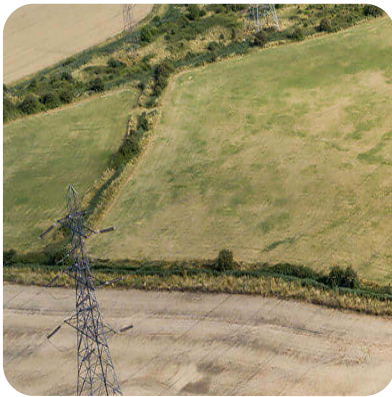


**Thurrock Flexible Generation Plant**

**Applicant's summary of position and note on status of protective provisions in version 8 of the dDCO (deadline 7)**



## **1 INTRODUCTION**

- 1.1 This note sets out a summary of the issues which the Applicant understands not to have been resolved through the Examination, and the Applicant's position on those as at Deadline 7.

## **2 CULTURAL HERITAGE AND INTRUSIVE ARCHAEOLOGICAL INVESTIGATIONS**

- 2.1 The Applicant continues to strongly refute Historic England's submission that the Applicant's assessment does not adequately establish the significance of buried archaeological remains that may be affected by the proposed development, and that consequently the assessment does not fully establish the harm that could be caused to the significance of such remains during the construction of the proposed scheme. 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.
- 2.2 The Applicant does not dispute that buried archaeological remains may be affected by the proposed development and has stated clearly in the ES that this would constitute an adverse effect of the development, for which good-practice mitigation is put forward. The Applicant again emphasises that both intrusive and non-intrusive archaeological investigation has been undertaken within Walton Common, which has informed the assessment of effects and the design of further investigation and mitigation. 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.
- 2.3 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. This intrusive geoarchaeological investigation was not acknowledged by Historic England in the Written Representation. The Applicant has 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.
- 2.4 As set out previously (PDC-002, REP2-041, REP3-008, REP4-021) the Applicant submits that the approach taken represents the most appropriate and balanced approach to carrying out pre-application investigation without causing unacceptable harm to the common. Given that the main feature of interest in the common is its deep paleoenvironmental deposits (discussed in APP-087, Geoarchaeological Deposit Model Report), trenches to reach features of interest at this depth would need to be substantial (due to the need for any trenching to be of considerable width to safely excavate to the deeper deposits level) and would disproportionately damage the common as a grazing landscape. It is therefore not justified unless and until the consent is in place and the commons designation removed and replaced.
- 2.5 As noted in the SoCG with Thurrock Council, Thurrock Council does not agree that an adequate assessment of below-ground archaeological remains has been undertaken. Thurrock Council considers that the trial-trenching evaluation should have been undertaken prior to submission of the DCO application. The Council has however accepted that:
- (a) the impacts will be mitigated by archaeological works in accordance with the Outline WSI by initial evaluation followed by preservation by record.
  - (b) trial-trench archaeological evaluation will need to be undertaken in accordance with the Outline WSI document, which has been revised to the satisfaction of Thurrock Council following their comments on an earlier draft. These results will inform the detailed development design plans which then come forward for the scheme.

- (c) the Outline WSI provides measures to complete the archaeological assessment of the development and undertake appropriate mitigation strategies to either preserve in situ or preserve by record of any investigation and recording of any onshore archaeology, mitigating impacts, subject to discharge of requirement 12 (archaeology) in the draft DCO.
  - (d) detailed strategies for both the evaluation and follow on mitigation will be agreed in conjunction with Thurrock Council for each stage of works as set out in the Outline WSI.
- 2.6 The Council has also agreed that the Environmental Statement provides an appropriate assessment of above-ground impacts on the settings of heritage assets. Less than substantial harm would result from these impacts.
- 2.7 The Applicant has submitted (REP4-021) 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 in the issue specific hearing on cultural heritage that they agreed with the Applicant that it is not uncommon for trial trenching to happen post-consent and pre-commencement.
- 2.8 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”. 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.

