

Dear Sirs

EN010092: Thurrock Flexible Generation Plant

Procedural Deadline 7 Submission on behalf of RWE Generation (UK) Plc

We are acting for RWE Generation (UK) Plc ("RWE") in relation to the application for Development Consent for the above project.

1. Comments on responses submitted for Deadline 6

1.1 Applicant's Notes on the Status of the Protective Provisions [REP6-020]

1.1.1 Since the submission of that document, the parties have been in further discussion about the drafting of the protective provisions for the benefit of RWE to be included in the DCO.

1.1.2 In relation to the areas of disagreement outlined in document [REP6-020], RWE provide the following update:

1.1.2.1 **Definition of 'specified works':** this definition has now been agreed between the parties;

1.1.2.2 **Acquisition of Land and Exercise of Powers:**

(a) This remains a point of disagreement between the parties. We understand that the Applicant is submitting a consolidated version of the protective provisions showing the preferred drafting of each party in respect of this provision.

(b) The Applicant raises concerns in relation to the meaning of consent being 'unreasonably withheld'. RWE note that what this means cannot be easily defined at this stage as what is unreasonable will depend on the circumstances and impacts at the time. RWE's position in this respect was explained at the recent DCO ISH, as noted in section 2.7 of the hearing summary. It is not rehearsed here.

(c) However, RWE are willing to include a new provision which makes clear that any such consent or approval is not to be unreasonably withheld and also is to be used to control the means of the development for the protection of RWE's apparatus and undertaking.

(d) This addition should provide the Applicant with sufficient comfort in relation to the operation of consent where required under the provisions.

(e) This addition has been accepted by the Applicant. However, the wording in relation to consent being required to exercise the powers of compulsory acquisition or temporary possession has not been accepted by the Applicant.

(f) RWE maintain that this wording is required to protect its undertaking.

(g) Further, RWE note that wording restricting the exercise of compulsory acquisition powers without consent has been included in the protective provisions in favour of Network Rail and National Grid and the requirement for consent to exercise temporary possession powers is included in the protective provisions in favour of PoTLL.

(h) Further, RWE notes that if there is continued disagreement about consent being withheld, the Applicant would be able to escalate this via the arbitration provision in the DCO.

1.1.2.3 **Relocation of the access route:** The provisions relating to the potential relocation of the access route have now been agreed between the parties.

1.1.3 We include RWE's preferred version of protective provisions are Appendix 1.

1.2 Applicant's updated draft Development Consent Order

Articles 19 and 22

1.2.1 As set out in our deadline 6 submissions, we believe that the reference to 'notice of entry' under s11 of the 1965 Act in articles 19 and 22 of the dDCO should be to a 'notice to treat' under section 5 of the 1965 Act.

1.2.2 Whilst taking possession pursuant to a notice of entry crystallises a valuation date, a notice to treat can have compensatable effects (see s31 Land Compensation Act 1961 regarding compensation on withdrawal of a Notice To Treat). As drafted, the article permits a Notice To Treat to be served in relation to both limbs of the work 12 access when the intention is to limit the exercise of compulsory acquisition powers in relation to only the access route that will be used. It would not be proportionate for the Applicant to exercise compulsory acquisition powers over land that is not required for the scheme. Nor does it appear to be in the Applicant's interests for RWE to be in a position whereby it has a claim in respect of two limbs of the work 12 access when only one will be used.

1.2.3 We understand that this change to the drafting has been accepted by the Applicant and will be included in the dDCO submitted for deadline 7.

Article 28

1.2.4 We understand that the Applicant will be adding in some wording to Article 28 to confirm that the powers of temporary possession cannot be used to construct the new access within Work No 12(c) or 12(d) unless the detailed design of the works has been approved.

1.2.5 RWE confirm they agree with this proposed amendment, subject to the final drafting being in accordance with the above.

