



Thurrock Flexible Generation Plant

Deadline 6 – Applicant’s response to the ExA’s Third Written Questions



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3.1 COMPULSORY ACQUISITION

ExQ.	Question	Response
<p>3.1.1</p> <p>Applicant</p>	<p>Does the Applicant intend to limit the exercise of CA powers in relation to Work Nos 10, 11 and 15 to ensure only one AIL access is brought into use? If so, please signpost where/how this is secured in the dDCO? If not, please explain.</p>	<p>No, the Applicant is not proposing such a limitation. Currently, the Applicant is still seeking to agree terms for the use of Tilbury Port (T1), T2 and RWE's land. Unless and until that is legally secured, the alternative access cannot be used and the land for Work no 15 would not be acquired and the access would not be constructed. As this alternative access is not yet secured and deliverable, the causeway remains the intended means of delivering AILs to the site.</p> <p>Currently, the identified constraints on the highway network mean delivery by water is the most practical option for this site; accordingly, the Applicant considers that delivery to the T1 Port and use of T2 and RWE's land is the most likely realistic alternative option to use of the causeway in the short to medium term. The application of compulsory powers in that area would be used only when agreement has been reached with the Port to use Port facilities (at T1), T2 and RWE which makes this access deliverable. There may accordingly be a need to 'swap' between these routes at some stage. The Applicant notes that this would only apply for 5 years as per the time limit in article 21.</p> <p>The Applicant has an option in place for the non-Port land (outside the public highway) within Work no.15 but requires to retain CA powers over that area should they be required to effect the commons exchange. The Applicant notes that the land interests other than the Port have not objected to the inclusion of this land within CA powers along with the causeway.</p> <p>Should a suitable agreement not be reached with the Port and RWE by the time the construction is to commence, the causeway would be built and brought into use. Where agreement is subsequently reached with the Port, the access would be moved to the alternative (Work no. 15) and the causeway would remain in place and available while Work no. 15 was constructed. Only after Work no. 15 was operational would the causeway be decommissioned, which would require continuing (normal HGV and construction traffic) access to and over Works no. 10 and 11 to carry out that decommissioning work and to reinstate the flood wall. There would accordingly be a period of time where both the causeway and Work no. 15 would be in place.</p> <p>The Applicant does not solely control the timing or delivery of the port based alternative as it requires agreement with the Port and cannot be delivered by the Applicant alone. The Port did not engage with the Applicant on a similar proposal to use port facilities during the pre-application period despite requests from the Applicant, and while productive negotiation on heads of terms is now ongoing (as the prelude to then negotiating binding detailed legal agreements with the Port and RWE), no agreements have yet been signed. As demonstrated in the pre-application period, the Applicant cannot force the Port to engage in agreeing use of its facilities should it decide not to, which is why the Port has agreed that the scope of the heads of terms and subsequent legal agreement include provisions relating to the grant of a handling agreement securing use of the port itself. The Applicant therefore requires to retain the ability to acquire rights to use the causeway in order to ensure that the development is deliverable.</p> <p>Removing the ability to 'swap' to the alternative route means that, where an agreement with the Port is not in place ahead of construction and Work no.10 is constructed, but can be reached later, for example to facilitate Freeport development on the RWE site, changing to the alternative access becomes more difficult as it could not be delivered under the DCO, for example commons consent would be required. This would delay a change that all affected parties agree is desirable if it can be delivered.</p>