### **3 COMMON LAND**

- 3.1 Inclusion of the common land in the DCO is a fall-back and has been done on a precautionary basis. An option for lease is in place for the common land and a separate s16 Commons Act application is being made so that the proposed development can take place in accordance with the agreed terms in the option for lease. However, if voluntary acquisition is not successful for any reason, the CA powers are required so that the Applicant can take ownership of the land. The Applicant’s response to FWQ 1.3.30 in REP2-041 sets out the approach to the twin tracking of the Commons Act application with the CA powers sought in the DCO.
- 3.2 The Applicant’s response to FWQ 1.3.16 and section 12 of the Statement of Reasons sets out the reasons why the exemptions in s131 and s132 of the Planning act 2008 apply in this case and special parliamentary procedure is not required. Section 131(12) defines “replacement land” as land which is: (a) Not less in area than the order land (the area proposed to be acquired) – paragraph 12.20 of the Statement of Reasons sets out the applicant’s case on this point; (b) No less advantageous to the persons entitled to the rights of common or other rights – paragraphs 12.21 - 12.24 of Statement of Reasons address this; and (c) No less advantageous to the public – paragraph 12.25 Statement of Reasons sets out the Applicant’s submission on this test.
- 3.3 Article 33 of the DCO would protect the common right holders where the freehold is compulsorily acquired by ensuring that the Applicant cannot acquire the current common compulsorily (which can remove existing rights over it) unless and until the replacement common has been acquired and is ready to be used as a replacement.
- 3.4 The Applicant has submitted into the Examination the representations made on the section 16 application for deregistration and exchange of common land, and the Applicant’s response to those (REP6-009, REP6-011, REP6-12, REP6-13 and REP6-019). The section 16 process will not proceed to the next stage at this time pending re-scheduling of the site visit, which is intended to follow on from the determination of this DCO application.
- 3.5 The representations made in the commons process are the same in substance those made in the DCO process. In the case of Historic England, the same points have been made in both processes and there is considerable duplication of those submissions. The ExA accordingly

has had the opportunity to consider all of the commons submissions in this DCO process in order to be able to reach a view on the compulsory purchase powers with effects on common land sought in the DCO.

#### **4 RIES**

- 4.1 The Applicant has submitted comments on the RIES at Deadline 7. In summary, the Applicant would note Natural England's deadline 6 submission (REP6-025) demonstrates that they are in agreement with the Applicant that no adverse effect on integrity is likely.

#### **5 RWE GENERATION UK PLC**

- 5.1 As set out at paragraph 10.10 of the Applicant's Statement of Reasons submitted with the application (APP-024), the Applicant has been in contact with RWE since 2016, both in relation to the potential to use the RWE site (which was not a viable option) and subsequently to seek to agree access arrangements.
- 5.2 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). 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.
- 5.3 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 affected landowners from the project as a whole. As set out in the Statement of Reasons, the Applicant therefore considers that the correct balance has been reached on overall impacts and interference with private rights in promoting the application and a compelling case in the public interest exists for the compulsory powers sought.
- 5.4 RWE has submitted that the acquisition of access rights over the former Tilbury B power station site jeopardises its future development (REP2-095 at section 3). The Applicant does not agree. The construction access route runs along the northern boundary of the site and a right of access already exists along it for a third party (National Grid). The causeway access route follows the path of existing accesses including to the National Grid substation. The accesses are therefore already subject to access rights which would co-exist with those sought by the Applicant.
- 5.5 RWE submit that plot 04/02 "is essential to allow for water intake and cooling for power related development. By virtue of its location and the function which it can perform", RWE have submitted that "this land could not be purchased and replaced by other land without serious detriment to RWE's undertaking". The Applicant submits that there can be no detriment to RWE's undertaking as an electricity generator as there is no generation facility on this site which the proposed compulsory powers could impact. Even if there were an adverse impact on the undertaking, the Applicant submits that it would not be of the high level required to constitute serious detriment.
- 5.6 The proposed causeway would occupy only a portion, not the whole, of RWE's foreshore ownership as shown in the plan included in their written representation (REP2-095). 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 plot 04/02. The Applicant will also seek to minimise the size of the affected plot at detailed design reducing the loss of foreshore access land.
- 5.7 RWE has no active energy generation facility on the site. RWE has presented no evidence that it has specific plans for thermal energy generation on this site using water cooling which would require to be routed through this plot. Construction of a new facility would require planning and the Applicant is not aware of any live planning application for this site. For the prohibition on authorisation of compulsory powers to apply, the 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. In the case of a future proposal requiring cooling water intake, the design would be able to take account of the causeway or potential alter or relocate the causeway, if required.

