

Representations by Highways England in respect of the proposed Port Terminal at the Former Tilbury Power Station “Tilbury 2”

1. These are the Relevant and Written Representations of Highways England in respect of the application by Port of Tilbury London Limited (the Applicant) for a Development Consent Order (DCO) for a new harbour facility and associated development including an infrastructure corridor (rail and road) at the former Tilbury Power Station in Essex.
2. Highways England has been appointed by the Secretary of State for Transport as a strategic highway company under the provisions of the Infrastructure Act 2015 and is the highway authority, traffic authority and street authority for the Strategic Road Network (SRN). The SRN is a critical national asset and as such Highways England works to ensure that it operates and is managed in the public interest, both in respect of current activities and needs as well as in providing effective stewardship of its long-term operation and integrity. In the vicinity of the Proposed Development the SRN comprises the M25 Motorway, the A282 all-purpose road and parts of the A13 and A1089 all-purpose roads. It is also worthy of note and relevant to the proposed Development Consent Order that the SRN in the vicinity of the Proposed Development is subject to a Design Build Finance and Operate (DBFO) contract. The contract was awarded in 2009 and has a duration of 30 years.
3. At the outset Highways England wishes to record that the Applicant did not consult Highways England on the draft DCO prior to its publication.
4. Highways England’s main areas of concern or disagreement with the Proposed Development and associated Development Consent Order are as follows:

A1. The Applicant has failed to demonstrate that the Proposed Development will not result in severe harm to the safe and efficient operation of the Strategic Road Network.

A1.1. It is of particular concern that, despite discussion having been underway since April 2017, the Applicant has not yet provided Highways England with persuasive evidence in respect of the amount of traffic generated by the Proposed Development. This means that Highways England is unable to advise the Secretary of State that the Proposed Development will not cause an unacceptable impact on the safe and effective operation of the SRN and/or that any mitigation proposed is adequate.

A1.2. In the event that persuasive evidence is not provided Highways England submits that the Applicant should carry out sensitivity tests to identify mitigation requirements for a range of traffic generation. The draft DCO should then contain Requirements to monitor traffic once the Proposed Development is in operation and to implement the appropriate mitigation for the observed traffic level. As stated in 2.2.9 of the Transport Assessment the Ports National Policy Statement is supportive of this approach:

“Obligations or requirements should be structured flexibly so as to keep to a reasonable minimum the risk that either applicants or network providers would be required to incur costs providing infrastructure that turned out to be under-used. Such measures might include various mechanisms, such as traffic-level triggers, shadow-tolling and/or escrow arrangements to guarantee funding.”

A1.3. The Applicant proposes work to Asda roundabout but, as a result of the lack of evidence to support the traffic generation in the Transport Assessment the following items are still under discussion between the Applicant and Highways England:

- i. The traffic generated by the Proposed Development
- ii. The points on the Strategic Road Network where mitigation is required
- iii. The mitigation required at those points
- iv. The design of mitigation works
- v. The timing of delivery of mitigation relative to the programme for delivery of the Proposed Development.

A1.4. In addition the draft DCO should be amended to include operational parameters for the Proposed Development above which further planning permission (whether by an amendment to the DCO or by a permission under the Town and Country Planning Act) including an assessment of the additional impact on the SRN would be required.

A1.5. In respect of Asda roundabout Highways England has concerns that the proposed mitigation is insufficient to mitigate the additional traffic from the Proposed Development and does not provide suitable safe facilities for pedestrians and cyclists. Highways England also believes that a change to the speed limit at the roundabout may be necessary.

A1.6. In respect of M25 Junction 30 it should be noted that the Section 106 agreement for the London Gateway Logistics Park Local Development Order https://www.thurrock.gov.uk/sites/default/files/assets/documents/ldo_report_making_20131023_app3.pdf sets out triggers for improvements to Junction 30 based on flows 'at the gate' of the Logistics Park, which is a similar distance from Junction 30 as the Proposed Development. In the absence of evidence to the contrary from the Applicant it appears likely to Highways England that the traffic generated by the Proposed Development will trigger the need for improvements at M25 Junction 30 over and above those agreed for the London Gateway Logistics Park.

A1.7. Depending on the evidence of traffic generated by the Proposed Development mitigation may also be needed to other parts of the Strategic Road Network.

