

THE A122 (LOWER THAMES CROSSING) DEVELOPMENT CONSENT ORDER

Summary of Oral Submissions at Compulsory Acquisition Hearing 4

Interested Party	Northumbrian Water Limited (operating as Essex & Suffolk Water)
PINS Reference Number	TR010032
IP Reference Number	20035532
Document Ref.	ESW 11
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Date	31 October 2023

10812/74/ESW 11 - Summary of
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1. Introduction

1.1 Northumbrian Water Limited (operating as Essex & Suffolk Water) (“ESW”) attended Compulsory Acquisition Hearing 4 on Wednesday 18 October virtually. Hazel Anderson of Winckworth Sherwood on ESW’s behalf made comments in relation to questions (i) to (iii) as set out in the Agenda (EV-050) and responded to questions posed by the Examining Authority (“ExA”).

1.2 This document summarises the submissions made and provides further detail where relevant.

2. Question (i): Outline of the current scope of objections, taking into account any progress in negotiations with the Applicant.

2.1 Ms Anderson explained that ESW’s fundamental points of concern remains as raised in its Written Representations (REP1-265). ESW has not reached agreement with the Applicant in relation to the removal of plot 24-133 – the Linford Well site – so as to not interfere with ESW’s statutory undertaking, and particularly its abstraction licence obligations and commitments relating to future water supply in its latest Water Resource Management Plan (“WRMP24”). Additionally, ESW has related concerns about water quality from contamination of the source of Linford Well attributable to the Lower Thames Crossing project (“LTC”).

2.2 At ISH5, it was indicated that there had been a meeting on 22 August which at the time was thought to be reasonably productive. Since then there have been three exchanges of a draft side agreement which deals with matters arising from the draft Development Consent Order (“dDCO”) and the protective provisions. The most recent comments on that were received from the Applicant yesterday (ie 17 October 2023). It was explained that these comments were being considered with a view to there being a further meeting before the end of October or very early in November.

2.3 The position between the parties, as far as ESW understands it, can be summarised in the following way. There is both the draft side agreement to deal with matters relating to the dDCO powers and the protective provisions, and also a further commercial agreement to deal with terms for works and water supply from the well in plot 24-133. The parties still need to sort out arrangements giving sufficient comfort to each other, so that the Applicant’s compulsory powers over plot 24-133 are given up with the Applicant having certainty on the connection of the supply pipe connecting over that plot and to the Linford well.

2.4 Specifically, in relation to compulsory acquisition over ESW’s plot 24-133, the Applicant has not yet provided wording of sufficient comfort to ESW and therefore these submissions proceed on the basis that there is no agreement and in the absence of an agreement ESW is seeking removal of plot 24-133 from the dDCO.

3. Question (ii): Whether CA and or TP powers (or both) are objected to and (with reference to the statutory tests and applicable guidance) why?

3.1 ESW is continuing to object to the inclusion of plot 24-133 for both acquisition of rights under Schedule 8 and for temporary possession purposes under Schedule 11. The reasons for the objection were set out in ESW’s Written Representations in paragraphs 5.1 to 6.5. Before responding in detail, Ms Anderson set out a number of contextual points.