1.2.6 Under requirement 4(10) the Applicant is only able to submit details for approval for either work 12(c) or (d) but not both, so therefore the revision to article 28 would mean the Applicant is unable to use the temporary possession powers to undertake works for both accesses. This will address the concern raised by RWE.

1.2.7 It is noted that the wording would still allow the Applicant to use the temporary possession powers for ground investigations/surveys to ascertain the suitability of each route. RWE can confirm they are satisfied with this position.

2. **Comments on the ExA's proposed schedule of changes to the dDCO**

2.1 We note the following changes proposed to the DCO by the ExA with RWE's comments included in italics:

2.1.1 Schedule 2, Part 1, Paragraph 18.—(1) "No later than ~~five~~ one years from the coming into force of this Order, ~~commencement of operation of Work no.1A~~, the undertaker must submit a report of the review of access options for transportation of AILs to or from Work no.1 in writing to the relevant planning authority and send a copy to Highways England."

RWE maintains its position that the causeway should not be included in the DCO because the AIL route provides a sufficient alternative. However, if the causeway remains in the DCO, RWE support this change to the DCO to reduce the timeline for the preparation of this report.

2.1.2 Schedule 2, Part 1, Paragraph 18 (3) (b) "advise the relevant planning authority and the Port of Tilbury London Limited of the outcome of any applications under this subparagraph which were not determined by that planning authority within five business days of the undertaker being notified of that outcome."

RWE should be included here as a consultee. This was agreed by the Applicant at the DCO hearing.

2.1.3 Schedule 9, Part 10 - Protective Provisions for the benefit of RWE

As set out above, RWE's preferred protective provisions as enclosed at Appendix 1 should be included in the DCO.

3. **Written summary of oral submissions made at the Compulsory Acquisition and Development Consent Order Hearings**

3.1 A summary of the submissions made on behalf of RWE at Compulsory Acquisition Hearing 2 and at Issue Specific Hearing 4 on the draft DCO are included at Appendix 2.

4. **Statement of Common Ground**

4.1 RWE has previously provided comments on a draft Statement of Common Ground to the Applicant but has not heard any further in relation to the progress on this document.

4.2 RWE remains willing to enter into a Statement of Common Ground with the Applicant.

Yours faithfully,

Eversheds Sutherland (International) LLP

Appendix 1: RWE's Preferred form of Protective Provisions

SCHEDULE 9
PROTECTIVE PROVISIONS
PART []
FOR THE PROTECTION OF RWE GENERATION UK PLC

1 The provisions of this part of this Schedule have effect for the protection of RWE Generation UK Plc unless otherwise agreed in writing between the undertaker and RWE Generation UK Plc.

2 In this Part of this Schedule:

"the road" means the existing road owned by RWE which runs through the site shown as plots 01/04, 01/11, 01/19, 01/20, 01/21, 01/22, 01/30, 01/33, 01/34, , 04/01, , 04/03, 04/05 and 04/06 on sheets 1 and 4 of the Land Plans ;

"the proposed road" means an access road for abnormal indivisible loads which runs through the site shown as plots 01/35, 01/36, 01/37 and 04/02 on sheets 1 and 4 of the Land Plans;

"existing apparatus" means any pipes, cables, drainage systems or associated equipment belonging to RWE within the Order land;

"environmental permit" means the environmental permit held by RWE in relation to the site with reference EP3433LZ;

"functions" includes powers and duties;

"in": in a context referring to the existing apparatus or alternative apparatus being in land, includes a reference to apparatus under, over or on land;

"plan" includes all designs, drawings, specifications and method statements necessary to describe the works to be executed;

"RWE" means RWE Generation UK Plc, company number 03892782 of Windmill Hill Business Park, Whitehill Way, Swindon, Wiltshire, SNS 6PB or any of its entities or successor entities;

"RWE Undertaking" means any land and existing apparatus belonging to RWE including but not limited to the site, the existing apparatus and the land subject to the environmental permit including any rights, liabilities and duties of RWE;

"specified powers" means the powers conferred by articles 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); 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) of the Order;

"specified works" means any authorised works under the Order which are undertaken within 3m of the road or proposed road or within 15m of any apparatus within the site or which may have an adverse impact on the RWE Undertaking and includes invasive investigatory works;

"the site" means the former Tilbury B Power Station site located to the East of Tilbury Town as shown on sheets 1 and 4 of the Land Plans.

