
- "Commons should be maintained or improved as a result of the works being proposed on them. The Secretary of State sees section 38 as conferring additional protection on common land, rather than enabling common land to be used for purposes inconsistent with its origin, status and character".*
- "consent under section 38 should be seen as a gateway, which enables the construction of works which are sympathetic to the continuing use and enjoyment of common land"⁵.*

² November 2015, <https://www.gov.uk/government/publications/common-land-consents-policy>

³ <https://www.gov.uk/government/collections/common-land-guidance>

⁴ Common Land Guidance Sheet 1a, Consent To Construct Works On Common Land, paragraph 3

⁵ Paragraph 5.7

Commons should be maintained or improved

- 5 The Applicant considers it important to set the context of why works would be proposed on the common, which is ultimately to facilitate development of the generating station. The Applicant would not be proposing trenching works in isolation from that context. The Applicant submits that trenching works would not meet the fundamental test that commons should be maintained or improved as a result of the works being proposed on them.
- 6 Trenching works would not be intended to benefit the common itself in any way, but rather would be undertaken to support applications which would, if granted, be inconsistent with commons status (which is why a section 16 application is being pursued). The justification for any trenching works is important in establishing whether they comply with the policy tests.

The proposed works are consistent with the use and enjoyment of the land as common land

- 7 The DEFRA guidance provides that *“In deciding whether to grant consent to carry out works on common land, the Secretary of State will wish to establish whether the proposed works are consistent with the use and enjoyment of the land as common land⁶”*. Trial trenching would require the opening of large, step-sided trenches in the common land. Trenching would require the use of machinery, the creation of safe working areas for machinery and the storage of excavated soils. Those works would require (for health and safety) exclusion of public access over the trenched areas, the working areas around them and soil storage areas. These works would by their nature interfere with the rights of commoners, the neighbourhood and the public to which regard must be had under section 39.
- 8 Trial trenching works would not be consistent with the use and enjoyment of the land as common land as is required by the DEFRA guidance⁷ as access to the land would be curtailed and use prevented while the works were carried out. Although there are no active grazers on this common at this time, their rights must still be considered. Digging up the surface and soil storage would interfere with the rights to graze by reducing the grazing available. Additionally, undertaking these disruptive works on the common would undoubtedly be inconsistent with the enjoyment of the land as a common land, which, due to its nature as common land, users would expect to be open and free from development-related activity.
- 9 The Planning Inspectorate guidance sheet 1a provides that the “best option” for works which are not consistent with the use and enjoyment of the land as common land is section 16 deregistration and exchange. Under that categorisation it specifically includes “ditches, trenches....or other works which are not consistent with the use and enjoyment of the land as common land”. As the Examining Authority is aware, a section 16 application for deregistration of Walton Common has been made. A section 16 application is unlikely to be granted without a consent in place as, in the absence of a consented development which would trigger the need for deregistration, there is no public interest in deregistering and replacing the common land. Section 16 accordingly could not have been sought just to undertake trial trenching.
- 10 The DEFRA guidance specifically considers works on common land which “do not benefit the common but nevertheless there is a potential underlying public benefit”. It continues however that “An application for consent to [infrastructure] works under section 38(1) will rarely be granted unless there are convincing reasons why an application under section 16(1) cannot or ought not to be pursued⁸”. The Applicant’s approach therefore aligns with

⁶ Paragraph 5.8

⁷ Paragraph 5.8

⁸ Paragraph 5.15

the Planning Inspectorate guidance that use of section 16 being the best option for these works and the DEFRA guidance that, for infrastructure works, section 16 should be used.

The public interest

- 11 The public interest is expressed as including the public interest in nature conservation, the conservation of the landscape, the protection of public rights of access to any area of land, and the protection of archaeological remains and features of historic interest. Under this heading the DEFRA guidance requires consideration of *inter alia* the impact on conservation of the landscape and the protection of archaeological features⁹.
- 12 Trial trenching on the common would have a temporary, reversible adverse impact on the common landscape. That impact would be incurred in undertaking works which were not for the benefit of the common but to support development proposals. The Applicant considers and continues to submit that trenching works would not be acceptable under this test because, despite being temporary, they would run counter to the key objectives of the statute and guidance in protecting common land from works which are of no benefit to that status.
- 13 Archaeological trial trenching by its nature requires interference with archaeological remains. Any intrusive investigation will disturb and potentially adversely affect buried remains. The Applicant submits that, in the absence of a development consent justifying interference with buried remains in this location, section 38 consent would not be granted for trenching. The trial trenching would not “help protect archaeological remains and features of historic interest”¹⁰ as required by the DEFRA guidance, but rather would cause interference with them which may be entirely unnecessary if consent for the generating station is not granted. The proposal would therefore fail to comply with this aspect of the public interest test.

⁹ Paragraph 4.5

¹⁰ Paragraph 4.5, Protection of archaeology