- 3.2 First of all, ESW is a statutory undertaker relating to public water supply and has statutory duties and obligations under the Water Industry Act 1991 and Water Resources Act 1991. These include domestic supply duties and statutory obligations to produce five-yearly water resource management plans to plan for how such public water supplies will be secured in the next 25 years. It is not a sewerage undertaker.
- 3.3 The applicant put the Linford Well plot 24-133 within the dDCO limits for acquisition of rights and temporary occupation, but this was not discussed between the parties in negotiations before the application was made. It is important to note that the Applicant has not included any powers itself to abstract water to supply its tunnel boring machines ("TBMs"). The Applicant is wholly reliant on securing an existing commercial supply. This is acknowledged by the Applicant in its REAC. Appendix 2.2 of the Code of Construction Practice, First Iteration of Environmental Management Plan (APP-336) contains commitment RDWE-003, that is: *"Water supplied to the tunnel boring machinery may be groundwater abstracted from a Northumbrian Water borehole at Linford. If this is the case, then extraction rates would be agreed with Northumbrian Water prior to commencement of main tunnelling works and the supply of groundwater would be within the limits of the groundwater abstraction licence."*
- 3.4 There are, therefore, commercial negotiations with ESW in relation to the supply of water from the existing wellsite which takes the form of a works and supply agreement.
- 3.5 The Applicant made submissions in relation to plot 24-133 in its Deadline 2 submission – Comments on Written Representations Appendix B – Statutory Undertakers (REP2-047) at page 7. They state that:
the Applicant does not intend to use the compulsory acquisition powers to ensure access to a water supply but does intend to utilise them (in the absence of an alternative agreement between the parties) to ensure the rights and restrictive covenants to construct, protect, operate, access and maintain the pipeline associated with the distribution of water from the Linford borehole to the TBM site (promoted as MUT6 within Schedule 1 to the dDCO) can be obtained in a lawful manner.
- 3.6 At this stage Mr Rynd Smith of the ExA queried whether it would be lawful to include a power to abstract water within the dDCO.
- 3.7 Ms Anderson explained that it was not for her to advise the Applicant because it has its own advisors but that one would have thought it could be possible to include powers to abstract water within a DCO and that it was certainly possible in other consenting regimes. However, the point is that the Applicant has not taken such powers and so it is in the position that it needs to rely on securing water from a licensed abstraction and at the moment that licensed abstraction is that of ESW at the Linford Well.
- 3.8 Ms Anderson then resumed her explanation of the Applicant's Deadline 2 submissions. The further point the Applicant made in its submission (REP2-047 at page 7) was that
to negate the fact that ESW cannot lay pipes and the risk to the successful delivery of the LTC associated with a non-functioning TBM adequate rights are being sought via powers in the DCO.
- 3.9 Finally, the Applicant stated in that same paragraph that:
it was not its intention to impede ESW in their undertakings within the Linford Well site nor replace ESW as the controller of the site.

- 3.10 ESW considers that the use of compulsory powers in the dDCO to acquire rights over the plot linked to the supply of water for the TBMs is not necessary and it is ESW's view that the Applicant does not, in fact, have a compelling case in the public interest to include such powers consistent with section 122(3) of the Planning Act 2008.
- 3.11 There appears to be a misconception by the Applicant that it must acquire rights over the site to take its supply pipe (work MUT6) to make a connection directly with the Linford Well, because ESW does not have powers to lay the pipe. ESW itself does not have statutory powers to lay a brand new service pipe in third party land for a single customer, which is what is required here for work MUT6. However, ESW does have the necessary powers within plot 24-133 – which is its own operational land – to take a supply pipe from the Linford Well water supply to the site boundary, and that can connect to the Applicant's proposed work MUT6.
- 3.12 In ESW's view, the connection to MUT6, and ultimately to the Linford Well, can therefore be done from the boundary of the plot and done by agreement, and indeed that is being discussed within the separate works and supply agreement which ESW is willing to enter into on reasonable commercial terms. There is therefore no reason for the Applicant, by compulsion, to temporarily occupy the Linford Well site or to seek rights or other powers over it.
- 3.13 Mr Smith of the ExA raised queries as to the position regarding abstraction. Ms Anderson explained that, in legal terms, the Applicant does not have powers of abstraction so it cannot itself abstract water. It must be reliant on an existing abstraction licence. Currently, it is relying on the form of ESW's abstraction licence at the Linford Well. It cannot, by compulsory acquisition, secure that abstraction. It cannot, in legal terms, acquire the water under the land because the water under the land is said not to attach to the land; so if the Applicant acquires the land it does not mean it would acquire the water supply itself.
- 3.14 Mr Smith queried whether this means that unless the Applicant had an agreement with somebody who already holds an abstraction licence then it would require an application for an abstraction licence. Ms Anderson confirmed that was the case.
- 3.15 The further point here is that from ESW's point of view any powers in relation to the actual supply pipe from the Linford Well across plot 24-133 to the site boundary are not necessary because ESW has the necessary means to lay that piece of pipe within its own operational land.
- 3.16 The Applicant seems to be under the misconception that ESW cannot lay the pipe completely whereas the position is that ESW cannot lay the pipe in third party land. It does not have the necessary powers to do that (and on this see further paragraph 5.9 below) but clearly it can lay the pipe within its own boundary. To take powers over the plot does not make sense and those powers are not necessary.
- 3.17 ESW's view is that the connection to MUT6 and ultimately to the Linford Well can be done from the boundary of the plot and done by agreement, as is being discussed. Therefore, there is no reason to temporarily occupy or take rights over plot 24-133 to make that connection. This is the most crucial point.
- 3.18 Furthermore, under the terms of paragraph six of the protective provisions in Part 1 of Schedule 14 to the dDCO, the Applicant can only acquire ESW's apparatus by agreement. Therefore, if the Applicant were to make out a compelling case for the acquisition of a right over plot 24-133, which obviously ESW does not think it can, the Applicant still cannot itself make a connection directly to the Linford Well except with

