



**Canal &
River Trust**

Making life better by water

keadby3@planninginspectorate.gov.uk

Your Ref EN010114

Our Ref IPP-117

Tuesday 01 February 2022

Dear Mr Christopher Butler

Proposal: Application by Keadby Generation Limited for an Order Granting Development Consent for the Keadby 3 Low Carbon Gas Power Station Project.

Canal & River Trust Response Submission for Deadline Two (Unique Reference : KDB3-SP090)

Summary

The Canal & River Trust's written representation provides further detail on those matters raised in our relevant representation. It responds to the Development Consent Order application by Keadby Generation Limited to the Secretary of State in respect of the Keadby 3 Low Carbon Gas Power Station Project. The Trust objects to the grant of the DCO in its current form.

The representations address the Trust's main outstanding issues:

1. The proposed compulsory acquisition of rights over land owned by the Trust
2. The inadequacy of the protective provisions contained within Schedule 10, Part 2 of the draft DCO
3. The impact that the Project could have on the operation of Keadby Lock

The representations also provide an update to the Trust's position on the Framework CEMP and Water Abstraction Agreement.

In summary:

Proposed Compulsory Purchase

The Trust considers that:

- (a) The Applicant has failed to demonstrate that there is a compelling case in the public interest for the land/rights to be acquired by (as required by s122(3) of the 2008 Act); and
- (b) The Applicant has failed to comply with guidance issued by the Department for Communities and Local Government, "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land" (September 2013) (the "Guidance") in seeking to use powers of compulsory acquisition.

Draft protective provisions

The Trust consider that the protective provisions contained in Schedule 10, Part 2 of the DCO are inadequate. The Trust considers that the imposition of a cap on liability within the protective provisions is unjustified. The Trust considers that this goes against established practice in other applications and imposes unacceptable risk onto the Trust. Furthermore, the Trust considers that the provisions should require compliance with its Code of Practice for Works affecting the Canal & River Trust. The Trust also considers that the protective provisions should be extended to cover Work Areas 9A, 9B and 11A, which are also in very close proximity to the canal.

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Impact on the Operation of Keadby Lock

During the deliveries for the Keadby 2 Power Station Works, which also utilised the same offloading point for AIL deliveries, it was observed by the Trust that some vessels arrived at the offloading point outside of times agreed by the Trust. This resulted in unscheduled closures of Keadby Lock. To avoid this occurring in respect of the Keadby 3 Low Carbon Gas Power Station Project, the Trust request that the Applicant sets out additional processes that it will comply with requiring co-ordination with the Trust prior to the mooring of vessels, including agreement to allow scheduled passage of Keadby Lock to take place.

Written Representation

These Written Representations are submitted in accordance with rule 10(1) of the Infrastructure Planning (Examination Procedure) Rules 2010 in relation to an application under the Planning Act 2008 (“the 2008 Act”) for a Development Consent Order (“DCO”) for the Keadby 3 Low Carbon Gas Power Station Project (“the Project”) submitted by Keadby Generation Limited (“the Applicant”) to the Secretary of State

The Canal & River Trust (the “Trust”) has already provided a summary of its principal concerns by letter on 2nd September 2021 in response to the Stage 2 Consultation in accordance with section 42 of the Planning Act 2008. The Trust has now had an opportunity to consider the application in more detail and has developed its position through the common ground discussions that have taken place with the Applicant. This document sets out in more detail the matters that remain of concern to the Trust:

1. The proposed compulsory acquisition of rights over land owned by the Trust
2. The inadequacy of the protective provisions contained within Schedule 10, Part 2 of the draft DCO
3. The impact that the Project could have on the operation of Keadby Lock

The Trust has also noted below amendments to the DCO that have been agreed with the Applicant. Finally, answers to the Examining Authority’s written questions and requests for information (WxQ1) issued on 14 December 2021 are contained in the appendix to this letter.

