

KEADBY 3 CARBON CAPTURE POWER STATION

A collaboration between **SSE Thermal** and **Equinor**

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The Keadby 3 (Carbon Capture Equipped Gas Fired Generating Station) Order

**Land at and in the vicinity of the Keadby Power Station site,
Trentside, Keadby, North Lincolnshire**

**Legal Submission – Response to
Examiner Question 5 (Deadline 7a)**

Document Ref. 9.24

Legal submission in relation to Question 5 of the Examining Authority's request for further information for deadline 7A

1 Introduction

- 1.1 This is a legal submission in response to Question 5 of the Examining Authority's request for further information at deadline 7A contained in Rule 17 letter dated 26 May 2022 [PD-022]. Its purpose is to provide the Examining Authority (and Secretary of State) with comfort that serious detriment does not arise in the context of Section 127 of the Planning Act 2008 in relation to those statutory undertakers with outstanding representations,
- 1.2 This legal submission should be read in conjunction with Document 9.12 submitted at the same deadline which sets out the detailed update of the position reached with each statutory undertaker, and the Applicant's covering letter dated 6 June 2022 including the summary table provided in appendix 1 thereof.

2 Section 127 of the Planning Act 2008

- 2.1 Section 127 of the Planning Act 2008 applies in relation to statutory undertakers' land where compulsory purchase powers are sought as part of a development consent order.
- 2.2 For the purposes of Section 127 the relevant elements are:
- 2.3 *Section 127(1)* – which confirms the section applies to land acquired by statutory undertakers for the purpose of their undertaking; a representation has been made in relation to the application for a development consent order and not withdrawn, and the Secretary of State is satisfied that the land is used for the purposes of carrying out the statutory undertaker's undertaking or an interest in land is held for those purposes.
- 2.4 *Section 127(2)* and *127(3)* only applies where the permanent acquisition of statutory undertaker's land is sought. The Secretary of State needs to be satisfied that:
- "The matters are that the nature and situation of the land are such that –*
- (a) *it can be purchased and not replaced without serious detriment to the carrying on of the undertaking; or*
 - (b) *if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking."*
- 2.5 Section 127(5) and 127(6) only apply where the creation of new rights are sought. The Secretary of State needs to be satisfied that:
- "(6) The matters are that the nature and situation of the land are such that:*
- (a) *the right can be purchased without serious detriment to the carrying on of the undertaking; or*

- (b) *any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertaking by the use of other land belonging to or available for acquisition by them."*

3 Affected Statutory Undertakers with Outstanding Representations

- 3.1 Section 127 only applies to those statutory undertakers who have outstanding representations at the point the examination process ends. The table below identifies those statutory undertakers who have made representations to the DCO application and who have not withdrawn them.
- 3.2 The table identifies the nature of the interest to be acquired by the undertaker using proposed powers of compulsory acquisition together with confirmation of the permanent right or land acquisition sought. There is no obligation under S127 of the Planning Act 2008 to consider the impact of temporary possession powers on the undertaking of a statutory undertaker.

Statutory Undertaker	Nature of Compulsory Acquisition Sought
Environment Agency (EA)	New Rights only
National Grid Electricity Transmission (NGET)	New rights only
Northern Powergrid (Yorkshire) Plc (NPG)	New rights only
Network Rail Infrastructure Limited (Network Rail)	New rights only
Canal & River Trust (CRT)	New Rights only
	Land acquisition

- 3.3 Protective provisions have been agreed with NGET/NGG, NPG, and CRT and these have been incorporated in the final preferred version draft DCO submitted at deadline 7a. The Environment Agency has not requested separate protective provisions but has provided comments on the Requirements at Schedule 2 of the draft DCO (as further explained below).
- 3.4 For completeness, protective provisions have been agreed with National Grid Carbon Limited and these are included in the final preferred form of dDCO. However, National Grid Carbon Limited is not a statutory undertaker and therefore does not fall to be considered as such for the purposes of S127.
- 3.5 The next sections of this note consider the application of Section 127(5) and 127(6).