ESW's agreement. The dDCO is predicated on the Applicant reaching agreement with ESW for the connection to the Linford Well to secure the supply of water, which ESW is willing to do on reasonable commercial terms. The actual supply of water is dependent on agreement; the applicant cannot use its compulsory powers for the supply because it is not possible to compulsorily acquire the water under the land.

- 3.19 The key point, therefore, is that as the connection to the well itself is – under the terms of the dDCO – reliant on agreement, ESW can see no compelling reason why the Applicant needs to secure compulsory powers over ESW's operational land for the final piece of pipe across ESW's site up to the well. That seems neither necessary nor proportionate.
- 3.20 Turning to the tests and guidance more generally, in ESW's view the Applicant has not demonstrated that all reasonable alternatives to compulsory acquisition have been explored, and that the interest sought is for a legitimate purpose, necessary and proportionate. The inclusion of powers should only be used as a last resort and here exercise of those powers will not fully address what the Applicant ultimately needs, which is to obtain a water supply for the TBMs.
- 3.21 Therefore, ESW does not consider that the Applicant has made out a compelling case in the public interest in relation to plot 24-133. Furthermore, the balance, in ESW's view, between the public benefit of acquiring rights over the well site for the construction of a transport scheme is not here to be weighed against a private loss to ESW. The balance is between the public interest of enabling construction of an NSIP road scheme, and the public interest of a statutory undertaker in being able to meet its statutory obligations, including a public water supply need under supply obligations required by the Secretary of State for Environment, Food and Rural Affairs, reflected in ESW's WRMP24.
- 3.22 For any compulsory powers extended over plot 24-133, in terms of section 127(5) of the Planning Act 2008, these have the potential to cause serious detriment for the carrying on of ESW's undertaking. Such powers, if exercised, will put doubt over ESW's control of or ability to occupy the site, so as to fulfil its statutory obligations, including ongoing monitoring and maintenance of the Linford Well and future public water supply obligations, and indeed in relation to water quality issues arising from contamination of the site or the source attributable to the LTC works.
- 3.23 The acquisition and exercise of rights over plot 24-133 has the potential to affect ESW's existing controls over the well site including monitoring and running to waste arrangements to prevent local flooding. These issues are covered in ESW's Written Representations in paragraphs 7.17 and 7.18.
- 3.24 In relations to obligations relating to WRMP24 and associated works required under that plan to bring the well back into public water supply use, if the powers currently in the order over plot 24-133 are exercised, there will be detriment to the carrying on of ESW's undertaking which cannot be made good by use of other land. There is no guarantee until boreholes are drilled and tested that other sites will actually yield the water supply envisaged. ESW therefore needs to retain uninterrupted control of the well site which is required for public water supply and to agree the terms on which it will supply water to the Applicant.
- 3.25 Finally, although water quality issues arising from contamination are not strictly related to compulsory acquisition, they are a further potential risk if the Applicant were to be in control of the Linford Well site.