While the Trust does not object to the principle of the Project, it remains concerned that the DCO, if made, would interfere with the Trust’s ability to carry out its obligations as statutory undertaker for the waterways within the Order limits and as a navigation authority. Although the Trust has been in discussions with the Applicant about the effect of the proposals on its undertaking, the protections provided in the Order as applied for do not adequately address the Trusts concerns. The Trust therefore **objects** to the DCO on the grounds set out in this letter. The Trust believes it should be possible to resolve its concerns with the Applicant by negotiation, but reserves the right to appear at Hearing(s) and/or the Compulsory Acquisition Meeting if they are not resolved satisfactorily by that stage.

The Canal & River Trust

The Trust is the charity who look after and bring to life 2000 miles of canals & rivers. Our waterways contribute to the health and wellbeing of local communities and economies, creating attractive and connected places to live, work, volunteer and spend leisure time. These historic, natural and cultural assets form part of the strategic and local green-blue infrastructure network, linking urban and rural communities as well as habitats. By caring for our waterways and promoting their use we believe we can improve the wellbeing of our nation.

The Trust has a duty under the Trust Agreement with the Secretary of State for Environment, Food and Rural Affairs (28 June 2012) (the “Trust Agreement”) to operate and manage the waterways and towpaths for public use and enjoyment. A copy of the Trust Agreement is at Appendix 2 of this letter. Additionally, the Trust has a duty under S105 Transport Act 1968 to maintain commercial and cruising waterways in a suitable condition for use by the public.

1. Proposed Compulsory Purchase/Acquisition of Trust land

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We refer to the Promoter's Book of Reference and note that the Trust is listed as either owner or as having an interest in 8 individual plots of land the Applicant seeks to acquire compulsorily. These comprise of Plots 27; 37; 38; 39; 75; 80; 80a; and 81 as identified within the submitted Book of Reference (Revision VP1.0) and associated Land Plans.

The Trust hereby formally **objects** to the compulsory acquisition of rights over land owned by Trust. The Trust considers that:

- a) The Applicant has failed to demonstrate that there is a compelling case in the public interest for the land/rights to be acquired by (as required by s122(3) of the 2008 Act); and
- b) The Applicant has failed to comply with guidance issued by the Department for Communities and Local Government, "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land" (September 2013) (the "Guidance") in seeking to use powers of compulsory acquisition.

(a) The Applicant has failed to demonstrate that there is a compelling case in the public interest for the land/rights to be acquired

S122 of the 2008 Act states *inter alia* that an order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that there is a compelling case in the public interest for the land to be acquired compulsorily.

As set out in more detail in sections 2 and 3 below, the proposed development has the potential to have an adverse impact on the Stainforth and Keadby Canal, which is a waterway owned by the Trust. As noted above, the Trust has a duty under the Trust Agreement to operate and manage the waterways and towpaths for public use and enjoyment. Additionally, the Trust has a duty under S105 Transport Act 1968 to maintain commercial and cruising waterways in a suitable condition for use by the public.

If the canal is adversely impacted by any works related to the proposed development, then this could result in the Trust being required to undertake remedial works to ensure that they are not placed in breach of their statutory obligations, or their obligations under the Trust Agreement. The Trust considers that, through the DCO application, the Applicant should provide sufficient detail that sets out how that risk will be mitigated. The protective provisions contained within the DCO (Part 2, Schedule 10) should provide sufficient comfort that the Trust will not be adversely affected by the works and/or will not be put at risk of breaching its statutory obligations. As currently drafted, they do not do so.

The Trust has set out at section 2 below its concerns and its view on how this could be addressed. The Trust's position is that, unless and until those issues are suitably addressed by the Applicant, a compelling case in the public interest for acquisition of rights and land to implement the scheme has not been made out. The use of compulsory purchase powers is not justified where the scheme has the potential to put owners/occupiers in breach of statutory obligations. That is particularly the case where the statutory obligations are to protect the interests of the public, as is the case with those obligations placed on the Trust.

(b) The Applicant has failed to comply with the Guidance

Paragraph 8 of the Guidance states:

"The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored. The applicant will also need to demonstrate that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose, and that it is necessary and proportionate."

Paragraph 25 of the Guidance states *inter alia*:

"Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail."

