



PLANNING ACT 2008
INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

**Application by Thurrock Power Limited for an Order
granting Development Consent for the Thurrock Flexible Generation Plant**

Planning Inspectorate Reference: EN010092

DEADLINE 8 SUBMISSION

13 August 2021

PoTLL/TFGP/EX/14

1. INTRODUCTION

- 1.1 This submission sets out Port of Tilbury London Limited's ('PoTLL') final position on the outstanding matters that are still in dispute between it and Thurrock Power Limited ('the Applicant'), the applicant for the Thurrock Flexible Generation Plant ('the TFGP') Development Consent Order ('DCO').
- 1.2 Whilst PoTLL recognises and is grateful to the Applicant that there has been much progress in closing down the matters between the parties during the course of the Examination and the separate discussions that have been undertaken between the parties, PoTLL is disappointed that its core issue of concern, that being ensuring the removal of the causeway from the draft of the DCO, has not been able to be secured by agreement during the course of the Examination.
- 1.3 This submission, and the marked-up draft DCO which accompanies it, therefore re-emphasises the need for the causeway to be removed and explains and sets out the approach that PoTLL considers that the Examining Authority ('the ExA') can recommend and which the Secretary of State can adopt, which will enable the TFGP to be capable of implementation and delivery, if development consent is granted, without causing the negative impacts that would be associated with the causeway being retained.
- 1.4 This submission also discusses other matters of DCO drafting which remain outstanding between the parties.

2. OVERALL CONTEXT

- 2.1 To facilitate use of the causeway the Applicant has sought:
 - compulsory acquisition powers over plot 04/02 on RWE's land;
 - compulsory acquisition of rights powers over plot 04/01 on RWE's land; and
 - works powers for Work Nos. 10 and 11 in Schedule 1 to the DCO.
- 2.2 In its Deadline 4 submission [REP4-031] (pages 3-5) PoTLL explained its position that it considered that these compulsory acquisition powers could not be justified. In summary this is because, in the context of paragraph 8 of the MCHLG guidance on compulsory acquisition:
 - there is a clear alternative available through the land-based access brought forward by the Applicant's material change to the DCO;
 - the use of these powers to provide the causeway is not a proportionate use of a last resort power for a causeway that will only support an initial need for abnormal indivisible loads ('AILs') followed by minimal ad hoc movements during the TFGP's operational phase; and
 - the purposes cannot be considered necessary, legitimate or proportionate in the context of:
 - the causeway's location at one of the last locations available for a deep water berth closest to London and thus an important strategic economic opportunity being lost;

- its siting in a location which could delay or prevent PoTLL's general expansion and Freeport proposals, which are explained on page 2 and illustrated at Appendices 1 and 2 to its Deadline 4 submissions [REO4-031]. By way of update since Deadline 4, following the successful Thames Freeport bid, the Freeport consortium of which PoTLL forms part has now submitted its Outline Business Case to the Government and it is understood the Government is intending to designate the Freeport zone at Tilbury by the end of the 2021. PoTLL fully expects development within the areas closest to the causeway to be brought forward in 2022/2023 (the Freeport designation being available for an initial 10 year period);
- the Local Plan position referred to in PoTLL's Deadline 2 submissions [REP2-09];
- the fact that continued development and growth of river freight facilities and opportunities in the Thames Estuary is supported at a regional level by the Port of London Authority's Investment Plan and the Thames Estuary Growth Board's Action Plan; and
- the national picture, where the National Policy Statement for Ports has recognised that port development is an '*engine for economic growth*' (para 3.3.5); that '*capacity must be in the right place if it is to effectively and efficiently serve the needs of import and export markets*' (para 3.4.11 and now further identified through the Freeports proposals); and that there is a '*compelling need for substantial additional port capacity over the next 20-30 years*' (para 3.4.16),

when compared to the use proposed as part of the TFGP, which is not required to be location-specific and where an alternative is plainly available.