Agreement, Approval or Consent by RWE

Where under this Part of this Schedule RWE is required to give its consent, agreement or approval in respect of any matter, that consent, agreement or approval:

(a) is not to be unreasonably withheld and any consent,

- (b) may be given subject to such reasonable requirements and/or conditions as RWE may have or consider necessary for the protection of the existing apparatus and RWE Undertaking; and
 - (c) is intended to control the means and practicalities of the specified works to protect the existing apparatus and the RWE Undertaking.
- 2.2 If RWE refuses any approval or agreement or consent sought under this paragraph then that refusal must be accompanied by a statement of grounds for refusal.

3 Acquisition of Land and Exercise of Powers

- 3.1 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.
- 3.2 At least 56 days before the undertaker exercises any or all of:
- (a) the specified powers in respect of the site and the affected highways or streets within the site; or
 - (b) the specified powers in respect of the RWE Undertaking (insofar as that Undertaking is located outside of the site); or
 - (c) the powers referred to in paragraph 3.4,
- the undertaker must submit to RWE details of the works to be undertaken in reliance on those powers.
- 3.3 Any specified powers:
- (a) in respect of the site and the affected highways or streets within the site must not be exercised except with the agreement of RWE; and
 - (b) in respect of the RWE Undertaking (insofar as that Undertaking is located outside of the site) must not be exercised without the undertaker first consulting RWE on the details submitted pursuant to paragraph 3.2 and taking account of any consultation response.
- 3.4 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.

4 Existing apparatus

- 4.1 Despite any provision of this Order and anything shown on the Land Plans, the undertaker must not acquire any existing apparatus other than by agreement.
- 4.2 If, in the exercise of the powers conferred by this Order, the undertaker acquires any interest in any land in which any existing apparatus is placed, that existing apparatus must not be removed and any right of RWE to use, maintain, or renew that existing apparatus in that land must not be extinguished until a replacement is installed and available for use by RWE.
- 4.3 Any replacement apparatus must fulfil the same functions as the apparatus being replaced and must be no less advantageous in nature to RWE than the apparatus being replaced.
- 4.4 Not less than 56 days before starting the execution of specified works, the undertaker must submit to RWE a plan, section and description of the works to be executed.
- 4.5 Those works must be executed only in accordance with the plan, section and description submitted under sub-paragraph 4.4 and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph 4.4 by RWE for the alteration or otherwise

for the protection of the existing apparatus, or for securing access to it, and RWE is entitled to watch and inspect the execution of those works, and the undertaker must supply RWE with any additional information concerning such works as RWE may reasonably require.