The Trust considers that the Applicant has failed to comply with the above paragraphs of the Guidance. The Trust has made it clear to the Applicant from the outset of the pre-submission consultation that it would be open to the possibility of

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entering into a voluntary agreement to transfer rights and/or land for both temporary and permanent works. The Trust was clear that such an agreement would need to ensure that any requirements that the Trust has as a statutory undertaker are suitably addressed. Those requirements are more difficult to address where rights/land are acquired compulsorily through a DCO. The Trust made it clear that use of compulsory acquisition powers would not be acceptable to the Trust. As a statutory undertaker, the Trust has no option but to resist the use of compulsory purchase powers that it considers may negatively affect its land or undertakings, and ability to comply with its statutory duties and obligations.

One of the key concerns of the Trust is that the Applicant agree to abide by the “Code of Practice for Works affecting the Canal & River Trust” (the Code of Practice). If the Trust was entering into an agreement to grant rights voluntarily over land that it owns, then its standard practice is that the party carrying out the rights must abide by the Code of Practice. This ensures that the Trust is able to verify that any works will not negatively affect the continued safety of navigational users of waterways under its control during and after the works. The use of the compulsory acquisition powers bypasses any requirement to agree to the Code of Practice, which would usually be agreed through a voluntary negotiation.

Initial approaches were made by the Applicant to the Trust’s estates division on the acquisition of rights and ownership from 10th September 2021. The Trust requested additional information, including the provision of a key plan for the plots of land involved (requested on 13th September; 26th October; 18th November; and 20th December 2021) in order to advance these discussions. This information has been received piecemeal, and the key plan was not received until 17th January 2022.

The Trust welcome the receipt of this information. However, the delay has meant that the Trust has been prevented from fully reviewing the matter with our professional advisors until this point. The Trust considers that the applicant has failed to take practicable measures to reach a voluntary agreement with the Trust. The Trust considers that the DCO, as drafted, fails to strike an appropriate balance between the scheme and the Trust’s interests as landowner and statutory undertaker.

The Applicant’s proposals indicate that a section of Trust land is sought for the installation of abstraction equipment, alongside a section of the waterway itself. It is noted that no formal agreement has been reached thus far regarding the abstraction of water from the Trust’s waterway. We welcome further information from the Applicant regarding their proposals.

The Trust have yet to receive full detailed information from the Applicant as to how the Trust’s land would be used, and for what duration, to support the delivery of the scheme. In addition, the details provided to date do not give a clear explanation of the practical implications that the use of CPO powers would have for the Trusts access rights, fishing rights, management of the waterway etc. We observe that plots 75, 80 and 81 appear widely drawn, and query whether this area is in excess of what would be required to deliver the scheme. The Trust remains open to discussing acquisition of rights voluntarily with the Applicant.

2. Draft Protective Provisions

The Trust is engaging with the applicant upon the wording of parts of the DCO, including the protective provisions contained in Schedule 10, Part 2. Whilst the Trust is encouraged by the proposed inclusion of protective provisions, the Applicant is seeking to include certain exclusions from, and limitations to, its liability, which are unacceptable to the Trust. Until those matters are suitably addressed, the Trust’s position is that the DCO should not be granted.

2.1 Applicant’s proposal to cap its liability

Under Paragraph 32(6) of Schedule 10 of the DCO, the Applicant seeks to impose a cap on their liability for consequential losses to the Trust. This paragraph states:

“(6) The aggregate cap of the undertaker’s gross liability for consequential losses shall be limited to £2,000,000 (two million pounds) for any one occurrence or all occurrences of a series arising out of the one original cause.”

The implication of this paragraph is that any expenditure beyond the cap on liability would be borne by the Trust.

The protective provisions are included within the DCO because it is foreseeable that the works to be undertaken as part of the Project could cause detriment to the Trust. It is foreseeable that works associated with the Project could result in

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losses to the Trust in excess of the proposed cap, for example, damage caused by the collapse of the canal wash wall or collisions between boats on the River Trent colliding with Keadby Lock.

The Trust considers that the imposition of the proposed capped amount on liability is unjustified. There are a number of other Nationally Significant Infrastructure Projects for which development consent was granted that included protective provisions relating to assets owned by the Trust (see for example Part 3, Schedule 9 of the Keuper Underground Gas Storage Facility Order 2017; Schedule Part 3, Schedule 12 of the Eggborough CCGT Order 2018). The Development Consent Orders for those projects had no cap on liability.