A1.8. In addition the Applicant has not completed the design of drainage and flood risk assessments to a stage where Highways England can be satisfied that the Proposed Development would not result in severe harm to the safe and efficient operation of the Strategic Road Network.

A1.9. Discussions on these matters are ongoing between the Applicant and Highways England. Until these discussions are concluded the impact of the Proposed Development on the Strategic Road Network following mitigation cannot be established. If the Proposed Development would result in severe harm to the safe and efficient operation of the Strategic Road Network, consent should be refused.

A2. The draft DCO is not sufficiently clear in respect of the roles and responsibilities that would apply on the Strategic Road Network when the proposed Works were being undertaken on or near it. The powers being sought by the Applicant, in going beyond those that would accrue to a statutory undertaker under the 1991 Act, would prevent Highways England discharging its statutory duties.

A2.1. Work No 11 is described in the draft DCO as “the improvement of a highway known as the Asda Roundabout.” Pursuant to the construction of the Work the Applicant (Schedule 6) seeks temporary possession of land for working space and to undertake works to improve the Asda roundabout and its slip roads, including to associated footways, cycleways and utilities.

A2.2. Article 27(4) of the draft DCO may be construed to have the effect of extinguishing the rights of Highways England over the land for as long as the Company remains in lawful possession of the land.

A2.3. Article 9(3) of the draft DCO, in seeking to disapply section 56 of the 1991 Act (power of a street authority to give directions to avoid or reduce serious disruption to traffic); cuts across the ability of Highways England to fulfil its duty to secure the expeditious movement of traffic on the strategic road network and to facilitate the expeditious movement of traffic on road networks for which another authority is the traffic authority (s16 of the Traffic Management Act 2004) and to coordinate works (s59 of the 1991 Act)

A2.4. The effect of the draft Development Consent Order therefore appears to be to deny Highways England (and Thurrock Council as local highway authority in respect of areas of local road within Work No 11) access to the Asda Roundabout during the time that the Company is in possession of it and to restrict the ability of Highways England to manage works on the SRN. Highways England cannot have certainty that it will be able to fulfil its duties as a highway, street and traffic authority for the area of Work No 11.

A2.5. The draft DCO should be amended to ensure that the relevant highway, street or traffic authority has adequate access to the street or highway and control over Work No 11 to discharge its responsibilities, where necessary balancing the Applicant's interests against those who also have a right to carry out works on the SRN.

A2.6. The draft DCO should be altered to allow Highways England to take over Work No 11 from the Applicant and complete it at the Applicant's expense, in the event that the Applicant fails to progress the Work safely and with reasonable speed. The public should not be subject to danger and avoidable delay and inconvenience.

A2.7. Similar considerations should apply to any other mitigation works on the SRN.

A3. The draft DCO is wholly inadequate to protect the reasonable interests of Highways England.

A3.1. Substantial alterations are needed to the draft DCO to protect the reasonable interests of Highways England. These extend to the body of the DCO as well as to the Protective Provisions proposed specifically for the benefit of Thurrock Council and Highways England. We are in ongoing discussions with the Applicant in respect of the principles of how and by whom Work No 11 and any other mitigation works to the SRN should be implemented. Further discussion is also required to protect Highways England's interests during construction. The Explanatory Memorandum to the draft DCO states that a broad scope is "considered necessary in light of the early design stage the Scheme is at as maximum construction flexibility is required" (paragraphs 5.34 and paragraph 5.48). As discussions have not yet been commenced, it would be premature to propose specific alterations to the draft DCO at this stage. It is hoped however that substantial alterations can be agreed with the Applicant.

A3.2. If we are unable to reach agreement with the Applicant Highways England will submit proposed alterations to the draft DCO and ask that the Examining Authority consider them for inclusion in place of those currently in the draft DCO. Broadly we anticipate these alterations would follow the model in The East Midlands Gateway Rail Freight Interchange and Highway Order 2016 with additional provisions to take into account the special circumstances of the DBFO contract that applies to this part of the SRN. The East Midlands Gateway Rail Freight Interchange and Highway Order 2016 provides for the undertaker to carry out the works to the SRN but affords Highways England the control necessary to discharge our responsibilities.