- 4.6 Any requirements made by RWE under sub-paragraph 4.5 must be made within a period of 56 days beginning with the date on which a plan, section and description under sub-paragraph 4.4 are submitted to it.
- 4.7 Where RWE requires any protective works under sub-paragraph 4.5 to be carried out either by itself or by the undertaker (whether of a permanent or temporary nature), the protective works must be carried out to RWE's reasonable satisfaction prior to the carrying out of the specified works.
- 4.8 Nothing in this paragraph precludes the undertaker from submitting at any time or from time to time, but in no case less than 56 days before commencing the execution of any works, a new plan, section and description instead of the plan, section and description previously submitted, and having done so the provisions of this paragraph apply to and in respect of the new plan, section and description.
- 4.9 The undertaker is not required to comply with sub-paragraph 4.4 in a case of emergency, but in that case it must give to RWE notice as soon as is reasonably practicable and a plan, section and description of those works as soon as reasonably practicable subsequently and must comply with sub-paragraph 4.5 in so far as is reasonably practicable in the circumstances.
- 4.10 The undertaker must pay to RWE the proper and reasonable expenses reasonably incurred by RWE in, or in connection with, the inspection, alteration or protection of any existing apparatus.
- 4.11 Subject to sub-paragraph 4.14 if by reason, or in consequence, of the construction, use, operation or failure of any specified works or in consequence of the construction, use, , operation, maintenance or failure of any of the authorised development by or on behalf of the undertaker or in consequence of any act or default of the undertaker (or any person employed or authorised by the undertaker) in the course of carrying out such works, any damage is caused to any existing apparatus or property of RWE, or to the road, or to the RWE Undertaking, or to operations, or there is any interruption in any service provided by RWE, or in the supply of any goods to RWE or by RWE, or RWE becomes liable to pay any amount to any third party, the undertaker must—
- (a) bear and pay on demand the proper and reasonable cost reasonably and properly incurred by RWE in making good such damage or restoring operations, services or supply; and
 - (b) indemnify RWE for any other expenses, losses, demands, proceedings, damages, claims penalty or costs incurred by or recovered from RWE, by reason or in consequence of any such damage or interruption.
- 4.12 The fact that any act or thing may have been done by RWE on behalf of the undertaker or in accordance with a plan approved by RWE or in accordance with any requirement of RWE or its supervision does not (subject to sub-paragraph 4.11) excuse the undertaker from liability under sub-paragraph 4.11(a).
- 4.13 Nothing in sub-paragraph 4.11(a) imposes any liability on the undertaker with respect to any loss, damage, injury or interruption to the extent that it is attributable to the neglect or default of RWE, its officers, servants, contractors or agents.
- 4.14 RWE must give the undertaker reasonable notice (being not less than 28 days) of any claim or demand, and no settlement or compromise may be made without the consent of the undertaker (not to be unreasonably withheld or delayed) which, if it reasonably withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

5 Road, proposed road and RWE Undertaking

- 5.1 The undertaker must give RWE no less than 56 days' written notice of the intended commencement of any specified works and must include with this notification a plan and description of the works to be commenced and a programme for these works.
- 5.2 Subject to 5.3, the undertaker must permit RWE, its successors in title, occupiers, tenants and invitees of the site pedestrian and vehicular access at all times and for all purposes along the road and proposed road in common with the undertaker.
- 5.3 The undertaker must give RWE not less than 28 days' notice of any exercise of powers under article 11 (Street works), article 13 (Temporary restriction of use of streets), article 14 (access to works) and article 15 (traffic regulation) which would restrict access by RWE, its successors in title, occupiers, tenants and invitees to the road and/or the proposed road. Where access to the road along an existing route is prevented or restricted by the undertaker, the undertaker must ensure that suitable alternative is available for use by RWE, its successors in title, occupiers, tenants and invitees for the whole period of the closure or restriction before exercising any power.
- 5.4 Save in the case of emergency, the undertaker may not prevent or restrict RWE from using the road (or any alternative access provided under these protective provisions).
- 5.5 The undertaker must ensure that the road or a suitable alternative is open for emergency access to the site at all times.
- 5.6 If the undertaker requires to undertake any specified works which will break open the surface of the road or involve any temporary closure of the road then the undertaker must provide 7 days written notice of such works to RWE and acting reasonably must have regard to (and accommodate so far as reasonably practicable) any requests from RWE in respect of this period of works, including measures, where practicable to minimise disruption and facilitate access to the site.
- 5.7 Where any temporary closure of the road is required, a suitable alternative access to the site must be provided to RWE, its occupiers, tenants and invitees which is no less convenient to access the site than the road for the whole period of the closure. The undertaker must have regard to any requests from RWE (acting reasonably) in relation to the location of the alternative access road.
- 5.8 The undertaker must keep the road (or alternative access if one is provided) clean and tidy and free of obstructions at all times.
- 5.9 If at any time RWE require the relocation, variation or alteration of the road or the proposed road, then RWE shall serve written notice on the undertaker informing them of this fact and identifying the proposed relocation, alteration or variation of the road or the proposed road within the Site.
- 5.10 Subject to
 - (a) agreement by the undertaker (not to be unreasonably withheld or delayed) that the proposed relocation, alteration or variation of the road or the proposed road within the site is acceptable; and
 - (b) RWE meeting any costs of the undertaker associated with the proposed relocation, alteration or variation of the road and/or the proposed road within the site including alterations of connections to access roads outside the Site; and
 - (c) RWE granting the necessary rights for the proposed relocation, alteration or variation of the road or the proposed road within the Site; and
 - (d) the undertaker seeking and being granted, the necessary rights for the proposed relocation, alteration or variation of the road or the proposed road as is necessary to connect to the altered or varied road or proposed road

