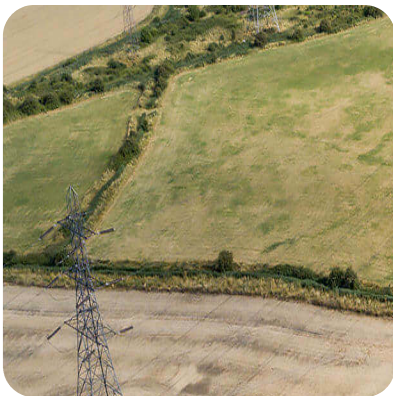


## Thurrock Flexible Generation Plant

Note on status of protective provisions in version 7 of the dDCO (deadline 6)



## 1 INTRODUCTION

- 1.1 This document has been provided to set out where the Protective Provisions, as included in version 7 of the dDCO, have been agreed with the protected parties. Where areas of difference remain, the Applicant has set out the reasoning for its proposed drafting as show in version 7.

## 2 STATUS SUMMARY

| Protected Party   | Status  | References   |
|---|---|--|
| <b>Generic</b>  |   |  |
| <b>Electricity, gas, water and sewerage undertakers</b> | These provisions protect undertakers who have not engaged with the DCO process. There is no outstanding representation on or objection to these provisions. | n/a  |
| <b>Electronic Communication Code network</b>            |   |  |
| <b>Specific</b>   |   |  |
| <b>Anglian Water</b>                                    | Agreed  | Agreed as documented in the signed SoCG REP2-064   |
| <b>Environment Agency</b>                               | Agreed  | Agreed as documented in the signed SoCG submitted at D6.   |
| <b>National Grid</b>                                    | Under discussion  | -  |
| <b>Port of London Authority</b>                         |   | Agreed as documented in the signed SoCG submitted at D6.   |
| <b>Network Rail</b>                                     | Under discussion  | -  |
| <b>Port of Tilbury London Limited</b>                   | Not agreed  | The differences to the Port's preferred version of these provisions (set out in REP2-096) are set out below. |
| <b>Highways England Company Limited</b>                 | Agreed  | Agreed as documented in Highways' England D5A submission, REP5A-004  |
| <b>RWE Generation UK Limited</b>                        | Not agreed  | The differences to the RWE's preferred version of these provisions in REP5-029 are set out below.            |
| <b>Thurrock Council</b>                                 | Under discussion  | The Council's comments on the draft are awaited.   |

## 3 NATIONAL GRID

- 3.1 The majority of the paragraphs are agreed with the only outstanding issues being:
- (a) The level of insurance which must be provided to be 'acceptable insurance': and
  - (b) The provision of security to National Grid by the undertaker in addition to insurance and an indemnity.

- 3.2 The level of acceptable insurance is under discussion between the parties but is considered likely to be able to be resolved.
- 3.3 National Grid is seeking that a security in their favour is put in place prior to starting works. This is in addition to the requirement for the undertaker to purchase insurance with National Grid named as a co-insured party and from a provider who is acceptable to National Grid (paragraph 2 – definition of ‘Acceptable Insurance’), and in addition to the indemnity for damage to apparatus provided in paragraph 11. The Applicant does not accept that it is reasonable for National Grid to require both insurance and a security in respect of the same works in addition to an indemnity for any damage caused by the same works.
- 3.4 National Grid is sufficiently protected by insurance only as it must approve that insurance prior to commencement of works. In addition, National Grid must approve plans of the works in close proximity to its assets or works to its apparatus under paragraphs 8 and 10 and is indemnified for damage and losses arising from such works by paragraph 11.
- 3.5 There is no reasonable case for three forms of protection being required for the same works. Should, for any reason, the Applicant be unable to meet its obligations under the indemnity, either insurance or a security adequately protects National Grid. The Applicant has agreed to provide insurance but will not agree to also provide a security.