- 2.3 PoTLL considers that the same arguments apply to the question of whether it is justified in the planning balance that the Applicant should receive the works powers it seeks, noting also that the removal of the causeway removes (i.e. avoids) environmental impacts that could otherwise be avoided (such as to ecology), thus being more consistent with the mitigation hierarchy.
- 2.4 Throughout the Examination, the Applicant has also sought to downplay PoTLL's Freeport proposals and the impact of the causeway, querying the speed at which PoTLL would be able to bring development forward and indicating that PoTLL would be able to remove the causeway as part of its own permissions; and that this would not be a difficult task.
- 2.5 PoTLL considered these points in pages 2-6 of its Deadline 4 submissions [REP4-031] and in its Deadline 5A submission [REP5A-008], noting that:
- 2.5.1 PoTLL has a record of developing its estate quickly, using all planning powers at its disposal; and intends to do so for the Freeport too;
 - 2.5.2 it is not clear why it should be incumbent on PoTLL (at significant cost) to be responsible for removing something that it did not implement and did not want to be put into place in the first instance and could reasonably foresee being a significant impediment to timely and effective Port development and operation – the obligation should not be on PoTLL to prove that it is not possible to remove it, but on the Applicant to prove that it is necessary in the first place; and

2.5.3 with reference to the Hydrock Report submitted as Appendix 3 to PoTLL's Deadline 4 submission [REP4-031], that the causeway design is likely to be complex and is at an early stage with a number of unknowns that were recognised by the Applicant's consultants [REP5-016]; as such it cannot just be said with any credibility that PoTLL could 'simply' remove the causeway.

2.6 As such, PoTLL considers that there is no reasonable and justified reason why the Applicant should be given the land and works powers it seeks over the causeway and that they should be removed from the draft DCO.

2.7 It is in this context that PoTLL has, in the marked-up DCO which accompanies this submission, made comments on Requirement 18 in Schedule 2 which reflect its previous submissions at Deadlines 2, 4 and 5A that, where the Secretary of State nevertheless determines that the causeway can be retained as part of the TFGP:

- not only should the review under Requirement 18 happen as quickly as possible, but that if that review finds an alternative, the works to remove the causeway should happen as soon as possible; and
- that given that it has been accepted by the Applicant that PoTLL should be consulted at the first stage of the review process in sub-paragraph (3) of the Requirement, it should logically follow through that PoTLL has a consultation involvement in later stages of the process and/or later reviews, as set out in sub-paragraph (5) of the Requirement.

3. **DCO DRAFTING – IN ANY SCENARIO**

3.1 In section 4, we explain our approach to dealing with the matters set out in section 2. However, above and beyond the issues surrounding the causeway and its removal, there are other issues that relate to DCO drafting which remain outstanding and which need to be dealt with irrespective of the final position in respect of the causeway.

Article 8

3.2 The first of these issues relates to article 8 of the DCO, dealing with the potential future transfer of benefit of the DCO. PoTLL has repeatedly set out in its submissions to the Examination that it is appropriate for the TFGP DCO to provide explicitly for the Secretary of State to consult with PoTLL where his consent is required under this article, given:

- 3.2.1 the explicit interaction of the TFGP proposals with both the carrying on of PoTLL's statutory undertaking and the land which makes up that undertaking;
- 3.2.2 the need to ensure that PoTLL can meet its statutory duties under the Port of London Act 1968 and the Harbours Act 1964;
- 3.2.3 that the need for explicit bodies to be consulted in these situations is well precedented and directly relevant and applicable in the circumstances of this case; and
- 3.2.4 that the decision-making government department under article 8 will differ from the relevant government department for PoTLL and the Freeport and so there is no certainty that the decision-making department would think to consult PoTLL, particularly in a process that has no prescribed statutory procedures.

- 3.3 Further detail on these points is provided at pages 8-9 of PoTLL's Deadline 4 submission [REP4-031], on page 4 of its Deadline 6 submission [REP6-026] in discussing Requirement 18 but where the points made equally apply to article 8; and in its Deadline 7 submissions [REP7-012].
- 3.4 In light of these submissions, PoTLL continues to believe that article 8 should provide for consultation with PoTLL by the Secretary of State, and it has suggested drafting in the marked-up DCO accompanying this submission as to what such a provision could look like.