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

- 6.1 The Applicant notes the concerns expressed by Port of Tilbury London Limited (“PoTLL”) in its Deadline 4 submission (REP4-031) regarding impact on future development of an expanded Port. Whilst an illustrative plan was submitted by PoTLL to the ExA showing the potential future use of land around the causeway, at this stage, it appears that those plans are nothing more than aspirational and that no firm proposals exist for development in this area. PoTLL has submitted that the causeway is located directly in conflict with a location that is ripe for port related development and forms part of the area covered by the Thames Freeport proposal (REP3-023).
- 6.2 The Applicant has submitted that should the causeway be constructed and in the future transpire to be incompatible with the Port’s proposed expansion, there will be a possible solution to be reached between the parties to agree an alternative at that point (REP4-019, REP4-020, REP5-007 question 2.6.3, REP6-010). The Applicant does not accept that its development poses any impediment to the delivery of a Freeport; dealing with existing infrastructure and rights on a development site is entirely normal and routine.
- 6.3 The Applicant would not be the only rights holder over the land, and providing accommodations for affected undertakers is necessary for almost every major project. It is often the case in major developments that issues, such as third party rights, arise and can be overcome, as has been achieved on this project where agreement has been reached with affected statutory undertaker parties including Network Rail and National Grid.
- 6.4 The Port would in practice be able to straight forwardly overcome any issue posed to its plans by the existence of the causeway in this case as it could provide an alternative as part of its business as usual. Delivery of AILs through the existing port and port roads would obviate any need to provide bespoke mitigation for any change in how the Applicant’s marine loads are delivered. The Applicant entirely disagrees with PoTLL’s contentions that removing the causeway would be prohibitively complex or technically difficult.
- 6.5 As demonstrated in the pre-application period, the Applicant cannot require the Port to engage in agreeing use of its facilities, which is why the Port has agreed that the scope of the heads of terms and subsequent legal agreement include provisions relating to a handling agreement securing use of the port itself.
- 6.6 The Applicant therefore requires retaining the ability to acquire rights to use the causeway in order to ensure that the development is deliverable. The Port undertook in the hearing on 26<sup>th</sup> July 2021 to put forward drafting to progress their suggestion that the securing of a handling agreement could be provided for within the DCO ahead of this deadline: the Applicant has not been provided with any such drafting to consider ahead of finalising this submission. The Applicant maintains that seeking to use an Order to force a party to enter a commercial agreement is not a legitimate use of DCO powers.
- 6.7 The Applicant is submitting at this deadline, a legal note prepared by DLA Piper, ports’ and DCO specialist lawyers, on some of the key legal points raised by PoTLL. The Applicant took advice from DLA Piper as ports’ specialists in advance of the application as regards the open port duty and whether the DCO could be used to compel PoTLL to allow access for the AILs through the port in the absence of agreement. The note addresses this issue, together with questions related to the extent of the port undertaking to be protected and operation of protective provisions in favour of a port statutory undertaker. The Applicant considers this will assist the ExA in relation to these matters in addition to the various submissions already made.
- 6.8 The Applicant remains firmly of the view that the DCO should include the causeway and the related access and associated compulsory acquisition powers unless and until a full set of legal agreements with PoTLL (including a handling agreement) and RWE have been entered into for the alternative AIL route and a formal request by the Applicant to remove the causeway and

related access is made. This is fundamental to the project. It would be a huge step for such a central element of the scheme to be removed without the agreement of the Applicant.

- 6.9 The Applicant continues to negotiate with PoTLL and RWE in relation to such agreements. If they cannot be secured before the close of the Examination, it will continue to negotiate after the close of the Examination and will update the SoS no later than the point at which the ExA submits its recommendation to the SoS.

## 7 PROTECTIVE PROVISIONS

- 7.1 This section of this document has been provided to set out where the Protective Provisions, as included in version 8 of the dDCO, have been agreed with the protected parties. Where areas of difference remain, the Applicant has included consolidated versions showing the differences as requested by the Examining Authority

### 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 REP6-016.
<b>National Grid</b>	Agreed	Agreed as documented in the joint position statement submitted at D7
<b>Port of London Authority</b>		Agreed as documented in the signed SoCG submitted at D6 REP6-018.
<b>Network Rail</b>	Agreed	Agreed as documented in the joint position statement submitted at D7
<b>Port of Tilbury London Limited</b>	Not agreed	The differences to the Port's preferred version of these provisions 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 are set out below.
<b>Thurrock Council</b>	Agreed	Agreed as documented in the signed SoCG submitted at D7.