#### **4 NETWORK RAIL**

- 4.1 The majority of the paragraphs are agreed with the only outstanding issues being:
- (a) The definition of the types of amendments to its plans that the Applicant is obliged to make at Network Rail’s request;
  - (b) The scope of the Applicant’s liability to the cost of works to the railway; and
  - (c) The inclusion in the protective provisions of the Princess Margaret Road level crossing.
- 4.2 Under item a) the ongoing discussion centres around how the wording provides that Applicant will make changes requested by Network Rail where these are necessary for the safety of the railway, but is not required to make changes for other reasons. That discussion is ongoing. The Applicant’s drafting covers this at paragraph 9 of Part 7.
- 4.3 Paragraph 9(5) provides that the undertaker must make any changes which Network Rail requests in order to secure the safety of the railway (9(5)(b)). The undertaker must also take into consideration any other amendment requested by Network Rail (9(5)(a)). The ongoing discussion focuses on 9(5)(b) and the Applicant’s position that as they are *required* to make any changes requested under this paragraph, these changes must be essential to secure the safety of the railway; measures which are merely desirable to Network Rail should be included under paragraph (a).
- 4.4 The costs point relates to paragraph 12. The Applicant agrees in principle that it should pay for any works necessary to the railway which are required as a direct consequence of the authorised development, but considers that these must be identified as being necessary within a reasonable period of time. The Applicant has proposed that such works must be identified by Network Rail within 24 months of the completion of the Applicant’s works. This time limitation is included in other granted DCOs<sup>1</sup>. The Applicant does not accept it is reasonable for its liability to be unlimited in time given that the authorised development does not include any works to or interference with railway assets other than limited use of a public highway over a level crossing.
- 4.5 The Applicant is not proposing to use the Princess Margaret Road; it is not included in the transport assessment as a route or in the outline CTMP. The Applicant therefore considers that including this as the protected assets under these provisions is misleading and serves no useful

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<sup>1</sup> See for example The Norfolk County Council (Norwich Northern Distributor Road (A1067 to A47(T))) Order 2015, schedule 13 part 1, paragraph 9

purpose, but rather creates doubt as to the extent of the Applicant's liability by including a route that the Applicant has no liability for because it is not using.

#### **PORT OF TILBURY LONDON LIMITED**

- 5.1 The fundamental points of disagreement with both the Port and RWE relate to the disagreement over the request for and use of compulsory powers, to which both the Port and RWE have objected; and which are required to deliver the construction of the causeway to which both object.
- 5.2 The Applicant continues to progress an access agreement with both the Port and RWE. While both landowners have made clear they are seeking that the alternative AIL access (Work no 15) is used and have submitted that the causeway should not be granted consent, that alternative route does not provide a complete access solution. In the absence of the necessary agreements, the Applicant cannot agree protective provisions with these landowners which would allow them to prevent delivery of project due to their objection to the causeway, rendering the project unfundable and undeliverable.
- 5.3 In the absence of a legally secure access agreement for the whole access route, the Applicant cannot agree drafting in protective provisions which allows the landowners to prevent the use of compulsory powers. To do so effectively grants the landowners a veto over the project and creates a ransom situation on the access agreement. No reasonable developer would accept such a position, and any DCO granted on that basis would not be fundable.
- 5.4 The degree of control sought by the Port in its drafting undermines the Examining Authority's and Secretary of State's roles by making powers which are included in the DCO by the Secretary of State subject to the Port's approval. As an example, compulsory acquisition of rights, if granted by the Secretary of State for the access route, would not be exercisable without the Port's consent. The deliverability of the project would be at the whim of the Port – the DCO could not be relied upon to deliver the authorised development. This is fundamentally unacceptable and contrary to the intention and objectives of the DCO regime.
- 5.5 The drafting also seeks to extend the Port's control over areas which are not its responsibility but in the remit of other bodies; including seeking to control works in public highway and matters which are, by statute, the responsibility of the Port of London Authority.
- 5.6 The Applicant has included its preferred version of the protective provisions in favour of the Port in version 7 of the dDCO.