Protective Provisions

- 3.5 The ExA will be aware from the Applicant's Deadline 7 submissions [REP7-012] that there are more issues of disagreement on the Protective Provisions ('PPs') for PoTLL's benefit within the draft DCO than PoTLL had understood to be the case as set out in its own Deadline 7 submissions.
- 3.6 Therefore, to assist in the ExA's considerations during the Recommendation period and the Secretary of State during determination PoTLL has, in the marked-up DCO accompanying this submission, made tracked changes to the Protective Provisions as they appeared in version 8 of the Applicant's DCO submitted at Deadline 7 [REP7-012], which reflect its own submissions at Deadline 7 where they differ from the Applicant's. This will mean that the ExA will have one version of the PPs to consider (subject to the points set out in section 4) in determining which drafting is most appropriate, effective and necessary.
- 3.7 The changes made seek to deal with four key issues arising from the Applicant's Deadline 7 version of the PPs [REP7-012], set out below:

PoTLL consent to land powers

- 3.7.1 PoTLL has restored paragraph 3. As its preferred option, PoTLL has restored this on the basis that the land powers would not be utilised at all within the Port (as defined) but that the relationship between the parties would be governed by a 'Lease of Easements' to be entered into pursuant to the Access Easement Heads of Terms that PoTLL has scheduled to the draft DCO. Section 4 of this submission goes on to explain this further.
- 3.7.2 However, if the ExA and Secretary of State do not agree with PoTLL's preferred approach, PoTLL has suggested that paragraph 3 should allow for the DCO land powers to be used only with PoTLL's consent (noting that the 'Legal advice note' submitted by the Applicant at Deadline 7 ('the Legal Advice Note' [REP7-042]) has considered the drafting of this paragraph before the changes made by PoTLL at Deadline 7 to remove works powers).
- 3.7.3 Importantly, however, PoTLL has also recognised that such consent should be accompanied by the words 'not to be unreasonably withheld' as it agrees that it is important that it acts reasonably in giving its consent where this is required. This is acknowledged in paragraph 2.5 of the Legal Advice Note.
- 3.7.4 PoTLL set out at paragraph 18 of its Deadline 7 submissions [REP7-012] how such a consent would work, noting that such a consent is not focussed on 'whether' the powers are utilised but 'how' they are utilised. These arguments reflect the debate on similar wording that was considered (and accepted) in the recent Examination of the DCO for the Lake Lothing Third Crossing.

- 3.7.5 Such a provision is the ultimate ‘protective provision’ to ensure that its statutory undertaking is protected. Crucially, PoTLL’s role differs from that of bodies such as National Grid, who are focussed on ensuring that their apparatus is protected. For ports, land is a key part of their undertakings – ensuring that the movement of goods is able to take place and in a way that meets the port’s statutory duties and obligations. As such, having proportionate controls on the land impacts of the TFGP proposals is just as important as controlling the works taking place.
- 3.7.6 Provision for harbour authorities to consent to the use of land powers is also well precedented, including in the Tidal Lagoon Swansea Bay, Hornsea Two and Lake Lothing Third Crossing DCOs; and indeed within the TFGP DCO itself, by requiring PLA approval for any closures of the river (which are analogous to temporary possession powers). Similar provisions were included in the Tilbury2 and Silvertown Tunnel DCOs in this regard. Network Rail has also obtained similar controls in the majority of the DCOs affecting rail infrastructure – an equivalent form of operational land.
- 3.7.7 As such, it is appropriate and precedented for the PPs to include paragraph 3 and such a provision would and could not operate as a ‘veto’ over the TFGP being able to be brought forward. The position with protective provisions for statutory undertakers is fundamentally different to, and not at all analogous with, that of local planning authorities exercising detailed planning approval functions under Schedule 17 to the HS2 Phase One Act 2017, as referred to in the Legal Advice Note.

Definition of ‘the Port’

- 3.7.8 PoTLL does not accept that the definition of ‘the Port’ within the PPs should be explicitly time limited to the date of the Order in the way that is proposed by the Applicant. Not only is this approach unprecedented¹, the suggestion fundamentally misunderstands the purpose of PPs. The purpose of PPs is to protect a statutory undertaking from impacts arising from a development. The question is, therefore, at the time when the Protective Provisions are actually required (i.e. when the development is taking place, e.g. construction, operation and decommissioning), what is the extent of the statutory undertaking that is to be protected?
- 3.7.9 If PPs were to be time limited, this would mean that the statutory undertaking as it stands at the time the development is to take place would not be protected, negating the very purpose of the PPs.
- 3.7.10 PoTLL notes the content of the Legal Advice Note on this point but considers that its focus is also misplaced. Whilst the land currently owned by RWE is PoTLL’s immediate focus (as explained at the most recent DCO hearings) for expansion, its expansion plans do not stop there, as would be expected of a statutory undertaking.
- 3.7.11 Once it has control of land that it uses for the purposes of the carrying on its undertaking, whether RWE land or otherwise, it will be operational land that forms part of the Port. For the purposes of the PPs, it does not matter how PoTLL intends