4 Compulsory Powers to Create New rights - Analysis

- 4.1 For all of the above identified statutory undertakers (save for CRT), the nature of the compulsory powers sought is the creation of new rights. It is the Applicant's case that these rights can be acquired without serious detriment to the carrying on of the undertaking as is detailed in Document 9.12.
- 4.2 In addition, protective provisions have been included in the draft DCO (Schedule 10), these protective provisions act as a limitation on the extent to which the undertaker can exercised its powers of compulsory acquisition under the draft Order. They protect the statutory undertakers

in that the Undertaker must have regard to protecting in-situ apparatus as part of the creation of a new right. The main protections afforded to the statutory undertakers can be summarised as follows¹;

- (a) *NGET/NGG (Part 1 of Schedule 10)*– prevents the use of compulsory purchase powers to appropriate, acquire or extinguish any easements or interest in relation to apparatus of National Grid without consents, and prevents the removal or interference with any apparatus without advance written notice and details of the proposed works including any alternative apparatus to the satisfaction of National Grid;
- (b) *CRT (Part 2 of Schedule 10)* - prevents the obstruction or interference with pedestrian or vehicular access to the waterway other than with the consent of the Canal and River Trust. The Undertaker is also prevented from exercising any powers under the Order relating to the discharge of water into the waterway or otherwise interfering with the supply of water or drainage to and from the waterway unless otherwise without the express consent of the Canal and River Trust;

The protective provisions also prevent use of powers to survey or investigate CRT land or temporarily interfere with the waterways so as to divert any rights of access or rights of navigation otherwise than without the consent of the Canal and River Trust. Further, before commencing any work near CRT operational land, the Undertaker must provide detailed plans of the works and have regard to the Canal and River Trust code of practice when carrying out such works. All details are to be approved by CRT's engineer and carried out in accordance with its engineer's requirements.

In carrying out any works – these must be carried out in accordance with the approved details and so as to cause as little inconvenience as reasonably practicable to CRT, its officers, agents and other persons lawfully using the waterway. The Undertaker is also under obligations to restore the waterway to a condition satisfactory to the Canal and River Trust following completion or any construction works.

- (c) *Network Rail (Part 5 of Schedule 10)* – Paragraph 51(5) prevents the undertaker from using powers under the order to do anything which would result in the railway property being incapable of being used and retained or otherwise affect the safe running of trains on the railway. In relation to the carrying out of the works, the Undertaker is obliged to enter into an asset protection agreement with Network Rail in advance and before commencing any construction or proper and sufficient plans of that work must be submitted to Network Rail for its prior approval and thereafter carried out other than in accordance with those drawings approved by the engineer. The engineer can specify any protective works, temporary or permanent required before commencing works to ensure the safety and stability of the railway and continued safe and efficient operation of the railway. During construction the Undertaker must allow Network Rail's engineer access for all specified works during construction and supply, all information it may reasonably require relating to its method of construction.

The Undertaker can confirm that plots 28 and 29 (of which Network Rail is the freehold owner) relates to an existing purpose built bridge, with parapets, over the railway. The Undertaker has consistently questioned Network Rail's position that this land is not operational land for the purpose of its undertaking. Other SSE companies already enjoy existing rights over plots 28 and 29. The new right sought by the Undertaker is consistent with those existing rights and on that basis, notwithstanding the question as

¹ All protective provisions should be read in full, paragraph 42 is a summary of key protections only.

to whether these plots fall within S127 in any event, it is considered that by virtue of the existing rights, acquisition of the same cannot cause serious detriment to Network Rail's undertaking: the same form of rights have been exercised in the real world without detriment to Network Rail.

- (d) *NPG (Part 7 of Schedule 10)* – the protective provisions prevent the undertaker from acquiring any apparatus of Northern Power Grid or extinguishing any easement or rights to such apparatus unless it is provided with alternative easements and/or relocated apparatus with required rights. Before commencing any works which are within the vicinity of NPG apparatus, the undertaker must submit plans and description of the works to be executed and thereafter comply with the relevant plans and sections;

4.3 For these reasons, the above Statutory Undertakers are protected through the Order such that the Secretary of State can clearly conclude that there is no serious detriment for the purposes of section 127.