#### **Prohibition on use of DCO powers without Port consent, paragraph 3 of REP2-096**

- 5.7 Paragraph 3 of the provisions set out in REP3-023 (the Port's written representation which include protective provisions drafting in appendix 1) provides:

*“3. (1) The undertaker must not exercise the powers conferred by articles 3 (Development consent etc. granted by the Order) including in respect of the permitted preliminary works, 5 (maintenance of authorised development), 11 (street works), 13 (temporary restriction of use of streets), 14 (access to works), 15 (traffic regulation), 17 (authority to survey and investigate the land), 18 (removal of human remains), 19 (compulsory acquisition of land), 22 (compulsory acquisition of rights), 25 (acquisition of subsoil only), 27 (rights under or over streets), 28 (temporary use of land for carrying out the authorised development), 29 (temporary use of land for maintaining the authorised development), 30 (statutory undertakers) and 35 (felling or lopping of trees and removal of hedgerows) in respect of the Port and the affected highways unless the exercise of such powers is with the consent of the Port Company.*

...

*(3) Articles 20 and 23 shall not apply to the Port and any interests or rights held by the Port Company.”*



- 5.8 The Port's drafting prohibits the exercise of almost all powers of the proposed DCO without the Port's consent. This drafting is fundamentally unacceptable. The prohibition sought would apply not only within the Port's land, but also in the public highway (which are included within the definition of 'affected highways' in the Port's drafting).
- 5.9 Although paragraph 4(1) provides that approval of plans for specified works cannot be unreasonably withheld, there is no such qualification on paragraph 3. In addition what 'unreasonably' withheld means in these circumstances is unclear. The drafting of paragraph 3(1) effectively gives the Port a veto over the development being brought forward. This fundamentally undermines the principle of the DCO by making the use of the development consent order granted by the Secretary of State subject to the consent of a third party.
- 5.10 This veto does not apply only to powers of compulsory purchase which instead of being subject to consent are disappplied to the Port by paragraph 3(3). Accordingly, the Applicant would not even have the option of seeking consent to use these powers as they would not apply.
- 5.11 Not only does this drafting undermine the powers sought in the articles but it extends the Port's control inappropriately over the public highway. The Port is not the guardian of the public highway; works in such highways will be controlled by the relevant highway authority and it is unreasonable for the Port to usurp that statutory role and seek to control works in highways they are not owners of nor responsible for.
- 5.12 The Applicant accepts that the Port requires to be able to control the use of the access through the Port. The Applicant has proposed paragraphs 5 and 6 of its drafting (version 7 of the dDCO) to address this. Paragraph 5 provides that the Applicant may not exercise any power of temporary possession granted under articles 28 and 29 of this Order over any land or interest within the Port without first obtaining the written consent of the Port. This is to ensure that the Port has certainty that temporary possession will not be taken of its access roads removing its ability to use and control these.
- 5.13 Paragraph 6 provides that, notwithstanding the creation of the access right sought, the Port may prevent access to or through the Port land where the Port "*reasonably considers that it is necessary to do so in response to; a request from an emergency service or government agency, any emergency or accident, or an imminent threat to health or safety of persons or of damage to property*". The Applicant notes that this wording has been retained in the Port's version as paragraph 9(2).
- 5.14 The Applicant also accepts that it is reasonable that the Port should have to approve the detail of works carried out to its streets and/or on its land (paragraph 4 of REP2-096, paragraph 3 of the dDCO drafting). The difference between the parties relates to the scope of works for which approval must be obtained. In particular, the Applicant does not consider it reasonable that the Port is seeking to approve the detail of work to public highways (that role lies with the relevant highway authority) or works in the river Thames which are controlled by the PLA and MMO.
- 5.15 The Applicant does not agree that the imposition of conditons by the Port on the carrying out of works may extend outside of its land and in particular offshore. The Applicant objects to the attempt by the Port to provide that the Port may impose navigational restrictions on the Applicant outside of the port itself (see paragraph 4(2)(b) of the Port's drafting). The control and co-ordination of works and navigation in the river Thames outside of the port is the responsibility of the PLA, not the Port and the Applicant will comply with the directions of the PLA. It is unreasonable for the Port to seek to control other parties' use of the river Thames and to interfere with the PLA's statutory role to manage the river.
- 5.16 The Port's drafting seeks to hold the undertaker liable to the Port for accumulations or erosions in the river Thames (at paragraph 5 of the Port's drafting). The Port is not the statutory harbour authority for the proposed causeway – the PLA is. Part 6 of the protective provisions in favour of the PLA already provide for an approved scour and accretion monitoring and mitigation strategy to be put in place prior to commencement (part 6 paragraph 11), river bed surveys to be carried out (paragraph 12) and remedial action for sedimentation etc to be carried where it is shown to be required (paragraph 13). The PLA as the statutory harbour authority