¹ PoTLL acknowledges that the Hornsea Two DCO and Immingham Open Cycle Gas Turbine DCOs reference this phraseology; in respect of Hornsea Two this was simply in relation to water discharge matters and for Immingham the term was used in reference to the land that was owned by the Applicant for that project, where the body being protected was potentially seeking to use that land in the future to undertake apparatus diversions. These examples are therefore not applicable to the situation for this project.

to develop that land (whether through permitted development powers or otherwise) – the question is how the land is used, which is simply a question of fact.

- 3.7.12 If it is land used in such a manner, it is land that should be protected if it is affected by development, to ensure the purposes of the PPs are able to be met.
- 3.7.13 Paragraph 3.7.5 above is also relevant on this point too – i.e. it is a harbour authority's land, as well as its apparatus, that is a vital part of its undertaking and therefore needs to be protected to its fullest extent at the time the development is brought forward.
- 3.7.14 Other amendments to this definition with the DCO mark-up accompanying this submission reflect PoTLL seeking to ensure that the full extent of the Port is covered, including Work No. 15. The definition has also been moved to article 2 of the DCO, as a consequential change related to PoTLL's minor amendments to article 10.

Indemnity – external costs for Schedule 2 consultations

- 3.7.15 In paragraph 12(a), PoTLL considers it appropriate that it should be able to be indemnified for external costs associated with it reviewing documents submitted to it for consultation pursuant to the Requirements in Schedule 2 to the DCO. PoTLL's consultee role in relation to those documents is necessary owing to its statutory functions, namely the need to ensure that the design of the marine aspects of the TFGP and terrestrial and marine movements do not affect the operations of the Port, pursuant to the Construction Traffic Management Plan and Navigation Risk Assessment. These could be complex matters which require external technical and professional support if PoTLL considers this is necessary (acting reasonably, as the proposed drafting requires).
- 3.7.16 Given that the PPs are in place to ensure that PoTLL's interests are adequately protected and that the PPs provide for PoTLL to recover its costs in that respect, it is equally appropriate for PoTLL to be able to reclaim its costs in checking that this is also achieved in the other mechanisms that have been put in place by the DCO through Schedule 2.

Indemnity - obstructions

- 3.7.17 In paragraph 12(c) PoTLL is seeking to be indemnified for costs associated with the Applicant obstructing movements within the Port, for example through a vehicle carrying abnormal loads crashing or breaking down on Port roads, preventing other vehicles from accessing and existing the Port. This has been PoTLL's primary concern in respect of managing vehicle movements, given the time critical nature of Port activities. Since Deadline 7, PoTLL has amended the proposed wording to ensure it is clear that this cost recovery would only apply where there is obstruction of Port roads (rather than of the public highway), however PoTLL considers that it is perfectly reasonable that it should be able to recover costs where there is an obstruction caused by movements that would not have been contemplated but for the TFGP.

