

Lower Thames Crossing

Application for Development Consent Order

Deadline 8 submission on behalf of the Environment Agency

Re Article 68 of the draft Development Consent Order [REP7-090]

1. This is a short written submission on behalf of the Environment Agency (“**the Agency**”) further to the issue specific hearing on the draft Development Consent Order (“**DCO**”) on 28 November 2023.

2. As set out in the Agency’s written representations [REP1-225], it took issue with the acceptability of the Applicant’s proposal to override environmental controls in existing environmental permits. Article 68 of the draft DCO v9 [REP7-090] deemed there to be no breach of an existing environmental permit or any provision of the Environmental Permitting (England and Wales) Regulations 2016 (“**EPR**”) by the permit holder or the undertaker to the extent that there is any inconsistency or conflict between the existing permit and any works carried out under or in connection with the authorised development, or the exercise of any functions granted by the DCO. In its place, it provided for the submission of a scheme, on which the Agency would have limited control, and which would be treated as if it were a permit condition under EPR. The Agency’s position was that this approach was unacceptable because:
 - (1) It removed the requirement for consents or authorisations connected to environment permits under EPR;
 - (2) It therefore disappplied the established framework for the regulation of waste activities of which the Agency has expertise and experience;

- (3) In practice, the Agency does not consider that the application of ordinary EPR requirements where third party development affects existing environmental permits to be difficult or particularly problematic; and
- (4) Landfill sites (both hazardous and non-hazardous) in particular give rise to significant environmental risks that require the specialist skills and experience that the Agency has, as the designated regulator under EPR.
3. The Agency was therefore not prepared to agree to the inclusion of Article 68 as previously drafted, where such agreement is required under section 150 of the Planning Act 2008.¹
4. Nor does the Agency accept that provisions disapplying EPR as regards existing waste sites would generally be appropriate.
5. However, the Agency was prepared to agree alternative wording for Article 68 with the Applicant and as indicated to the Examining Authority on 28 November 2023 agreement was reached on a form of wording which is appended to this submission. That agreement was reached in the specific circumstances of this case, in light of the Applicant's specific concerns.
6. The alternative wording for Article 68 has the following principal advantages from the perspective of the Applicant (or undertaker):
- (1) It allows the undertaker to submit an environmental scheme to the Agency, subject to consultation with the permit holder;
- (2) It imposes an expedited timescale for consideration of that scheme by the Agency (56 days) in which to make a regulator initiated variation under EPR; and
- (3) It gives the undertaker a right to appeal if that timescale is not met or if it is unhappy with the conditions imposed, in addition to the permit holder.

¹ For the avoidance of doubt, the Agency does not accept the correctness of the (limited) analysis at paras.5.284-5.288 of the Explanatory Memorandum v5 [REP7-092].

7. From the perspective of the Agency, the alternative wording ensures that it retains control and the fundamental consideration in decision-making remains the Agency's duties under EPR.

5 December 2023

APPENDIX

Provision for existing waste operation permits

68.—(1) Before the undertaker carries out an authorised activity which would give rise to inconsistency or conflict with an existing permit, it may—

- (a) consult the Environment Agency and the permit holder on a draft environmental scheme,
- (b) amend that scheme as appropriate to take into account of representations received; and
- (c) submit the final scheme to the Environment Agency, and serve a copy of that scheme on the permit holder,

but if the undertaker decides not to submit an environmental scheme, it must give reasonable notice to any permit holder to enable appropriate steps to be taken to ensure it continues to be able to comply with its permit.

(2) The Environment Agency must within 56 days (or such other period as the undertaker and the Environment Agency may agree) of receipt of the final scheme under subparagraph (1)(c) make a regulator initiated variation to the relevant existing permit.

(3) The Environment Agency must, subject to its duties under the 2016 Regulations, ensure that the regulator initiated variation referred to in paragraph (2) –

- (a) allows the authorised activity to be carried out in accordance with the environmental scheme; and
- (b) minimises the need for any future variations to the existing permit arising from an authorised activity.