and the appropriate body to control these matters. The dDCO has accordingly already provided for these matters. The Port has no jurisdiction over the causeway, is not the harbour authority and will be protected by the PLA's carrying out of its functions. The Applicant therefore rejects all of the Port's drafting on these points.

- 5.17 While the principle of an indemnity is agreed, the scope of that is not and there is considerable difference between the parties' drafting. The Applicant's drafting indemnifies the Port "*from and against all costs, loss or claim arising out of or incidental to any breach or non-observance of the undertaker's obligations under these Protective Provisions, the Construction Traffic Management Plan and the Construction Worker Management Plan*". This is because the Applicant considers that it should only be liable for costs where it has not acted in accordance with the provisions of the DCO. The Port's drafting seeks to impose liability on the undertaker for use of public resources, for a number of matters outside of its control, for matters where statutory bodies have decision making roles not the undertaker, and for which no costs should be payable or where the incurring of costs is not evidenced to be necessary.
- 5.18 For example, paragraph 12(1)(b) of the Port's drafting seeks to make the undertaker liable for cost of changing aids to navigation with the Port – however no need to do so has been identified in the NRA. Paragraph 12(1)(c) refers to disruption to navigation to the Port, however the Port is not entitled to sole use of the river Thames and it is the role of the PLA to determine how interactions in the river are managed. Given that this will be subject to the control of the PLA not the undertaker it is unreasonable for the Port to seek an indemnity for undefined 'disruption' due other parties use of the publically navigable river.

## **6 RWE GENERATION UK LIMITED**

- 6.1 As stated at 5.1 above, the fundamental points of disagreement with both the Port and RWE relate to the disagreement over the request for and use of compulsory powers, to which both the Port and RWE have objected; and the construction of the causeway to which both also object. The main area of difference with RWE centres on access to use of compulsory powers. There is also some difference between the parties regarding who should be responsible for moving the access road if requested by RWE to facilitate re-development of their site.
- 6.2 The areas of disagreement are set out below. The Applicant has included its preferred version of the protective provisions in favour of RWE in version 7 of the dDCO.

### **Definition of "specified works"**

- 6.3 RWE in REP5-029 are seeking a that any work within 15m of any RWE apparatus (not just apparatus in their site) and the access road and proposed new access road is a specified work. RWE must be given plans of all such specified works for approval and may put conditons on the carrying out of them. The Applicant considers that 15m is very wide area in those circumstances, especially where apparatus in public highways would then catch works with no potential to interfere with that apparatus. However, the Applicant is will to concede on 15m for apparatus. The Applicant will not however agree that a 15m buffer area is necessary for the road and proposed road.
- 6.4 Works undertaken within 15m of the road and proposed road will include works in land outside RWE's landholding and area of responsibility. The Applicant submits that a 3m buffer is sufficient to protect RWE's interest in works in the vicinity of the road and the proposed road as these not sensitive assets which need extraordinary protection; they are access roads designed to be used by heavy vehicles and are accordingly reasonably robust. Works outside of 3m are not likely to cause any interference with these routes.

### **Acquisition of Land and Exercise of Powers**

- 6.5 Paragraph 3(1) of the RWE drafting (REP5-029) provides: "*Regardless of any provision in this Order or anything shown on the land plans or contained in the book of reference to the Order the undertaker must not acquire any land interest or apparatus under articles 19, 22, 25 or 30 override any easement or other interest of RWE otherwise than by agreement*". Paragraph 3(4)

further provides “*The undertaker must not exercise the powers conferred by article 20 (statutory authority to override easements and other rights) or article 23 (extinguishment of private rights) in relation to any land in the site without the consent of RWE*”.