- 5.11 then RWE must undertake the relocation, alteration or variation of the road or the proposed road within a reasonable time agreed between the parties.

6 Flood Defences and Site Security

- 6.1 The undertaker must consult RWE on the detailed design for the flood defences and gate in the flood defence wall (forming part of Work No 11) prior to undertaking these works.
- 6.2 The undertaker must take into account any reasonable comments and suggestions from RWE in relation to the design of the flood defences and gate in the flood defence wall (forming part of Work No. 11).

7 General

- 7.1 Any difference or dispute arising between the undertaker and RWE under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and RWE, be determined by arbitration in accordance with article 44 of this Order.
- 7.2 The undertaker and RWE must each act reasonably in connection with the implementation of this Part of this Schedule.

8 Notices

- 8.1 Any plans or notices submitted to RWE by the undertaker pursuant to this Part must be sent to RWE c/o the Company Secretary at its registered address on Windmill Hill Business Park, Whitehill Way, Swindon, SN5 6PB or such other address as RWE may from time to time appoint instead for that purpose and notify to the undertaker in writing .

Appendix 2: Summary of the submissions made on behalf of RWE at Compulsory Acquisition Hearing 2 and at Issue Specific Hearing 4 on the draft DCO

RWE GENERATION UK PLC

THURROCK FLEXIBLE GENERATION PLANT DEVELOPMENT CONSENT ORDER APPLICATION

SUMMARY OF HEARING SUBMISSIONS

5. COMPULSORY ACQUISITION HEARING – 26 JULY 2021

- 5.1 It was confirmed that the Joint Statement read by PoTLL reflected RWE's position.
- 5.2 This statement on the potential sale of the land is important context to the submissions made by RWE, especially in light of the Applicant's submissions at Deadline 5 which questioned why was RWE not objecting to the PoTLL proposals.
- 5.3 It was clarified that even were the sale to come under contract in August as per the Joint Statement, RWE will still retain an interest in the land and therefore must retain its objection to the dDCO unless and until any sale completes such that it no longer has an interest in the land. It is essential that RWE protects its position in case that sale does not happen for any reason.
- 5.4 It was confirmed that RWE is also working with the Applicant in relation to the land rights for the AIL route.
- 5.5 It is RWE's position that there is no justification for the inclusion of the Compulsory Acquisition powers in respect of the causeway on the basis that there is a clear alternative which gives rise to less harm. RWE submitted a plan at Deadline 6 in relation to the cooling water function for the Tilbury Energy Centre proposals and how it needs unfettered access to the river - the causeway would materially prejudice such a scheme coming forward in the future. It was confirmed in response to the ExA that RWE does not have current plans for the flexible energy plant but that it was not the suitability of the site which caused it to be halted. RWE cannot comment on likelihood or timing of that coming forward in the future.
- 5.6 RWE made no comment on the detail of the handling agreement point discussed between the Applicant and PoTLL but did acknowledge the wide scope of what may properly be provided for in an Order in s120 of and schedule 5 to the Planning Act 2008.
- 5.7 RWE maintains the position that there should be no compulsory acquisition without consent and RWE endorsed the position of PoTLL as advocated by PoTLL about it being established practice that there shall be no compulsory acquisition of statutory undertaker land without consent. These protections enable parties to deal with representations under both s127 and s138 of the Planning Act 2008. These are not controversial matters and such protections are commonly given to statutory undertakers that own land (see for example the protective provisions for National Grid, PoTLL and Network Rail in this very draft DCO). Similarly, there should be no compulsory acquisition of apparatus without consent, as is provided for the general protective provisions in Part 1 of Schedule 9 to the draft DCO.
- 5.8 The Applicant suggested that the causeway could also benefit RWE for any future energy scheme by enabling RWE to bring in AILs. RWE is surprised that now being suggested that the causeway could be for RWE's benefit when it could sterilise its land for 5 years or more. The remote possibility that it may be used on unknown terms at an unknown time in the future does not mitigate that harm.