- 7.3 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.
- 7.4 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 unworkable and undeliverable.
- 7.5 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.

## **8 RWE GENERATION UK LIMITED**

- 8.1 The main area of difference with RWE centres on access to use of compulsory powers. The parties have resolved all other points.

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

- 8.2 The position on this provision remains as advised at deadline 6 (REP6-020)
- 8.3 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*".
- 8.4 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 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>1</sup> and is actively opposing the causeway.
- 8.5 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.
- 8.6 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.
- 8.7 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,

---

<sup>1</sup>REP4-032

with which the Applicant will co-exist. There is accordingly no new constraint on the land created by the proposal.

8.8 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 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.

8.9 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 8 of the dDCO is preferred.

#### 8.10 **Consolidated drafting RWE protective provisions**

##### PROTECTIVE PROVISIONS 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. (1) 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.

(2) 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.

(3) 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.

Applicant drafting	RWE drafting
<p><b>Exercise of Powers</b>            3.—(1) At least 56 days before the undertaker exercises any or all of-</p> <ul style="list-style-type: none"> <li>(a) the specified powers in respect of the site and the affected highways or streets within the site; or</li> <li>(b) the specified powers in respect of the RWE Undertaking (insofar as that Undertaking is located outside of the site);</li> </ul> <p>the undertaker must submit to RWE details of the works to be undertaken in reliance on those powers.</p> <p>(2) Any specified powers 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 (1) and taking account of any consultation response.</p>	<p><b>Acquisition of Land and Exercise of Powers</b>            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.</p> <p>(2) At least 56 days before the undertaker exercises any or all of:</p> <ul style="list-style-type: none"> <li>(a) the specified powers in respect of the site and the affected highways or streets within the site; or</li> <li>(b) the specified powers in respect of the RWE Undertaking (insofar as that Undertaking is located outside of the site); or</li> <li>(c) the powers referred to in sub-paragraph (4),</li> </ul> <p>the undertaker must submit to RWE details of the works to be undertaken in reliance on those powers.</p> <p>(3) Any specified powers:</p> <ul style="list-style-type: none"> <li>(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</li> </ul>

	<p>(b) in respect of the RWE Undertaking (insofar as that Undertaking is located outside of the site)</p> <p>must not be exercised without the undertaker first consulting RWE on the details submitted pursuant to sub-paragraph (2) and taking account of any consultation response.</p> <p>(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.</p>
--	---

**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.

(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.

(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) 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.

(5) Those works must be executed only in accordance with the plan, section and description submitted under sub-paragraph (4) and in accordance with such reasonable requirements as may be made in accordance with sub-paragraph (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.

(6) Any requirements made by RWE under sub-paragraph (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.

(7) Where RWE requires any protective works under sub-paragraph (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.

(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.

(9) The undertaker is not required to comply with sub-paragraph (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.

(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.

(11) Subject to sub-paragraph (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.

(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 (11)) excuse the undertaker from liability under paragraph (11)(a).

(13) Nothing in paragraph (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.

(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.

### **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.

(2) Subject to sub-paragraph 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.

(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.

(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) The undertaker must ensure that the road or a suitable alternative is open for emergency access to the site at all times.

(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.

(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.

(8) The undertaker must keep the road (or alternative access if one is provided) clean and tidy and free of obstructions at all times.

(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.

(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

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

### **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.

(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).

### **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.

(2) The undertaker and RWE must each act reasonably in connection with the implementation of this Part of this Schedule.

### **Notices**

8. 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.

## **PORT OF TILBURY LONDON LIMITED**

- 9.1 The Applicant and the Port have been in discussion on the drafting of the protective provisions following the issue specific hearing on DCO on 26 July 2021. While some progress has been made, the parties have not been able to agree all of the drafting.

### **Definitions**

- 9.2 The Port has drafted the definition of their protected operation to include future port land as and when the Port may be expanded. The Applicant does not accept that it is reasonable and creates in effect a potentially ever expanding obligation. The Applicant maintains that these provisions should only apply to the Port as it exists at the date the Order is made.
- 9.3 The Applicant does not accept that works under the DCO outside of the Port should be specified works for which Port approvals is required. The detail and construction of Works No. 10 and 11 is controlled by requirements and the deemed marine licence, for which the Port is a consultee. These works are situated entirely outside the Port's undertaking and the marine element of the causeway is located within the jurisdiction of the PLA and MMO, both of whom will control its construction, not Port of Tilbury. The Port is seeking an unreasonable degree of control over the development by drafting for its approval to be required to deliver these elements, Given The Port's continuing objection to the delivery of the causeway, this provision would allow the Port to frustrate delivery of the causeway and the development and is entirely unreasonable.