4. DCO DRAFTING TO ENABLE CAUSEWAY REMOVAL FROM THE DCO

- 4.1 As indicated above and in PoTLL's Deadline 7 submissions, accompanying this Deadline 8 submission is a mark-up of the Applicant's 'clean' version 8 of the DCO submitted at Deadline 7 – this is not the DCO submitted in response to the ExA's Rule 17 Request.
- 4.2 As such, the mark-up incorporates the following:
- tracked changes to article 8 to reflect the position stated in section 3 of this submission;
 - black strike-through of provisions of the DCO, which are the same changes as those made by the Applicant in its Rule 17 Request response, which PoTLL agrees with;
 - additional tracked changes made by PoTLL to the DCO which PoTLL considers also need to be made to reflect the removal of the causeway these are coloured red; and
 - further track changes in the PPs which reflect PoTLL's position as set out in section 3 of this submission.
- 4.3 Finally, and importantly, PoTLL has also made further changes to the PPs coloured green which seek to account for the fact that, despite full and frank efforts to reach a full and final agreement with the Applicant before the end of the Examination, this has not been possible.
- 4.4 Whilst PoTLL will endeavour to work with the Applicant to reach agreement as soon as possible before the Secretary of State's decision is made, PoTLL does consider that ultimately:
- TPL could rely on its compulsory acquisition powers, subject to reasonable controls in the case of statutory undertakers (which are well precedented) as has been done in the majority of DCOs to date where there is any uncertainty as to being able to reach a deal with third parties, to have the 'equivalence' TPL claims it needs to rely upon before it can remove the causeway;
 - in its negotiations, the Applicant has accepted that any overarching legal agreement between the parties could only ever agree to agree at a future point in time to a Handling Agreement based on a set of defining principles, given that the actual 'when, where and what' of the goods to be handled cannot be known at this stage. The Applicant has always accepted that at this point in time there could only ever be an 'agreement to agree'; and so it is surprising to see the claims made in the Legal Advice Note; and
 - the open port duty is a statutory duty, thus whilst it may be subject to charges (i.e. ship and goods dues, which are regulated), the Applicant could invoke it without the need for the DCO to state anything on its face, as the Legal Advice Note concedes.
- 4.5 However, PoTLL acknowledges that the ExA will want to have as much information and certainty in front of him as possible in order to be able to make a recommendation which can ensure that:
- the Applicant is able to construct the TFGP without impediment;
 - PoTLL's interests are adequately protected; and
 - importantly for PoTLL, both of the above are achieved with the causeway removed.

- 4.6 As such, and further to section 120(3) of the Planning Act 2008 which enables a DCO to “make provision relating to, or matters ancillary to, the development for which consent is granted”, PoTLL’s amendments to the PPs in the DCO provide that:
- the Applicant’s land powers in the DCO over the Port (including if the Port is extended into RWE’s land) and PoTLL’s controls over those powers are to be substituted by a Lease of Easement (referred to as an ‘access easement’) consistent with the set of Heads of Terms scheduled to the DCO;
 - the interaction between the Applicant and PoTLL prior to the exercise of those powers is to be governed by those same Heads of Terms; and
 - in the context of paragraph 4.4 bullet point two above, that the Applicant is able to ‘call down’ a handling agreement on the basis of the defining principles that have been agreed between the parties for several months and which are set out in the same Heads of Terms.
- 4.7 These Heads of Terms have been the subject of intensive discussions with the Applicant for the entire Examination and are now almost entirely agreed with the Applicant save for a few points. Indeed, it was only on 13 August that PoTLL was notified by the Applicant that the Heads of Terms would not after all be signed by it, even though discussions for many weeks had been held on the premise that the Heads of Terms should be agreed well before the end of the Examination to enable full agreements then to be signed by the end of Examination.
- 4.8 To aid the ExA’s understanding of the outstanding points, PoTLL has appended to this submission a comparison of the Heads of Terms that are included in the DCO against the latest version of the Heads of Terms that were received on 12 August from the Applicant, with comments to explain PoTLL’s position on the differences.
- 4.9 In PoTLL’s view, the key outstanding issues with the Heads of Terms are:
- ensuring that if the Applicant brings forward a DCO change during the Recommendation or Decision period, this includes removing all powers from the Order limits within the Port;
 - the extent of indemnity;
 - PoTLL’s control over the Applicant’s ability to change the land that is to be the subject of the access easement; and
 - ensuring that the easement comes to an end if there is a sale of the land on which the TFGP is to be constructed and the proposed use following sale falls outside of the ambit of the agreed terms for the purpose of the easement within the Heads of Terms.
- 4.10 In light of all of the above PoTLL’s view is that the Heads of Terms to be included in the DCO represent a reasonable and proportionate way for the land powers sought by the Applicant within the Port to be managed.
- 4.11 PoTLL is also aware that the Applicant will be including within its Deadline 8 submission an email that it sent PoTLL on 13 August 2021 giving the Applicant’s views on the proposed approach set out in this section 4 and the state of negotiations between the parties. To

assist the ExA, PoTLL has also appended to this submission a reply to that email, explaining why its approach is considered appropriate in the context of negotiations to date.