3.2 CULTURAL HERITAGE

ExQ.	Question	Response										
3.2.1		<p>The WSI for Marine and Intertidal Archaeological Mitigation is an outline document subject to final approval by the MMO through the discharge of Condition 15 in the Deemed Marine Licence. As such, the Applicant considers that there is an opportunity for matters of detail around timing for MMO actions under the WSI to be discussed and agreed when discharging the condition. That said, the following responses can be made at this stage.</p>										
		<table border="1"> <thead> <tr> <th>MMO submission (REP5-025, Section 4)</th> <th>Applicant's response</th> </tr> </thead> <tbody> <tr> <td>4.1. The MMO defer to Historic England (HE) regarding the suitability of the document and description of the baseline.</td> <td>Noted.</td> </tr> <tr> <td>4.2. With regard to paragraph 1.2.4 – The MMO do not consider a minimum of 10 working days as a turnaround time for the Method Statement to be sufficient, as the MMO would require time to consult with HE on the documents provided. The MMO will liaise with HE to establish a suitable timeframe.</td> <td> <p>The Applicant has contacted the MMO to discuss this timeframe but has not received a response.</p> <p>Ten days is the minimum not the maximum, and the undertaker would endeavour to give more notice when possible; but 10 days is felt to be reasonable minimum time period for method statement approval for each step of works under the WSI in order that the investigation is not unduly delayed.</p> </td> </tr> <tr> <td>4.3. With regard to paragraph 1.3.3 – The MMO note that part of the programme of archaeological works comprise of marine geotechnical site investigation works which may require additional consent from the MMO. The MMO recommend the Applicant refers to the MMO's online guidance tool to check if activities are licensable or advise the Applicant may want to build provision into DML if not already covered: https://marinelicensing.marinemanagement.org.uk/mmofox5/journey/selfservice/start</td> <td>Edits have been made to the wording of sections 3(2)(c) and (d) in Part 1 of Schedule 8 (Deemed Marine License) in the draft DCO submitted at Deadline 6 to make it clearer that geotechnical site investigation works and archaeological investigation form part of the licensed activities.</td> </tr> <tr> <td>4.4. With regard to paragraph 5.1.3 – The MMO does not agree with the Applicant's comments that the MMO 'will approve the report within 15 working days of receipt'. The MMO will endeavour to approve within 15 working days but cannot commit to a timescale as it depends on the quality of the submission, capacity of each organisation and the need for further consultation. Such a restrictive deadline would impact the MMO's ability to fulfil its duty/responsibility.</td> <td> <p>The Applicant has contacted the MMO to discuss this timeframe but has not received a response.</p> <p>The Applicant accepts that a fixed approval period may not be possible in all cases, but does consider it to be an important part of the WSI to set expectations on timescales for all parties. Wording to reflect this could be discussed further in due course when discharging DML Condition 15.</p> </td> </tr> </tbody> </table>	MMO submission (REP5-025, Section 4)	Applicant's response	4.1. The MMO defer to Historic England (HE) regarding the suitability of the document and description of the baseline.	Noted.	4.2. With regard to paragraph 1.2.4 – The MMO do not consider a minimum of 10 working days as a turnaround time for the Method Statement to be sufficient, as the MMO would require time to consult with HE on the documents provided. 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Applicant	Please respond to the MMO's comments in its Deadline 5 response [REP5-025] in relation to the WSI for Marine and Intertidal Archaeological mitigation.											

3.3 DRAFT DEVELOPMENT CONSENT ORDER

ExQ.	Question	Response
3.3.1 Applicant	Article 10(4) – Please respond to the alternative wording proposed by PoTLL in its Deadline 5a submission [REP5a–008].	The Applicant can agree the drafting changes sought and has proposed an amendment in revision 7 of the dDCO. The Applicant notes that it has not seen any evidence produced by the Port to demonstrate that such a conflict is likely outside of Work no.15 having regard to the nature of the Applicant's works, however it agrees as a principle providing a mechanism to prevent conflict is sensible.
3.3.2 Applicant	Articles 28 and 29 – The ExA notes the Applicant's changes to Articles 19 and 21 in version 6 of the dDCO [REP5–003] which are intended to limit the use of CA powers in respect of Work No. 12. Please respond to PoTLL's suggestion that similar wording should be included in Articles 28 and 29.	The Applicant considers that powers of temporary possession may still be required in these areas to allow for work necessary to carry out intrusive ground investigation works (including in relation to ground stability to inform the decision on which route to pursue) and to carry out ecological improvements (to improve grassland habitat for invertebrates). The Applicant accordingly does not agree with PoTLL's suggestion. This does not allow the Applicant to construct and use the access works over the non-selected option (in effect getting around the CA limitation by using one under temporary powers only) as these are limited by the detailed design approval requirement which only allows one access to be brought forward.
3.3.3 Applicant	Requirement 18 – In light of the inclusion of Work No 15 (Alternative AIL access), and noting the concerns expressed by IPs in relation to the potential impact on plans for the Thames Freeport, please provide further justification for the 5 year review period included in Requirement 18. Please also explain why the review date is linked to the commencement of operation of Work No 1.	<p>As has been previously submitted, the Applicant does not accept that its development poses any impediment to the delivery of a Freeport as dealing with existing infrastructure and rights on a development site is entirely normal. The Applicant would not be the only rights holder over the land and providing accommodation for affected undertakers is necessary for almost every major project. The ability to provide a suitable alternative is within the Port's 'business as usual' operations.</p> <p>The Applicant has been looking at AIL routes since 2017. There is no alternative other than the use of Tilbury Port for unloading (T1) and transport through the port (T2) as no alternative highway route from another Port exists.</p> <p>It would not be reasonable for the Applicant to have to review the access shortly after grant and, once the detailed design is approved and work commenced, it should be able to be completed. At the time the Applicant is progressing detailed design, the Applicant needs to have certainty on what will be the access during construction, for example to draft the final CTMP and agree interfaces with LTC, to book vessels and carry out the final NRA for approval, and to book long lead deliveries of the AILs and the vessels necessary to deliver those. Review during the initial period would risk serious disruption to delivering the project and increase risk and cost, result in delay to commencing its operation and extend the period of construction impacts. Five years from commencement of operation allows for the initial construction and any immediate repair/replacement operations to have been carried out before a review for the longer-term operational phase is required.</p> <p>On the use of Tilbury Port, the Applicant does not solely control the timing or delivery of the alternative access over Work no.15 as it requires agreement with the Port and cannot be delivered by the Applicant alone. The Port did not engage with the Applicant on a similar proposal to use port facilities during the pre-application period and the Applicant therefore does not consider it credible (or fundable) to rely on the Port's assertion that its statutory duty to provide port facilities protects the Applicant on this point. As already explained, the Port has conceded this point because the heads of terms under active negotiation as a prelude to a binding legal agreement include obligations to enter into a handling agreement for the use of the Port for delivery (T1).</p>