- 6.6 In the absence of a binding legal agreement to deliver an access route through the RWE (which is not yet in place) the Applicant cannot agree to this prohibition on the use of compulsory powers without RWE’s consent. Although paragraph 3.5 provides that consent cannot be ‘unreasonably’ withheld, it is not clear what that means in these circumstances, especially where RWE has objected to the seeking of compulsory powers, has claimed serious detriment<sup>2</sup> and is actively opposing the causeway.
- 6.7 As set out in REP3-012, the Applicant is seeking the minimum interference possible with RWE, seeking freehold acquisition only where the current use would be interfered with (in accordance with the guidance), and, for the majority of plots, the Applicant seeks only rights to improve and use existing accesses. Those rights would exist in common with other rights of access, including existing rights in favour of National Grid and there is no proposal to remove such existing rights.
- 6.8 The seeking of access rights along existing routes on a previously developed site where other third party rights already exist is considered to represent the minimum level of interference and impacts on RWE from the project as a whole.
- 6.9 As has been set out by the Applicant in REP5-017, the Applicant refutes RWE’s submission that the imposition of access rights over an existing access on land already subject to third party access rights (over the same route) reaches the level of impact necessary to constitute serious detriment under section 127 of the Planning Act 2008. The land is already subject to such rights, with which the Applicant will co-exist. There is accordingly no new constraint on the land created by the proposal.
- 6.10 Further, serious detriment must be to the ‘carrying on’ of the undertaking. The Applicant does not accept that the acquisition of land or rights in the current circumstances causes any detriment to the ‘carrying on’ of the RWE electricity generation undertaking. At this time there is no generation facility operating on the site, there can accordingly be no detriment at all in terms of impact on generation. RWE will retain considerable direct access to the foreshore on land already within their ownership, which could serve exactly the same function (as part of access to cooling water) as the area occupied by Work no.10.
- 6.11 The drafting sought by RWE would allow it to prevent the development of the project despite the authorisation of compulsory powers by the Secretary of State. The Applicant strongly objects to that drafting and requests that its drafting of the provisions as set out in version 7 of the dDCO is preferred.

#### **Relocation of the access route**

- 6.12 The Applicant has repeatedly stated that it would agree to (not carry out) the relocation of the access route where that was requested by RWE in order to allow or facilitate re-development of the RWE site<sup>3</sup>. The main difference between the parties on this point (paragraphs 5.9 to 5.13 of REP5-029) is who is responsible for moving the access in such circumstances.
- 6.13 The Applicant is seeking in the DCO to acquire rights of access over RWE land together with right to improve, upgrade and extend that access as is required to make it suitable for the intended use. Where that is done compulsorily, RWE will be entitled to compensation for the acquisition of these rights and interference with their landholding. Where it is done voluntarily payments will be agreed. The rights are then in effect an easement over the defined route in favour of the Applicant. As a general principle of law, where a landowner wishes to relocate an

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<sup>2</sup>REP4-032

<sup>3</sup> Eg in REP3-012 at paragraph 4.1 the Applicant stated “The Applicant is happy to accept that such accesses may be relocated or changed to accommodate development of the site, provided that the alternative is suitable for the use required”; and REP5-017 at paragraph 2.5 “the Applicant has already agreed that it would consent as is necessary to the reasonable diversion of the access rights sought where that is requested to facilitate RWE’s redevelopment of the site”.

easement, it is for the landowner to provide the alternative, not the benefitted party, as it is the landowner who is seeking to interfere with a right in land belonging to another.

- 6.14 The Applicant should not have to pay to construct more than one access route to accommodate RWE where RWE has already been compensated for the creation of the original route. It is entirely normal for the party moving a facility to suit its redevelopment to bear the cost of providing the alternative – that can be seen in other sections of these provisions where the Applicant has to pay for any relocation of apparatus necessary for its works. What RWE is seeking here is unreasonable. RWE, will have been compensated for the creation of the access, the Applicant will have paid for the works to make that suitable for use. It is unreasonable in those circumstances that the Applicant should have to incur the cost to create another access on demand by RWE when RWE has already received payment for the creation of the first route.