- 4.12 PoTLL has taken the approach of scheduling the Access Easement Heads of Terms to the draft DCO because this will enable the ExA and the Secretary of State to modify the terms of the easement if they disagree with PoTLL's view that the terms are reasonable, which they would not be able to do if the terms were to be submitted as a separate document.
- 4.13 PoTLL also submits that the scheduling of documents to Acts and Statutory Instruments is well precedented – see for example:
- government legislation such as the Infrastructure Planning (Applications Prescribed Forms and Procedures Rules) 2009; the Infrastructure Planning (Compulsory Acquisition Regulations) 2010; the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017; and the Compulsory Purchase of Land (Vesting Declarations) Act Regulations 2017; and
 - the River Mersey (Mersey Gateway Bridge) Order 2011 and the maps incorporated in the Port of Ipswich Harbour Revision Order 2006 and the Port Security (Port of Tees and Hartlepool) Designation Order 2012.
- 4.14 Furthermore, there is no reason under the Planning Act 2008 why this cannot be done, having regard to the breadth of section 120.
- 4.15 PoTLL recognises that the Applicant also seeks sufficient 'equivalence' over RWE's land as the 'second half' of the access route to the power plant site from the public highway.
- 4.16 As noted at the Hearings and stated in its Deadline 7 submissions, PoTLL intends to acquire RWE's land prior to the DCO being made, never mind before its powers could be sought to be used. In that scenario, RWE's land would be covered by the definition of 'the Port' in the DCO (as PoTLL is proposing that the definition should be drafted) and so the access easement approach set out above would apply to that land too.
- 4.17 In that context, the ExA will see that the scheduled Heads of Terms provide for PoTLL's approach for how this will be dealt with by the proposed eventual access easement.
- 4.18 However, even if it is the case that PoTLL has not purchased the RWE land by the relevant time, or that a full agreement has not been able to be reached between the Applicant and RWE by the relevant time, the Applicant will be able to rely on its proposed compulsory acquisition powers over RWE's land, subject to RWE's consent under its own PPs (which RWE has already agreed must not be unreasonably withheld).
- 4.19 As set out above, it is PoTLL's position that it is not at all reasonable for the Applicant to argue that it is not in an 'equivalent position' in respect of the RWE land if it is forced to rely on compulsory acquisition powers, particularly:
- in a context where there is no handling agreement required and therefore it is only the land requirements that are at issue;
 - given the Applicant is seeking compulsory acquisition powers to facilitate use of the causeway, as such they were being relied upon in the 'causeway position' in any event; and

- given that issues such as this are why compulsory acquisition powers are included in DCOs and in the Planning Act 2008 – to enable projects to proceed in the absence of a voluntary agreement but subject to reasonable controls where statutory undertakers are involved.

4.20 In any scenario in respect of the RWE land, therefore, the Applicant would be able to rely on temporary possession and compulsory acquisition powers to access its site via Fort Road and the Port, in the way that promoters of all DCOs across England and Wales have been able to do so.

5. **CONCLUSION**

5.1 PoTLL has worked diligently throughout the Examination to find common ground with the Applicant in relation to the issues in dispute.

5.2 For the reasons given in section 2 of this submission, it is clear that the continued promotion of the causeway cannot be justified, particularly against the relevant statutory tests. This, taken with the DCO drafting approach explained in section 4 of this submission:

5.2.1 enables the Applicant to have certainty that it has 'equivalence' in terms of AILs access to the position it is currently in with the causeway;

5.2.2 avoids the harm that authorising the causeway in the DCO, let alone building it, would cause PoTLL and the wider public interest; and

5.2.3 gives sufficient protection to PoTLL.

5.3 Together, PoTLL considers that this approach and the measures outlined put the ExA in a position to be able to recommend a DCO which removes the causeway outright.

5.4 If this is done, alongside the changes to the DCO discussed in section 3 and the changes already made to the DCO and its certified documents during the course of the Examination, and the ExA's recommendation is then accepted by the Secretary of State, PoTLL's objections will be able to be considered as withdrawn.