APPLICANT'S RESPONSE TO THE EXA'S THIRD WRITTEN QUESTIONS

ExQ.	Question	Response
		<p>This review period does not mean that the access could not be moved earlier where circumstances required and agreement reached which, for example, allowed for the re-arrangement of planned deliveries to the Port instead of the causeway in line with the existing delivery schedule, but only that the Applicant is not required to carry out the review earlier and during the construction period.</p> <p>Transportation by public highway has been ruled out as an alternative as set out in the ES given the constraints on the strategic highway network (bridge heights are too low in particular) and on the local highway, where widening of some access routes would be required. The Applicant considers it highly unlikely that anything will have fundamentally changed in relation to the highway network in less than 5 years, so this is a realistic timeframe for reconsidering alternatives which need to use the public highway.</p>
3.3.4	<p>Requirement 18 – The ExA understands that the Applicant has structured the dDCO to facilitate the removal of the causeway (and relevant part of the access) when a suitable alternative is available.</p> <p>Requirement 18 defines a suitable alternative as one which is 'environmentally acceptable, permanent, feasible and economic'.</p> <p>Please explain why the Applicant considers the alternative AIL access does not currently meet the criteria for a suitable alternative as defined in Requirement 18.</p>	<p>The Applicant considers that the alternative is environmentally acceptable.</p> <p>The Applicant included a complete solution in the original application for the delivery of the most critical part of the entire project – the AILs. Without a completely secure and deliverable access for the AILs there is no project. In the pre-application phase, the Applicant attempted to engage with the Port to agree arrangements via T1, but the Port did not engage. Having gone to substantial effort and cost to devise the causeway solution, the Applicant could only accept an alternative when it is certain that it is on an equivalently secure footing – both in terms of deliverability and fundability. The Port has applied considerable pressure on the Applicant to develop an alternative in a very short timeframe.</p> <p>As has been set out in response to questions 3.3.1 and 3.3.3, the alternative access does not provide a complete solution and an agreement is still required in addition to it with Port of Tilbury to use their (T1) port facilities for the berthing, unloading and storage of AILs in order for the alternative AIL access to be feasible.</p> <p>At this stage, negotiation of the terms of voluntary agreement for access through the Port within the Order land are progressing well and the commercial heads under discussion give the Applicant confidence at this stage that an economic level of fee will be agreed. However, should those negotiations fail, compulsory powers will be required to deliver any access through the Port (with compensation payable).</p> <p>For the use of Port facilities (which will be subject to a separate handling agreement), although the Port's charges for many items are published and known, other charges (such as storage) are not; agreement on those will be required to demonstrate that the alternative is economic. This is also not 'permanent' as it would require further arrangements to be reached for handling for AIL delivery of replacement engines in case of failure, with no certainty what terms those would be on or if agreement could be reached. The Applicant considers that this risk is likely to be able to be addressed through agreement with the Port and overcome, however that agreement is not yet in place. The heads of terms under discussion would oblige the Port to enter into a handling agreement for use of T1 facilities.</p> <p>The Applicant therefore considers that the primary AIL route using the causeway is deliverable across its whole length and will be available for the entire life of the development (is permanent for these purposes) under the DCO drafting as requested, and is feasible and economic; the alternative is not. Therefore, unless and until an agreement is executed with the Port, the alternative is not feasible and cannot be known to be economic and permanent. This issue is of central importance to the Applicant as it goes directly to the fundability of the project.</p>