As a registered charity, the Trust's funds are limited. It does not serve the public interest for any residual risk from the Project to be borne by the voluntary sector. We believe that the Applicant should be responsible for any such risks and associated liabilities. The Trust does not consider that the circumstances of this case justify the proposed restriction on liability.

2.2 Applicant's proposal to limit the Protective Provisions to Work Areas 4A, 8A and 10B

The Trust note that the protective provisions included in schedule 10 that relate to the Trust only apply to Work Areas 4A, 8A and 10B with regards to the 'specified work' being carried out.

The Trust note that Work Areas 9A, 9B and 11A are also in very close proximity to the canal. The Trust consider that it cannot be ruled out at this stage that activities associated with the construction layout areas, access arrangements, and landscape works associated with these Works do not have the potential to adversely impact the canal; for example through adverse loading or unexpected vibration close to the canal.

The Trust consider that it is necessary for these areas to be included within the protective provisions, so as to ensure that risks to the canal can be adequately managed and that the Trust will not be liable for any damage repairs or losses due to these Works.

2.3 Compliance with the Trust's Code of Practice

The Code of Practice is designed to safeguard the Trust's assets and to deal with the nuances of developing adjacent to a 200-year-old waterway heritage assets, which are not built to modern engineering standards. These features have an inherent fragility and the extent to which development adjacent to or over them may affect their stability can reach far beyond any narrow waterway corridor. Ensuring that development is appropriately located and controlled on land adjacent to the Trust's waterways network is crucial to limit the potential for failure of its infrastructure and the associated economic, environmental and social consequences of this. Therefore, in order to ensure that the construction works will not result in a danger to navigational safety, the Trust requires that any consents given to the works adjacent and over its waterways abide by the Code of Practice.

The Code of Practice is critical to the Trust, as it specifically deals with waterway structures and the nuances of protecting the rights of our users, boaters, anglers etc. Based on the details provided through the application, there is insufficient clarity on what standard would be applied for the Trust to comment on how that might impact the structural integrity of the canal and impact its users. The Trust would normally deal with these matters via the Code of Practice on a site-by-site basis and would need to ensure that measures are in place to mitigate stability and any chances of landslides.

The wording of Schedule 10, Part 2, includes extracts from the Trust's Code of Practice. However, it has not been adopted in full, which could allow for works to be undertaken outside of the Trust's established process via the Code of Practice.

The Trust understands that the Applicant is willing to amend the wording of the DCO to make it more explicit that the works will accord with the Code of Practice. This is welcomed by the Trust. The Trust request that they have an opportunity to comment on any proposed wording to accommodate this.

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3. Impact on the Operation of Keadby Lock

3.1 Background

The proposed offloading area associated with Work No 10B lies to the immediate north of Keadby Lock, which provides the sole access between the River Trent and the Stainforth & Keadby Canal. As confirmed in table 8 of appendix 12C: Navigation Risk Assessment submitted by the applicant and referenced in the draft Statement of Common Ground between the Trust and the applicant, it is recognised that it may be necessary to close Keadby Lock for short periods during certain larger AIL deliveries.

Due to the nature of the Lock access from the Trent, vessels seeking to utilise the facility need to pre-book slots for assisted passage. It is agreed with the applicant that Notices to Mariners (Notices and Stoppages) through the Trust can be used to provide mariners with forewarning of closures.

3.2 Procedures for Vessels Arriving Outside of Agreed Times

During the deliveries for the Keadby 2 Power Station Works, which also utilised the same offloading point for AIL deliveries, it was observed that some vessels arrived at the offloading point outside of times agreed by the Trust, often due to delays occurring at sea. This resulted in unscheduled closures of Keadby Lock, which prevented craft utilising this structure.

Due to the events of the Covid-19 pandemic, use of the lock was low during the Keadby 2 deliveries. However, it is anticipated that, as vessels arrive at the AIL loading point outside of scheduled times, this could result in canal-bound vessels becoming stranded on either side of Keadby Lock. The Applicant's submission does not address this specific issue, which the Trust considers needs to be resolved in order to prevent hazards to navigation during the proposed Works for the Project.