4.4 As noted above, the Environment Agency has not requested its own protective provisions. However there has been detailed representations on the draft DCO which have been accommodated by the Undertaker. As a result, the draft DCO has been altered expressly to accommodate all of the Environment Agency's requests. The following elements of the draft DCO affords the Environment Agency with the requisite protections in relation to its undertaking:

(a) *Article 14 (Discharge of Water)-*

- (i) *Article 14(3)* acts as an absolute restriction on the Undertaker from discharging any water into any watercourse or drain without the consent of the relevant person to whom it belongs and subject to such conditions such person may require.
- (ii) *Article 14.4* prevents the opening into any opening of a public sewer or drain except other than in accordance with approved plans to whom the drain belongs and where that person has been given the opportunity to supervise the making of any opening.
- (iii) *Article 14(5)* requires the Undertaker to ensure that any water discharged into a watercourse or drain is free (as practicable) from gravel, soil or other solid substance, oil or similar.
- (iv) *Article 14.6* prevents the undertaker from carrying out or maintaining works pursuant to Article 14 other than in accordance with the consent granted by the Environment Agency.

4.5 There are various requirements which are also subject to consultation with the Environment Agency, this includes:

- (a) Requirement 13 (Foul Water Drainage),
- (b) Requirement 14 (Flood Risk Mitigation),
- (c) Requirement 15 (Contaminated Land and Ground Water),
- (d) Requirement 17 (Construction Environmental Management Plan),

(e) Requirement 30 (Piling and Penetrative Foundation Design).

4.6 Provision is also included in the deemed Marine Management Organisation at Schedule 13 in relation to condition 14 which requires that the undertaker must ensure any coating and treatments used in a marine area are approved by the Health & Safety Executive or the Environment Agency.

4.7 Separately, the Undertaker has also provided a legal undertaking dated 6 June 2022 in favour of the Environment Agency to respond specifically to the Agency's representation relating to the possible impact the permanent acquisition of Plot 80a poses to parking of vehicles associated with the checking and maintenance of flood defences along the canal. The Undertaking secures the following in favour of the Environment Agency:

(a) To work and liaise with the Agency to agree appropriate alternative parking provisions if the permanent acquisition of plot 80a affects its existing parking provision;

(b) To make available such additional land within plot 77 (comprised in the Undertaker's ownership) to facilitate such alternative parking provision; and

(c) To provide such alternative parking provision as agreed and grant the Agency appropriate rights to use such parking provision.

The undertaking therefore ensures that the Agency's ability to park vehicles when carrying out flood defence **checks**/works remains unaffected.

4.8 Accordingly, there are more than sufficient controls within the Undertaking, Articles, Requirements and Deemed MMO Licence for the benefit of the EA such that any rights sought will not cause any serious detriment to its undertaking, as any new rights acquired will always need to be exercised within the limitations of the identified Articles, Requirements and Deemed MMO Licence conditions.

4.9 As is set out in detail in Document 9.12 none of the existing rights afforded to each of the statutory undertakers are to be extinguished or acquired. Accordingly Section 127(6)(a) is met and the Secretary of State can be satisfied that new rights can be purchased without serious detriment to the carrying on of each of these undertakers.

5 Compulsory Powers – Acquisition of Land Analysis

5.1 The only parcel of land sought to be permanently acquired pursuant to the draft Order is Plot 80a which is owned by CRT and falls to be considered in the context of S127(2) and 127(3). As is described in Document 9.12, this land is required for a new pumping station and directly adjoins land which is already being put to similar use in connection with Keadby 1 and 2. The land is currently a vacant embankment and neither used nor occupied by CRT.

5.2 It is not used for a purpose in connection with its undertaking and there is no need to replace the land. As a result, no detriment will be caused to CRT as a result of its permanent acquisition and the Secretary of State can be satisfied that S127(3)(a) is met.

6 Conclusion

- 6.1 Whilst side agreements are in an agreed or near final form with many of the identified statutory undertakers at the time of this note, their representations remain outstanding.
- 6.2 It is submitted, for the reasons and justification explained above that the Secretary of State can be satisfied that the requirements of either S127(3)(a) or 127(6)(a) are met and the development consent order can be made in the form submitted at Deadline 7a.

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