APPLICANT'S RESPONSE TO THE EXA'S THIRD WRITTEN QUESTIONS

ExQ.	Question	Response
3.3.5		The intention of this wording was simply to allow the Planning Authority to consider whether there are likely impediments to deliverability of an alternative in much the same way as this examination will consider those for the other consents and licences required for the project. The Applicant has proposed an alternative draft in version 7 which simply requires the Planning Authority to be satisfied that the alternative is environmentally acceptable – as is required for its normal decision making.
Applicant	Requirement 18 – The ExA notes the concerns raised by PoTLL [REP5a–008] in relation to the wording of Requirement 18(6)(a). Please comment on the proposed amendments to R18(6)(a) suggested by PoTLL [REP5a–008 and REP2–096].	The Applicant does not accept that the wording proposed by PoTLL in REP2-096 (“that the alternative route does not cause materially new or materially different effects to those reported in the environmental statement”) would function in these circumstances. An alternative outside the DCO (i.e. not using Work no. 15) would <u>necessarily</u> have new or different environmental effects from those assessed for this application because it has not been included in the assessment for this application. To limit the alternatives to those which comply with this application’s EIA undermines the purpose of the requirement and fundamentally restricts it to using Work no. 15; nothing else would fall with the currently assessed effects. That there may be new or different effects is recognised in the need for other consents to be obtained, which may include planning permission. This DCO does not seek to consent an as yet unidentified alternative access and could not reasonably do so. The environmental effects of any new alternative will be assessed as part of that process and therefore may be completely new and different to the conclusions of the current ES and still be entirely acceptable.
3.3.6	Requirement 18 – The ExA notes PoTLL’s proposed amendments to Requirement 18(2). Please provide further justification for the report of the review of AIL access to be prepared in consultation with the Port.	n/a
PoTLL		
3.3.7		The Applicant is happy for the Port to be consulted on the report it prepares and agrees that an obligation to consult them can be added to sub-paragraph (3). The Port is seeking a disproportionate and unreasonable degree of control over another party’s development by seeking to control the review process outside its area of responsibility. The decision on whether an alternative is suitable will be taken by the relevant planning authority – the Port can and will be consulted on that but they are not the undertaker or decision maker here.
Applicant	Requirement 18 – The ExA notes PoTLL’s proposed amendments to Requirement 18(2). Please provide further justification for the report of the review of AIL access to be prepared in consultation with the Port.	It is for the undertaker carry out the review: it will do so in compliance with the DCO. The addition simply adds an unnecessary requirement that the report submitted has been consulted on with the Port in advance (18(2)) and they are then consulted again (18(3)); only the consultation with the planning authority should be mandated. The Applicant does not accept that PoTLL’s request for the review to be “prepared in consultation with” in requirement 18(2) is necessary or is certain enough as to what is required from the Applicant and what recourse it has should the Port not engage on such consultation. For example, would a report where the Port has failed to engage in consultation be deficient under the requirement? The undertaker cannot force the Port to engage on this or to do so timeously. Early consultation on drafting is clearly good practice and will be sought voluntarily, but cannot be allowed to put the undertaker at risk of DCO non-compliance through the actions of a third party.
3.3.8		