To avoid the above occurrence, we respectfully request that the Applicant needs to set out procedures specifying what will occur should vessels arrive at the offloading point outside of scheduled times. Additional processes requiring co-ordination with the Trust prior to the mooring of vessels, including agreement to allow scheduled passage of Keadby Lock to take place, could help to resolve this matter.

4. Changes to the Draft DCO Agreed in principle with the Applicant

Our previous representation from September 2021 highlighted a number of minor alterations to the wording of the requirements within the draft DCO, which are summarised below:

- Amendments to Requirement 5(4c) to include the wording 'angle of flow'
- The amendment of Requirement 5(4c) to secure, in relation to Work 4A, that details are to be submitted to and in consultation with the Canal & River Trust approved by the relevant planning authority
- The amendment of Requirement 5(4d) to secure, in relation to the cofferdam installation, that details are to be submitted to and in consultation with the Canal & River Trust approved by the relevant planning authority

The Trust note that the Applicant has agreed to make appropriate amendments to these Requirements to address the Trust's concerns, which is welcomed.

5. Comments on Questions Raised by the Examining Authority

Please find the Trust's response to the Examining Authority's written questions and requests for information in Appendix 1. These relate to questions Q1.2.7; Q1.16.13; Q1.16.18; and Q1.16.21.

In addition to the above responses, we note that the Examining Authority have asked a question to the Applicant (Q.1.13.3) in relation to design proposals for the proposed water abstraction from the Stainforth and Keadby Canal (Work No. 4A). Although not directed at the Trust, we believe the information below may be of use.

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- The Applicant has been working with the Trust regarding the abstraction of water from the canal. No commercial agreement has yet been reached which would give rights to the Applicant to abstract water from the canal. However, in anticipation of this agreement, the Trust (as the relevant Licence Holder for the Stainforth and Keadby Canal) has submitted an application to the Environment Agency for the potential abstraction of the volumes of water proposed by the Applicant. No response has yet been received.
- The proposed water abstraction will require additional water efficiency measures to be undertaken, which will necessitate minor physical modifications to Keadby Lock. Such physical modifications will require consent from the Secretary of State for Digital, Culture, Media and Sport, (advised by Historic England) as these works would occur within the curtilage of the Scheduled Monument.
- The Trust understand that final designs of the abstraction equipment on site have yet to be developed and as such, no further progress has been made on this matter. The Trust therefore consider that a requirement to submit details of Work No 4A (DCO Schedule 2(4)) is appropriate

6. Other Matters – Framework Construction Environmental Management Plan (CEMP)

The Trust has made comments to the applicant on the Framework CEMP on 25th January 2022, which we believe would make it more effective in implementation and in the development of the final CEMP. These concern:

- Page 19: The inclusion of proposals to cover/seed spoil heaps (see our response to ExA's question Q1.2.7)
- Page 48: Ensuring the recommendations concerning fish rescue are consistent with those on page 72 (fish rescue prior to de-watering of any cofferdams)
- Page 57: Correction to GPPs being referred to as Environment Agency Documents (as GPPs are not)
- Page 57: Recommendations to expand what the Pollution Response Plan will outline to include a map of hazardous materials storage and locations of spill response kit, training details for staff, and details of where incidents will be reported to (including the Trust).
- Page 64: The inclusion of the Trust in a list of bodies to be consulted regarding water quality monitoring.
- Page 67: Accountability for the role of silt as being potentially damaging to aquatic organisms and habitats (not just what is contained within it)
- Page 70: We advise that all refuelling and reoiling needs to take place above a drip tray. Refuelling above an impermeable surface without a drip tray allows for possible contamination of runoff which should be avoided at source.

We understand that the applicant is looking into revising the Framework CEMP in line with the advice above.

Concluding Remarks

The Trust considers that its objections and concerns are capable of being addressed by the Applicant. In the event that the issues are not satisfactorily resolved, then the Trust confirms that it would wish to take part in any Hearing(s) and/or the Compulsory Acquisition Meeting that is fixed to consider these issues.

The above comments are given without prejudice to any further matters which may be raised by the Trust at a later stage as more details emerge.

Yours sincerely,

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Area Planner

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