(4) In relation to a regulator initiated variation made pursuant to this article, the 2016 Regulations are to be construed so that—

- (a) regulation 20(2) does not apply where the Environment Agency (or, in the case of an appeal, the appropriate authority) agrees that the conditions in paragraph 14(a) and (b) of Part 1 of Schedule 5 to the 2016 Regulations are satisfied by the environmental scheme;
- (b) where a regulator initiated variation made pursuant to this article includes provision to reduce the extent of the site of a regulated facility, an application for a surrender of a permit in respect of land which, by virtue of that variation, is no longer the site of a regulated facility will not be required;
- (c) paragraph 8 of Part 1 of Schedule 5 to the 2016 Regulations does not apply;
- (d) paragraph 9 of Part 1 of Schedule 5 to 2016 Regulations does not apply so as to require notice to be served on the undertaker;
- (e) both the undertaker and the permit holder have a right of appeal under regulation 31(1)(c)(i);
- (f) if the Environment Agency fails to comply with paragraph (2), the undertaker may serve a notice under paragraph 15(1) of Part 1 of Schedule 5 of the 2016 Regulations and the undertaker may then appeal under regulation 31(1)(a), as if the failure were a refusal of an application under the Regulations;
- (g) the appropriate authority for the purposes of regulation 31 is the Secretary of State for Transport;
- (h) the permit holder shall be served with a copy of an appeal made by the undertaker within 14 days of it being lodged and shall have the right to make representations and appear at the appeal as an interested party; and
- (i) no requirements relating to publicity of an appeal apply.

(5) Charges that would otherwise apply to a regulator initiated variation under the charging scheme are substituted by a requirement for the undertaker to pay to the Environment Agency its reasonable costs incurred in connection with paragraphs (1) to (3) of this article.

(6) Regulation 25 of the 2016 regulations is to be construed to allow the undertaker to make an application, following consultation with the permit owner and the Environment Agency, to surrender in whole or in part an existing permit in respect of land which has been, or is proposed to be, compulsorily acquired by the undertaker under this Order.

(7) If a surrender application is made under paragraph (6) the undertaker must pay the surrender application charge that would otherwise have been payable by the permit holder under the charging scheme and regulation 31 of the 2016 Regulations is construed so that the undertaker may exercise the appeal rights associated with the application in place of the permit holder.

(8) In the case of a surrender application under paragraph (6) or a determination under paragraph 4(a) the requirement in paragraph 14(b) of Part 1 of Schedule 5 to the 2016 Regulations is to be construed so that regard is also had to the use of the site subject to the application in connection with an authorised activity.

(9) Nothing in this article affects—

(a) the requirement under the 2016 Regulations for a regulated facility to be authorised by an environmental permit; or

(b) the right of a permit holder to make an application for a variation or surrender of an environmental permit under the 2016 regulations.

(10) In this article—

“2016 Regulations” means the Environmental Permitting (England and Wales) Regulations 2016 and unless otherwise specified, expressions used in this article have the same meaning as in the Regulations;

“authorised activity” means any works or activities authorised by this Order, works carried out in connection with the authorised development, or the exercise by the undertaker of functions conferred by this Order;

“charging scheme” means the Environment Agency (Environmental Permitting and Abstraction Licensing) (England) Charging Scheme 2022, and includes any subsequent amendment to that scheme or any new scheme;

“environmental scheme” means a written scheme containing appropriate measures to ensure –

(a) the continued effective operation of the existing permit;

(b) the methods to be used to remove or separate existing waste from land subject to an existing permit or land on which an authorised activity is carried out;

(c) monitoring of land, air and water, equivalent to that required under existing permit and measures relating to surrender which arise as a result of an authorised activity;

(d) continued access arrangements, including in relation to monitoring, for the permit holder in connection with land retained by the permit holder which remains subject to the existing permit and

(e) an equivalent level of environmental protection to that which would be provided by either the existing permit or permit conditions complying with Schedules 7, 9 and 10 of the Regulations; and

“existing permit” means any environmental permit in respect of a waste operation whether granted under the 2016 regulations (or any predecessor or substituted regulations) before or after the coming into force of this Order granted by the Environment Agency on or over the Order limits, excluding any environmental permit obtained by the undertaker.