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

- 9.4 The Port has provided drafting to the Applicant which reduces the number of paragraphs to which the prohibition on use without its consent would apply from their previous submission. However, as with the RWE provisions, in the absence of a binding legal agreement to deliver an access route (which is not yet in place) the Applicant cannot agree to this prohibition on the use of compulsory powers. The Applicant also notes that the Port's drafting, in contrast to RWE's, does not specify that consent cannot be 'unreasonably' withheld. This therefore would remain effectively a veto on the use of granted powers being sought. 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.

### **Accumulations or erosions**

- 9.5 The parties have agreed, subject to any dispute being resolved by expert determination (provided for in paragraph 16), that a reduced clause on accumulations and erosions can be included.

### **Passage plan – paragraph 10**

- 9.6 The Port's drafting seeks to prevent 'use' of the causeway one before and after scheduled arrivals and departure of large vessels at the adjacent berths. The requirement for this plan arose from the pNRA identifying that vessels trying to arrive at or depart from the causeway and adjacent berths at the same time would create a risk which has to be managed.
- 9.7 The Applicant agrees that a restriction on vessels arriving or departing the causeway was discussed and agreed to, but not any 'use' at all of the causeway; that is entirely unreasonable. There is no reason that having arrived before the restricted window, a vessel berthed on the causeway could not be used for unloading, or that the undertaker cannot carry out movements of ALLs on the structure as such operations do not pose a risk of increased conflict with vessels the minimisation of which was the objective of this obligation.

### **Indemnity – paragraph 12**

- 9.8 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 does not consider it reasonable that, having requested to be a consultee on various requirements through the examination, the Port is now seeking to charge the Applicant for being so consulted (paragraph 12(1)(a)). The

Applicant agrees to pay the costs of the Port approving specified works as they directly affect its land or property, but will not agree to pay for consultation under requirements.

9.9 The Applicant strongly objects to the Port’s drafting of paragraph 12(1)(c). This has its origins in discussion between the parties about remedying obstructions caused by broken down vehicles or where an accident has occurred. The Applicant has agreed to a best endeavours clause to remedy any such obstruction, and, where the Port has to take action to remedy an obstruction, the Applicant will meet the costs of that. The Applicant does not accept that it should be liable for unspecified costs and losses beyond that, in the context of the existing heavy HGV use of the Port, the normal approaches to dealing with vehicle breakdown and accident should be well-tested and sufficient to protect the Port.

**9.10 Consolidated drafting Port of Tilbury London Limited protective provisions**

**PROTECTIVE PROVISIONS FOR THE PROTECTION OF THE PORT OF TILBURY LONDON LIMITED**

1. The provisions of this Part of this Schedule have effect unless otherwise agreed in writing between the undertaker and Port of Tilbury London Limited.

2. In this Part of this Schedule

“accumulation” means any accumulation of silt or other material (including any materials used to construct the authorised development) which constitutes an impediment to navigation within the Port;

“the affected highways” means the A1089 St Andrews Road, Ferry Road, Fort Road and the unnamed link road between Fort Road and the A1089 St Andrews Road;

“erosion” means any erosion of the bed or banks of that are of the river, or any quay or jetty or other structure of whatever nature, within the Port;

“plans” includes sections, descriptions, drawings, specifications, proposed method statements, traffic management measures, vehicle movement profiles and hydraulic information including, but not limited to, information as to the intended discharge of water and materials within the Port;

