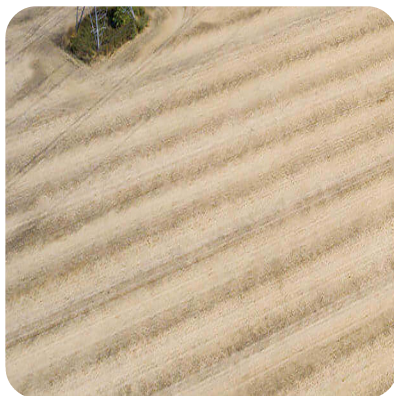
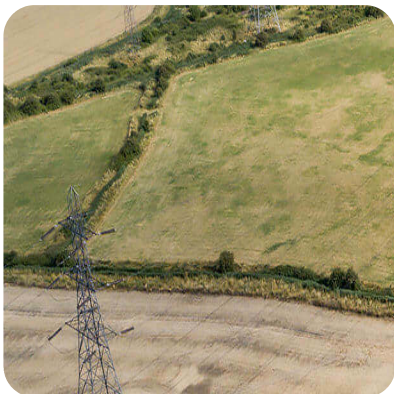


**Thurrock Flexible Generation Plant**

**Written Summary of Oral submissions: Compulsory Acquisition Hearing 2 (26 July 2021)**



## 1 APPLICANT'S UPDATE

- 1.1 The Applicant provided an update on discussions with Port of Tilbury London Limited (PoTLL) and RWE Generation (UK) Plc (RWE) regarding the access for abnormal indivisible loads (AILs).
- 1.2 A plan was put in place at the end of May 2021 with an agreed sequence of negotiations in relation to the different documents required. This plan continues to be executed. However, while there has been substantive negotiations on the agreements, those agreements are not yet complete. It is agreed that the Applicant will not formally request the removal of the causeway from the application unless and until the fully binding agreements with PoTLL and RWE have been signed.

## 2 SUBMISSION OF CHANGE DOCUMENTATION ON WITHOUT PREJUDICE BASIS

- 2.1 The Applicant is not prepared to provide the amended dDCO into the Examination before the change request is formally made, on a without prejudice basis. The Applicant expressed considerable concern that it was being asked to facilitate a scenario where the causeway is removed from the DCO against its will leaving it in a potential ransom position with the Port.
- 2.2 ***(Post hearing note: the Applicant informed the ExA subsequent to the hearing that if a Rule 17 request were made for the submission of an amended dDCO and related documents on a without prejudice basis it would comply with it.)***

## 3 FUNDABLE ALTERNATIVE ACCESS

- 3.1 The Applicant reiterated its position, as set out in submissions to date, that the proposed alternative using Work no.15 is not a like for like alternative to the causeway proposals. The causeway could be used at will, subject to Port of London Authority's normal controls. The alternative requires bringing AILs through the Port of Tilbury (T1) and needs a handling agreement to do so.
- 3.2 The Applicant emphasised that the causeway is a fundamental part of the application currently before the examination. There is no project without the ability to deliver the AILs. The Applicant delayed the application to develop the causeway to ensure it had a deliverable project and specifically to avoid any impact on PoTLL. The removal of the causeway from the application goes to the heart of the whole project. It should only happen if the Applicant requests it and should not be imposed on the Applicant.
- 3.3 The Applicant will only make this request if there is a deliverable, secured alternative in place.
- 3.4 The Applicant does not accept that the open ports duty referred to by PoTLL can be relied upon to ensure it can deliver its AILs and that the necessary handling arrangements could be imposed by compulsion through the DCO. The Applicant took specialist ports legal advice on this matter when preparing the application. ***(Post hearing note: an advice note from DLA Piper on this and other ports-related legal points is being submitted at Deadline 7.)***
- 3.5 This point has in fact been conceded by PoTLL as a handling agreement is included within the proposed agreement between PoTLL and the Applicant, currently under negotiation.
- 3.6 The Applicant does not consider that a requirement for a handling agreement can be included in the DCO in the event that agreement is not reached with PoTLL. The handling agreement is not in the nature of an access right, it does not bind the land and no relevant precedent could be established. It is instead a commercial agreement for services. The Applicant does not consider commercial terms can be imposed by compulsion, and particularly not in an adversarial position should the parties fail to agree.

3.7 The uncertainty over being able to legally include the handling agreement in the DCO was a factor in why the Applicant decided to develop the causeway option for the Project in the first place. This reinforced the fact that PoTLL had indicated clearly to the Applicant that it did not want to discuss arrangements for AILs, as opposed to other construction (and operational) traffic.

3.8 The Applicant submitted and maintains that relying on the Port to enter into a handling agreement under the DCO to deliver the access is not a fundable position. In contrast, being able to deliver and use the causeway provides certainty and is fundable.