- 3.26 Mr Smith queried whether ESW might be prepared to accept a protective provision that would frame and secure a regime of testing around water quality and an obligation on the Applicant to carry out and maintain water to relevant standards at relevant points in time.
- 3.27 Ms Anderson responded that as it set out in its Written Representations, ESW will require some mechanism to deal with monitoring at the well site, if its existing monitoring is not able to continue, and for arrangements, and indemnities if necessary, for any contamination or pollution which arises from something attributable to LTC. Quite where that would sit in the dDCO is not settled. It is not currently within the existing Requirements but there is some element of it which could be included within the Requirements. We had suggested previously having a dedicated article within the dDCO which deals with the Linford Well site and ESW's concerns. Certainly on compulsory acquisition, ESW will be expecting to have either a provision which removes plot 24-133 or to have qualifications on the exercise of powers over it. Ms Anderson asked the ExA to suggest what it would like to see on this.
- 3.28 Mr Smith explained that in his experience probably the simplest and clearest way of dealing with multi-factor elements that include a measure of protection is to deal with in protective provisions. He suggested a number of precedents for such protective provisions.
- 3.29 ESW notes that action point 2 from CAH4 requests that it consider the best mechanism to mitigate/resolve various concerns within the dDCO (e.g. whether a Protective Provision would be preferable to amendments to potentially multiple Articles). Its response is in submission ESW 12.
- 3.30 Ms Anderson returned to further points ESW wished to make. Although the Applicant stated in its Deadline 2 submissions that it does not intend to prevent access to or control of the Linford Well site, from ESW's point of view this mere intention without a legally binding commitment does not provide any comfort to ensure that ESW's statutory undertaking does not suffer serious detriment.
- 3.31 In relation to temporary occupation powers, although one can argue that these are not the same as outright compulsory acquisition or acquisition of rights, in ESW's view the same concerns arise whether there is temporary occupation or acquisition of rights over the plot.
- 3.32 In conclusion, the Applicant only needs to make a supply connection. ESW can and is willing to lay the necessary length of pipe within its own operational land for that. The dDCO requires the actual connection with the well only to be made with ESW's agreement. Since it is accepted that an agreement is needed for the actual connection there appears to be no reason for the rest of the pipe on plot 24-133 not to be dealt with in the same way. ESW has the necessary powers to lay that section of pipe on its own operational land. The Applicant, therefore, does not need to take powers to do so and cannot make out a compelling case in the public interest. The public interest balance must consider the potential loss or effect in relation to future public water supply and, in section 127(3) terms, such powers if granted and exercised, will cause ESW the serious detriment we have explained in our submissions.

4. Question (iii): What relief is sought?

- 4.1 This has already been dealt with but, as stated, if agreement cannot be reached, ESW is looking for the removal of all powers over the Linford Well site. This means the

removal of plot 24-133 from Schedule 8 and Schedule 11 to the dDCO and from sheet 24 of the Land Plans and the Book of Reference. ESW agreed to give more thought to the consequences of damage or pollution to the water source and whether protection should come through the protective provisions or in a more specific Article or Requirement in the dDCO –its response is in submission ESW 12.