6. ISSUE SPECIFIC HEARING 4 – DEVELOPMENT CONSENT ORDER – 26 JULY 2021

- 6.1 Articles 19 and 22
- 6.2 RWE confirmed that it seeking to avoid a situation whereby the Applicant has exercised compulsory acquisition powers in relation to both limbs of the access road around the ash field (works 12(c) and (d)). Whilst taking possession pursuant to a Notice of Entry crystallises a valuation date, a Notice to Treat can have compensatable effects (see s31 Land Compensation Act 1961 regarding compensation on withdrawal of a Notice To Treat).

As drafted, the article permits a Notice To Treat to be served in relation to both limbs of the work 12 access when the intention is to limit the exercise of compulsory acquisition powers in relation to only the access route that will be used. It would not be proportionate for the Applicant to exercise compulsory acquisition powers over land that is not required for the scheme. Nor does it appear to be in the Applicant's interests for RWE to be in a position whereby it has a claim in respect of two limbs of the work 12 access when only one will be used.

6.3 The ExA asked the Applicant to consider this point and RWE are pleased that the Applicant has agreed to change this drafting.

6.4 Article 27

6.4.1 RWE is not seeking to limit the Applicant's powers under that article to undertake ground investigation works and/or carry out ecological improvements as per their Deadline 6 response on this issue. However, Article 27 is broad and allows permanent works to be undertaken whilst in temporary possession and it is a residual concern of RWE that the scope of what the Applicant might do whilst in temporary possession could go beyond what is reasonably required, justified or proportionate. RWE is please that alternative drafting has now been included by the Applicant.

6.5 Requirement 18(1)

6.5.1 RWE agrees with the PoTLL that there must be a provision for a review before the causeway is constructed.

6.5.2 RWE also questioned how the Applicant considers this review mechanism would work alongside the 5 year period for the exercise of compulsory acquisition powers in the DCO. In principle, compulsory acquisition powers may have been implemented before the review takes place as to whether the causeway is needed or should be retained, which calls into the question the appropriateness of the exercise of compulsory acquisition powers were they to be granted for the causeway.

6.6 Requirement 18(3)

6.6.1 RWE stated that they wish to be added as a consultee. The Applicant confirmed it would add this into the next draft.

6.7 Protective Provisions schedule 9 Part 10

6.7.1 The Applicant in its version 7 draft DCO has corrected RWE's name in the opening paragraph but not the heading. As noted by the ExA, this should be RWE Generation UK Plc not Limited.

6.7.2 The Applicant's Deadline 6 submission of protective provisions did not provide a comparison between the version of the protective provisions submitted by RWE at Deadline 5, which reported a position that RWE understood to have been agreed with the Applicant save for the items expressly noted by RWE as being under discussion. Rather, the Applicant made a series of fairly extensive changes to the Protective Provisions at Deadline 6 without having drawn this to the attention of RWE or the Examining Authority.

6.7.3 RWE's solicitors had to request a word version of the Deadline 6 version from the Applicant and carry out our own comparison, which is not acceptable in the circumstances.