#### **4 COMPULSORY ACQUISITION POWERS OVER THE UNDERTAKINGS OF STATUTORY UNDERTAKERS**

4.1 The Applicant considers that it is common in practice for compulsory acquisition to be granted over the undertakings of statutory undertakers. This includes port examples such as Lake Lothing and Great Yarmouth DCOs. The position of statutory undertakers will be protected by protective provisions. ***(Post hearing note: This topic is also addressed by the DLA Piper note being submitted at Deadline 7.)***

4.2 The compulsory powers included in the DCO are required to deliver the project in the absence of agreement with the affected land interests.

#### **5 HISTORY OF NEGOTIATIONS WITH POTLL**

5.1 The Applicant and PoTLL engaged in substantial pre-application discussions regarding the construction access, but in relation to AILs PoTLL indicated that this was very problematic and it was clearly not interested in engaging in detailed discussion. This was the key trigger for developing the causeway AIL solution in detail.

5.2 This is a crucial distinction – the difference between discussions regarding the main construction access and that for AILs, which gave rise to different considerations around height and weight.

***5.3 Since the hearing the Applicant has (again) reviewed the key email correspondence with PoTLL from April to July 2019 which makes this clear. The Applicant is content to release these emails if PoTLL is, with any commercial points redacted.***

5.4 When the causeway consultation was carried out before submission, no in principle objection was made by PoTLL and no discussions were proposed by PoTLL as regards an alternative AIL route through the port. The in principle objection was only raised by PoTLL after the application was submitted and accepted. Discussions with PoTLL on the AIL alternative only took place after that time.

5.5 In preparing an application, there comes a point when the promoter of a project has to make a decision on matters such as these and then see it through. In this case, the Applicant's actions speak volumes. It involved substantial delay, expense and complexity to develop and consult on the causeway for AILs. The Applicant had concluded it was the only viable, fundable option. Significant new stakeholders (e.g. PLA, MMO) became involved and new issues (e.g. SPA impact). It was not a decision taken lightly.

5.6 If there had been a realistic chance of negotiating the current alternative prior to submission the Applicant would have done so.

5.7 In designing the causeway option the Applicant went out of its way to avoid impact on PoTLL. It is notable that issues with the PLA have been resolved. It is extremely frustrating to now find that PoTLL is objecting to the causeway because it is seeking to acquire the RWE land – the very objection which the Applicant took pains to avoid by developing the causeway in the first place. It is for this reason that it is reasonable to limit any protection for PoTLL to the land which is currently part of its port undertaking.

- 5.8 The Applicant is aware of ongoing negotiations between PoTLL and RWE for the acquisition of RWE's land, but notes that the deal is not certain. The Applicant notes that the RWE D6 submission refers to sale of 'parts' of its land, the Applicant has not had sight of any plan showing the parts concerned, and therefore cannot assess how much of that overlaps with its proposed works.
- 5.9 The Applicant has no indication what conditions any sale may be subject to. PoTTL's agreed statement with RWE is very careful not to give a date for completion, assuming the contract is in fact signed.
- 5.10 This is a severe limitation on how that potential sale is approached and how much weight it can be given. The ExA has to consider the position as it finds it at the close of the Examination. It is perfectly possible that the sale will not happen and, if it does, that PoTTL's ambitions for the RWE land do not take place, or take place in a way which can straightforwardly accommodate the causeway and related access. In any event, mere acquisition by PoTTL does not give the RWE land port status. The Applicant by contrast has statutory undertaker status by virtue of an electricity generation licence and has specific proposals for which it is seeking consent.

## **6 IMPACT OF CAUSEWAY**

- 6.1 The Applicant has considered the report issued by Hydrock and has responded in writing to the Examination. That response notes that while the Hydrock report raises a number of issues to be taken into account in finalising the design, none of those are new, the Applicant was already aware of those elements and none prevent delivery or subsequent removal of the causeway.
- 6.2 The causeway itself will be designed to be removed in future. The Applicant considers that the impact of the causeway on future development has been substantially overplayed.
- 6.3 The presence of the causeway and its associated access will cause less harm than suggested. The access route will follow an existing route used by National Grid for its facility next to the river. The Applicant submitted that adding an access right over a route already subject to access rights is not detrimental and an argument of serious detriment on those facts is not sustainable.
- 6.4 The Applicant does not consider that the impact of the causeway comes close to causing serious detriment. There would be no interference with its current operations. RWE does not have current proposals for a new generating station. Any cooling water requirement for any future proposals can take account of the presence of the causeway or lead to its alteration or removal as part of the provision of an alternative AIL access for TPL at that time. If the causeway were present there might be a benefit to RWE in allowing it to bring AILs directly to the site for a future power station proposal, though the Applicant noted RWE's response in the hearing.
- 6.5 The claimed harm to PoTTL is speculative. PoTTL does not own the RWE land and may never acquire it. Its ambitions for the RWE land are aspirational at this stage. Any future development could accommodate or replace the causeway solution. It would be inappropriate to give any real weight to this point when weighing up the obvious need for the Applicant to have a deliverable and fundable solution for AIL deliveries, which are critical to the project.
- 6.6 The Applicant understands that other parties do not want the causeway to be built, and has repeatedly agreed that in principle it could be removed provided a suitable alternative is secured. It continues to work towards securing an alternative, by agreement, but that is not yet in place.