5. The Applicant’s response and further issues arising

- 5.1 Ms Isabella Tafur and Mr Keith Howell responded on behalf of the Applicant.
- 5.2 ESW note from the responses given by Ms Tafur and Mr Howell that there appears to be agreement between the Applicant and ESW on a number of points. Firstly, Ms Tafur did not raise issue with ESW’s comment that it had not been consulted before plot 24-133 was included in the dDCO.
- 5.3 Additionally, Ms Tafur confirmed ESW’s understanding that the Applicant’s expectation is that ESW will remain as the abstraction licence holder and will undertake any monitoring as required under the licensed obligations. Similarly, the Applicant confirmed ESW’s understanding that the abstraction of water had always been intended to be dealt with through agreement with ESW. Finally, Ms Tafur very helpfully agreed that there is no objection in principle from the Applicant to an indemnity in favour of ESW.
- 5.4 ESW would like to raise, following its review of the transcript after CAH4, that its concerns about water quality appear to have been slightly misinterpreted in what Ms Tafur said. There appears that there was a suggestion that its concerns about water quality are limited to a single pond within SPZ1 (pond S10001). However, as has been outlined in detail in paragraphs 7.1 to 7.22 of its Written Representations, ESW’s concerns about water quality are more wide ranging than this, to cover both the construction and operational stages of the project.
- 5.5 During the Applicant’s response, Mr Howell gave an explanation of the possibility of an alternative water supply, and following this Mr Smith asked ESW whether if the Applicant were to apply as a customer to take from the potable water supply ESW would be obliged to provide such a supply in the volume the Applicant requires. He also asked whether there are any limitations as to the timescales ESW would be entitled to impose or whether ESW would have to deliver it when asked for it.
- 5.6 Mr Paul Kelly responded on behalf of ESW. He explained that in terms of ‘normal’ potable water supplies, then any customer is entitled to request a water supply. In a residential situation, that comes with no strings attached. In a commercial request for a non-domestic supply, as this one would be, there are caveats to the supply in that, under section 55 of the Water Industry Act, the water company is entitled to impose restrictions on the supply that govern the amount of water, for example, if that demand would place the company at risk of not being able to meet existing or future supplies to other customers. So a supply could be made available via the potable supply system and there is a process for that, but it does not guarantee that the substantial quantities the TBMs require – would necessarily be available by that route.
- 5.7 Ms Anderson responded to the Applicant’s submissions with three further points. The Applicant had indicated a meeting was due to take place on 2 November but Ms Anderson stated it will not be on that date but that ESW is hoping to arrange an alternative date as soon as possible.
- 5.8 The Applicant read out sections from the Statement of Common Ground (“SoCG”) that it submitted as part of the Application and made reference to the point about powers to lay the pipe. Ms Anderson pointed out, as was explained in ESW’s Relevant

Representations (RR-0797) at paragraph 8, that this SoCG was drawn up before ESW actually had sight of the dDCO. Therefore, we would stress that the comments made were before ESW saw that plot 24-133 was included within the Order limits.

- 5.9 As regards its powers, ESW does not have power to lay a supply pipe (such as MUT6) under the Water Industry Act 1991 was correct at the time it was made, based on ESW's understanding that the Well was not within the Order limits and therefore the pipe would be laid entirely in third party land. The power to lay pipes under section 159 of the Water Industry Act 1991 (WIA) relates to laying a service pipe or water main for making the general supply of water available to customers or potential customers of the undertaker. It does not extend to allow or impose a duty for a dedicated pipe to provide a supply to a single customer or building to be laid unless it is a direct replacement for a pipe already there. Similarly, the duty under section 46 to supply water to a single premises does not apply where there is no power to lay a service pipe. Nor can the powers of section 41 of the WIA be used because a supply requisition under that section must be for more than one building.
- 5.10 ESW clarified in the hearing that it has the necessary powers to lay a supply pipe within its own operational land at the well.
- 5.11 Finally, there was some discussion about necessary controls to groundwater and the Applicant suggested that there were adequate controls for the risk. ESW's point of view is that the difficulty with the contamination of a public water supply is that a risk, however small, remains a risk and ESW is left with no real recourse if that risk eventualises. The Secretary of State for Transport has acknowledged this in other circumstances. Therefore ESW welcomes the Applicant's comments that they accept the principle of an indemnity and look forward to discussing that with them in the further ongoing discussions.

Winckworth Sherwood LLP