APPLICANT'S RESPONSE TO THE EXA'S THIRD WRITTEN QUESTIONS

ExQ.	Question	Response
MMO/ Thurrock Council/ Applicant	Requirement 19 – Please comment on the request by the MMO to have Requirement 19 (Causeway Decommissioning Plan) moved to Schedule 8 (Deemed Marine Licence) [REP5–025] (paragraph 2.6).	<p>The DML in the DCO does not provide licencing consent for decommissioning activities (as these cannot be known with enough precision at this time). A separate licence for decommissioning works will be required. The decommissioning plan is therefore outside the scope of the DML as it would not form a condition imposed on the licensed works. There would accordingly be considerable doubt that this is a valid condition of that licence.</p> <p>The Applicant considers that the decommissioning plan is primarily a planning requirement – the licensing aspects will require a separate licence but that is concerned with that regime in the marine environment. The decommissioning plan will need to cover wider 'planning' issues including for example the access for decommissioning from land, the interface with the costal path, the flood defence wall and any terrestrial waste disposal. It is therefore properly a requirement of the DCO not a DML condition.</p>
3.3.9 Applicant	Please state whether the Applicant considers the dDCO contains all of the powers necessary for the creation of the alternative AIL access. If not, please explain.	As has been set out in response to questions 3.3.1 and 3.3.3, the alternative access does not provide a complete solution and an agreement is still required in addition to it with Port of Tilbury to use their (T1) port facilities for the berthing, unloading and storage of AILs. From the public highway outside the port (Fort Road) to the site, the dDCO provides a solution through acquisition of rights and works powers.
3.3.10 Applicant	Article 33(2) – the ExA understands the purpose of the Article is to act as a restriction on the CA powers contained elsewhere in the Order. Please explain the purpose of the words 'vest in the undertaker' in this subsection? Do they duplicate the CA provisions elsewhere in the dDCO?	<p>The term 'vested in' covers the acquisition by compulsory means which 'vests' the title in the acquiring authority, for example through execution of a general vesting declaration. This follows standard compulsory acquisition terminology for that process of ownership becoming 'vested in' the acquiring authority. This terminology is also used in other CA articles in the dDCO, see for example article 23(7) and in the protective provisions (see for example paragraph 2(d) of part 1 or paragraph 20 of part 6 of schedule 9). This wording also follows section 131 of the Planning Act 2008 which requires that replacement land must be 'vested in' the seller.</p> <p>This terminology is used by the underlying compulsory purchase legislation which governs the exercise of CA powers, especially the Compulsory Purchase Act 1965 (as applied to the DCO by article 26), the Acquisition of Land Act 1981 (applied to the dDCO by article 24, see in particular section 19 Common, open spaces etc) and the Compulsory Purchase (Vesting Declarations) Act 1981. It also aligns with the compensation provisions, for example the 'vesting date' can be important in establishing the date of valuation for compensation claims under the Land Compensation Act 1961 where a general vesting declaration is used.</p> <p>Given that this terminology has been specifically used to align with statutory language in a number of related statutes, the Applicant is not proposing any amendment.</p>
3.3.11 Applicant/ Thurrock Council	Requirement 20 – Please provide further justification for the inclusion of new Requirement 20.	The Local Impact Report (REP2-077) notes that employment creation has been assessed as a positive impact of the development in that LIR. The Council requested in that LIR that the promotion and implementation of an Employment and Skills Strategy during construction and operation of the development be progressed. The Applicant considers that it is reasonable that the Council seeks to ensure the claimed benefits of the development in term of employment and skills opportunities are secured and where possible maximised in line with its development plan policies.
3.3.12 Applicant	Please provide a fully consolidated version of the CTMP and Code of Construction Practice.	The consolidated CTMP is enclosed. The CoCP is already consolidated, with the latest version being AS-031.

APPLICANT’S RESPONSE TO THE EXA’S THIRD WRITTEN QUESTIONS

ExQ.	Question	Response
<p>3.3.13</p> <hr/> <p>Applicant</p>	<p>Requirement 29 – The ExA notes the 3 working days provided for in Requirement 29(3) for the discharging authority to notify the undertaker of any further information requested by the consultee is short. A longer notification (e.g. 5 days or more) would accord with other recently made DCOs. Please update the dDCO or provide further justification for the 3 working days proposed.</p>	<p>The Applicant has proposed an amendment in version 7 of the dDCO to change this to 5 days.</p>

3.4 HABITATS AND ONSHORE ECOLOGY

ExQ.	Question	Response
3.4.1	Please provide an update on the discussions between the Applicant and NE in relation to HRA matters and water vole translocation.	HRA matters: Following discussions with NE, the Applicant has submitted further analysis of potential impacts on wintering birds [AS-047 and AS-048]. The Applicant understands that NE intends to comment on this at Deadline 6.
Applicant/ NE		Water vole: The Applicant has confirmed with NE its understanding that it would be necessary to apply for a licence from NE to translocate water voles to a suitably prepared receptor site prior to commencement of works affecting ditches containing water voles, subject to updated surveys confirming that a water vole licence is necessary (i.e. water vole presence). The translocation would be undertaken in accordance with the principles set out in the Outline EMP. The method of translocation would not include taking water voles into captivity.
3.4.2	Please respond to the concerns raised by NE in relation to the replacement common land as set out in [REP5-027].	Please see enclosed the Applicant's responses as part of the Commons Act 2006 s16 application process in June. The Applicant's response to NE is on pages 3-4.
Applicant		

3.5 [SECTION UNTITLED IN QUESTIONS DOCUMENT]

ExQ.	Question	Response
3.5.1	Please provide details of any comments in respect of noise impact thresholds by Deadline 6 to ensure that there is sufficient time for the Applicant and other IPs to comment before the close of the Examination.	n/a
NE		
3.5.2	Does the council consider there is a credible risk that anti-social or criminal activity could occur at the proposed footbridge and path, or the Exchange Common Land, as a result of the proposed permissive access from Fort Road?	n/a
Thurrock Council		