Applicant Drafting	PoTLL drafting
<p>“the Port” means any land (including land covered by water) within the Port of Tilbury which is owned or used by PoTLL as at the date of the Order, and specifically including the private highways and access roads within the Port, and includes the Work No.15 land;</p>	<p>“the Port” means—</p> <p>(a) any land (including land covered by water) for the time being owned or used by Port of Tilbury London Limited for the purposes of its statutory undertaking; and</p> <p>(b) the Work No.15 Land,</p> <p>together with any quays, jetties, docks, river walls and other land (including land covered by water) or water or works held in connection with that undertaking;</p>
<p>"specified work" means any work, activity or operation authorised by this Order and their associated traffic movements which may affect-</p> <p>(a) the Port;</p> <p>(b) access to and from premises within the Port;</p> <p>(c) streets within the Port;</p> <p>(d) navigation within the Port;</p> <p>(e) the Port of Tilbury London Limited's ability to carry out dredging to facilitate shipping access to the Port; and</p>	<p>"specified work" means any work, activity or operation authorised by this Order and their associated traffic movements which may affect-</p> <p>(a) the Port;</p> <p>(b) access to and from premises to, from and within the Port;</p> <p>(c) streets within the Port;</p> <p>(d) navigation within to and from the Port;</p> <p>(e) the Port of Tilbury London Limited's ability to carry out dredging to facilitate shipping access to the Port; and</p>

(e) the functions of Port of Tilbury London Limited as the statutory harbour authority for the Port;	(e) the functions of the Port of Tilbury London Limited as the statutory harbour authority for the Port, and and includes without limitation Work Nos. 10, 11 and 15;
--	--

“street” has the same meaning as in the 1991 Act; and

“Tilbury2” means the development in the river Thames authorised by the Port of Tilbury (Expansion) Order 2019.

Applicant Drafting	PoTLL drafting
<i>[no equivalent, not agreed to be necessary]</i>	“the Work No.15 Land” means the land within the limits of deviation of Work No. 15 owned by Port of Tilbury London Limited.
<i>[no equivalent, Port drafting is objected to by the Applicant, the numbering below excludes this additional sub-paragraph 3(1)]</i>	3. (1) The undertaker must not exercise the powers conferred by articles 17 (authority to survey and investigate the land), 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) and 30 (statutory undertakers) in respect of the Port unless the exercise of such powers is with the consent of Port of Tilbury London Limited.

**3.—(1)** The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to the Port, unless preventing such access is with the consent of Port of Tilbury London Limited.

(2) The undertaker must notify Port of Tilbury London Limited prior to exercising its powers conferred by articles 11 (street works) or 13 (temporary restriction of use of streets) in respect of any of the affected highways. Notification under this sub-paragraph will be effected by the undertaker sending to Port of Tilbury London Limited a copy of the documents seeking consent to or approval of the works or measures under those articles at the time as they are submitted to the relevant street authority for such consent or approval. The undertaker must also forward to Port of Tilbury London Limited a copy of any response received by the undertaker from the relevant street authority in response to any such submission for consent or approval under those articles.

(3) Articles 20 and 23 do not apply to the Port and any interests or rights held by Port of Tilbury London Limited unless otherwise agreed by Port of Tilbury London Limited, acting reasonably.

**4.—(1)** At least 56 days before commencing the carrying out or maintenance of any specified work, the undertaker must submit to Port of Tilbury London Limited plans of that work for its approval.

(2) Any approval of Port of Tilbury London Limited under this paragraph—

- (a) must not be unreasonably withheld;
- (b) may be given subject to such reasonable requirements, conditions or restrictions as Port of Tilbury London Limited may make for the protection of the Port and navigation within the Port and its ability to carry out dredging to facilitate access to the Port, including a requirement for the undertaker to carry out protective works at its own expense; and
- (c) must not restrict the powers granted to the undertaker by this Order where such powers do not affect the Port.

(3) The undertaker must carry out any specified work and any protective works required under sub-paragraph (2)(b) in accordance with the plans approved under sub-paragraph (1) or settled under paragraph 16 of this Part of this Schedule

(4) The undertaker must inform Port of Tilbury London Limited in writing of the intended start date and the likely duration of the carrying out of any specified work at least 30 working days prior to the commencement of the specified work.

**5.—(1)** If during the construction of a specified work or after the completion of that work and wholly or partly in consequence of its construction there is caused or created an accumulation or erosion the undertaker, if so requested by Port of Tilbury London Limited acting reasonably, must remedy the accumulation or erosion to the extent attributable to the construction, maintenance or operation of the specified work and, if it refuses or fails to do so as soon as reasonably practicable, Port of Tilbury London Limited may itself cause the work to be done and may recover the reasonable cost of doing so from the undertaker.

(2) For the purposes of sub-paragraph (1)—

(a) in the case of an accumulation, the remedy must be its removal; and

(b) in the case of erosion, the remedy must be the carrying out of such reconstruction works and other protective works or measures as Port of Tilbury London Limited reasonably requires.