6.7.4 However, progress has since been made between the parties on two of the matters drawn to the ExA's attention by the Applicant in the Deadline 6 document [REP6-020] and there is now an agreed position on the definition of specified works, the indemnity and the relocation of the access route. The

Applicant has produced a consolidated version of the protective provisions illustrating the points still not agreed between the parties.

- 6.7.5 Further, there has also now been agreement in respect of the previously deleted provisions regarding prior approval of drawings for example and the carrying out of protective works to RWE's reasonable satisfaction (paras 4.4-4.7 of RWE's Deadline 5 version). RWE maintain that the right to approve plans is fundamental to the purpose of Protective Provisions, as is the right to ensure that remedial works are done properly.
- 6.7.6 RWE has now included some overarching drafting relating to the provision of consent and is pleased that the Applicant has agreed to reinstate these provisions.
- 6.7.7 What remains are provisions which relate to RWE giving consent before certain Order powers are exercised. This issue was raised in the Compulsory Acquisition hearing on 26/7/21 and also addressed by the PoTLL in the DCO hearing in relation to their interests.
- 6.7.8 RWE acknowledges that the Applicant has previously disputed the provisions in paragraph 3.1 pending completion of an agreement between the parties. However, RWE is particularly dismayed to see the unjustified change of approach for other consent mechanisms such as those that were in paragraph 3.3 of the RWE Deadline 5 version regarding the use of highways powers with consent for example or the overriding of rights (paragraph 3.4).
- 6.7.9 The Applicant's given reason is that these changes have been made because of RWE's objection to the causeway as a matter of principle. Clearly that objection by RWE is not new and was known at the date of the previous set of protective provisions returned to RWE by the Applicant, which included the consent and approval mechanisms.
- 6.7.10 The Applicant then suggested in the DCO hearing that it would be unusual for a landowner to benefit from such provisions rather than a statutory undertaker. RWE does not understand what distinction the Applicant is seeking to make here. It has previously been agreed with the Applicant that RWE is a statutory undertaker. It was also agreed that it owns land for the purpose of its undertaking, in respect of which s127 planning Act 2008 is engaged. It has apparatus in that land (including drainage infrastructure and communication cables) for which s138 Planning Act 2008 is engaged, and it has responsibilities to tenants who themselves are statutory undertakers, such as National Grid. RWE submits that it is essential that it receives the benefit of the Protective provisions in the version it seeks. These seek to ensure reasonable co-operation and protective arrangements. We also note National Grid's protective provisions in part 5 of schedule 9 contains equivalent controls, as do those for Network Rail in part 9. Further PoTLL's protective provisions contain a restriction on the exercise of temporary possession powers without consent. A similar provision has been rejected by the Applicant in respect of RWE's land.
- 6.7.11 The Applicant did not provide any explanation as why it should be appropriate to strip out the series of provisions that provide for RWE's consent or approval, not to be unreasonably withheld, save for identifying that it is not clear what would be reasonable to withhold in the context of allowing access to the causeway and implying that RWE would seek to re-run its objection to the causeway via the protective provisions. To seek to undermine the statutory scheme would not however be the proper purpose of protective provisions.
- 6.7.12 As to when consent might be reasonably withheld, that must be judged in the context of the prevailing circumstances at the time that consent is sought, having regard to how the Applicant's proposed exercise of powers might impact on the RWE undertaking at that time. However, it would not be reasonable for a statutory undertaker to seek to thwart the principle of the scheme via the operation of the protective provisions in circumstances where the Secretary of

State has determined that the causeway and compulsory powers for it should be included in the DCO. Furthermore, RWE's Deadline 5 version of the Protective Provisions contain a mechanism in para 3.5 that consent must not be unreasonably withheld or delayed, and if refused (para 3.6) there must be a statement of grounds of refusal. It is not clear what further comfort the Applicant could be seeking in this respect. RWE has however agreed to add additional text in the latest draft provisions to seek to clarify the role of the consent mechanism. This drafting has been accepted by the Applicant.