**6.** In exercising the powers conferred by the Order in relation to the affected highways or any street through the Port, the undertaker must have regard to the potential disruption, delay or congestion of traffic which may be caused, and seek to minimise such disruption, delay or congestion so far as is reasonably practicable. The undertaker must not at any time prevent or unreasonably impede access by emergency services vehicles to the Port.

**7.—(1)** Where the undertaker carries out any works to any street within the Port it must make good any defects in those works notified to it by Port of Tilbury London Limited within the period of three months after the date of its removal from occupation of that area of street.

(2) The undertaker may, at its sole discretion and in place of carrying out any works to remedy any defects under sub-paragraph (1), pay to Port of Tilbury London Limited a sum equal to the cost to Port of Tilbury London Limited of carrying out the required works as calculated by Port of Tilbury London Limited, acting reasonably.

(3) Where any event or accident on or affecting any road, street, way or the river Thames, prevents or obstructs access into, out of or within the Port, which event or accident is caused by or attributable to the undertaker, its agents or contractors, or which requires the removal of any item, vessel or vehicle which is preventing or obstructing access and which is owned by, contracted to or otherwise being used on behalf of the undertaker, the undertaker must use its best endeavours to reinstate access or remove the obstruction as soon as practicable.

(4) Port of Tilbury London Limited may, where an obstruction has occurred and has not been removed by the undertaker on request by Port of Tilbury London Limited, remove the obstruction itself and repair any damage caused by the event or accident causing the obstruction.

**8.** Any person duly appointed by Port of Tilbury London Limited for this purpose may at all reasonable times, on giving to the undertaker such notice as may in the circumstances be reasonable, enter upon and inspect any part of a specified work; and the undertaker must give to such person all reasonable facilities for such inspection and, if the duly appointed person is of the opinion that the construction of the work poses danger to any property of the Port or person within the Port, the undertaker must adopt such measures and precautions as may be reasonably practicable for the purpose of preventing any damage or injury.

**9. (1)** Port of Tilbury London Limited may at any time close the Port and exclude access by the undertaker (including access under any power granted by this Order, under any access right howsoever acquired and as provided for in any agreement between the undertaker and Port of Tilbury London Limited) where Port of Tilbury London Limited 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 the health or safety of persons or of damage to property.



(2) Port of Tilbury London Limited must inform the undertaker of any closure of the Port as soon as reasonably practicable, including details of the location and extent of the closure and where known, the anticipated duration of the closure.

**10.—(1)** The passage plan to be prepared by the undertaker under Requirement 17(5) must include, but is not limited to, the following matters-

- (a) a deconfliction process for use of Work No. 10 and vessels navigating to and from and berthing at berths adjacent to Work No. 10;

Applicant Drafting	PoTLL drafting
(b) a prohibition on arrival at or departure from Work No. 10 within the period between 1 hour before and 1 hour after a scheduled departure or arrival of large vessels at berths adjacent to Work No. 10; and	(b) a prohibition on use of Work No. 10 within the period between 1 hour before and 1 hour after a scheduled departure or arrival of large vessels at berths adjacent to Work No. 10; and

- (c) protocols for sharing of information between Port of Tilbury London Limited and the undertaker to facilitate compliance with paragraphs (a) and (b).

(2) In this paragraph, 'berths adjacent to Work No.10' means the construction materials and aggregates berths constructed and operated as part of Tilbury2 and situated on the river Thames to the west of Work No.10.

**11.** Where transshipment use of the Port by the undertaker is authorised by Port of Tilbury London Limited (on such commercial terms as may be agreed), the undertaker may not commence such use unless and until a port passage plan in respect of that transshipment has been approved by Port of Tilbury London Limited.

**12.—(1)** The undertaker is to be responsible for, and must make good to Port of Tilbury London Limited all losses, costs, charges, damages, expenses, claims and demands however caused, which may reasonably be incurred or occasioned to Port of Tilbury London Limited by reason or arising in connection with-

Applicant Drafting	PoTLL drafting
(a) the perusal of plans of any specified work, and the inspection of a specified work;	(a) the perusal of plans of any specified work, the perusal of those documents prepared by the undertaker under Schedule 2 to this Order (in relation to which Port of Tilbury London Limited is a consultee and for which purpose reasonably commissions external consultancy support) or under this Part of this Schedule, and the inspection of a specified work;

- (b) the costs of alterations to aids to navigation within the Port owned by Port of Tilbury London Limited, laying down moorings or buoys within the Port or carrying out any dredging operations in relation to either of those activities within the Port, as may be necessary in consequence of the construction of a specified work;

Applicant Drafting	PoTLL drafting
<i>[no equivalent, not agreed to be reasonable in the context of the existing considerable HGV use of Port roads]</i>	(c) the costs, expenses and losses associated with or arising from any obstruction, event or accident on or affecting any road, street, way or the river Thames which prevents or obstructs access into, out of or within the Port which is caused by or attributable to the undertaker or its agents or contractors;

- (c) where the undertaker has not reinstated access or removed an obstruction the costs, expenses and losses of Port of Tilbury London Limited incurred in removing the obstruction itself and repairing any damage caused by the event or accident causing the obstruction;

- (d) the construction, maintenance or failure of a specified work, or the undertaking by Port of Tilbury London Limited of works or measures to prevent or remedy a danger or impediment to navigation within the Port, or damage to the Port arising from such construction, maintenance or failure, including but not limited to—
  - (i) any additional costs of dredging incurred by Port of Tilbury London Limited as a result of the construction, maintenance, decommissioning or use of the specified work or the contamination of the riverbed caused by the construction, maintenance, decommissioning or use of the specified work; and
  - (ii) damage to any, street, plant, equipment or building belonging to Port of Tilbury London Limited that is caused by the construction, maintenance or failure of a specified work; and
  - (iii) any act or omission of the undertaker or its servants and agents while engaged in the construction, maintenance or use of a specified work.

(2) Without limiting the generality of sub-paragraph (1), the undertaker must indemnify Port of Tilbury London Limited from and against all claims and demands arising out of, or in connection with, such construction, maintenance or failure or act or omission as is mentioned in that sub-paragraph.

(3) Nothing in this paragraph imposes any liability on the undertaker to the extent that any losses, costs, charges, damages, expenses, claims or demands referred to in sub-paragraph (1) are attributable to negligence on the part of Port of Tilbury London Limited or of any person in its employ or of its contractors.

(4) Port of Tilbury London Limited must give to the undertaker notice in writing of any claim or demand for which the undertaker may be liable under this paragraph and no settlement or compromise of any such claim or demand may be made without the consent in writing of the undertaker.

**13.** The fact that any work or thing has been executed or done with the consent of Port of Tilbury London Limited and in accordance with any conditions or restrictions prescribed by Port of Tilbury London Limited or in accordance with any plans approved or deemed to be approved by Port of Tilbury London Limited under this Part of this Schedule or under Schedule 2 to this Order or to its satisfaction or in accordance with any directions or award of any arbitrator does not relieve the undertaker from any liability under the provisions of this Part.

**14.** Save to the extent expressly provided for nothing in this Order affects prejudicially any statutory or other rights, powers or privileges vested in, or enjoyed by, Port of Tilbury London Limited at the date of this Order coming into force.

**15.** With the exception of any duty owed by Port of Tilbury London Limited to the undertaker, nothing in this Order is to be construed as imposing upon Port of Tilbury London Limited any duty or liability to which Port of Tilbury London Limited would not otherwise be subject.

**16.—(1)** Any difference arising between the undertaker and Port of Tilbury London Limited under this Part of this Schedule (other than any difference as to the meaning or construction of this Part of this Schedule) will be resolved by expert determination.

(2) The undertaker and Port of Tilbury London Limited will agree on the appointment of the expert and will agree with the expert the terms of their appointment.

(3) If the undertaker and Port of Tilbury London Limited are unable to agree on an expert or the terms of their appointment within seven days of either party serving details of a suggested expert on the other, either party will then be entitled to request the President of the Institution of Civil Engineers to appoint an expert of repute with no less than 15 years' experience in the relevant matter, and to agree with the expert the terms of appointment.

(4) The expert is required to prepare a written decision including reasons and give notice (including a copy) of the decision to the parties within a maximum of two months of the matter being referred to the expert.

(5) The expert will act as an expert and not as an arbitrator. The expert's written decision on the matters referred to them is final and binding on the parties in the absence of manifest error or fraud.

(6) The expert's fees, any costs properly incurred by them in arriving at their determination and the costs incurred by the parties under this paragraph will be borne by the parties equally or in such other proportions as the expert may direct.