A3.3. We acknowledge that the scale of works to the SRN permitted by the East Midlands DCO is much greater than that proposed in the draft DCO. However many of the provisions are required irrespective of the scale of works, for example the provision of 'as built' drawings and information.

5. Within these main areas there we have numerous other areas of concern or disagreement, these include the following:

B1. The draft DCO does not make adequate provision for the safe construction and subsequent operation of mitigation works to the SRN.

B1.1. The draft DCO should provide that all aspects of the Construction (Design and Management) Regulations 2015 or any statutory amendment or variation of the same are adhered to. In particular the Applicant must ensure that all client duties (as defined in the said Regulations) are satisfied and must indemnify Highways England against all claims, damages, costs, losses, liabilities and actions arising out of a failure to do so.

B2. The draft DCO does not provide for works to the Strategic Road Network to be assessed, designed and constructed in accordance with the Design Manual for Roads and Bridges (DMRB).

B2.1. Paragraph 11 of Department for Transport Circular 02/2013 requires developers' proposal on or affecting the Strategic Road Network to conform to the Design Manual for Roads and Bridges (DMRB). It is expected that detailed design of mitigation works to the Strategic Road Network will continue after any Development Consent Order is made. Therefore the draft Development Consent Order should be amended to require works on or affecting the Strategic Road Network to conform to the Design Manual for Roads and Bridges (DMRB).

B3. Clarity is needed about what the maintenance and other ongoing responsibilities of the Company would be following completion of Work No 11.

B3.1. Article 10(1) of the draft DCO requires the Company to maintain Work No 11 for a period of 12 months from its completion.

B3.2. The word 'maintain' needs clarity to ensure that routine maintenance of the highway is clearly the responsibility of Highways England after completion. The draft DCO should be amended as set out in A2.5 above to ensure that Highways England has the necessary access and control to fulfil its routine maintenance and other duties during the maintenance period.

B3.3. Also 12 months is an insufficient maintenance period for elements such as planting.

B3.4. Also DMRB requires a Stage 4 Road Safety Audits to be carried out 12 and 36 months after completion. Taking into account the need to identify and implement any remedial measures arising from the Stage 4 Audit, the Applicant's liability for the works is likely to extend well beyond 36 months. The draft DCO should be amended to reflect this liability and ensure that the necessary safety works are carried out at the Applicant's expense.

B4. The draft DCO does not indemnify Highways England against claims by third parties resulting from activities by the Company.

B4.1. Article 20(5) requires the Company to compensate the owners and occupiers of the land for any loss or damage arising from surveys conducted under Article 20(1).

B4.2. The draft DCO should be amended to further require the Applicant to indemnify Highways England against all claims, costs etc. arising out of or in connection with the carrying out or use of Work No 11, including claims made by third parties under the Land Compensation Act and Noise Insulation Regulations..

B4.3. Similarly the draft DCO should require the Applicant to take out and maintain public liability insurance at an appropriate level to cover claims arising out of or in connection with Work No 11.

B5. The provisions in the draft DCO relating to the reimbursement of costs incurred by Highways England are inadequate and would result in a cost to the public purse.

B5.1. Article 10(1) of the draft DCO requires any street constructed under this Order must be completed to the reasonable satisfaction of the street authority but makes no provision for the inspection of Work No 11 by Highways England during construction. Section 70 of the 1991 Act contains a duty to reinstate and Section 75 of the 1991 Act provides for inspection fees. However these provisions are inappropriate for Work No 11 which is a highway improvement and which requires a higher standard of inspection than would be the case for a streetwork.

B5.2. The draft DCO should be amended to afford Highways England the right to inspect Work No 11 at any time during its construction and for all reasonable costs incurred by Highways England to be reimbursed by the Applicant.

B5.3. Paragraph 78 of Schedule 10 Part 7 of the draft DCO requires the Company to submit proper and sufficient plans to the appropriate authority for its approval, but does not contain any provision for the reimbursement to the authority of its costs in considering those plans and responding to the Company. The draft DCO should be amended to require the Applicant to reimburse Highways England for all reasonable costs incurred by Highways England. The draft DCO should require the Applicant to provide funds in advance to cover Highways England's reasonable costs and the time limit contained in paragraph 79 should cease to have effect when the funds held by Highways England are insufficient to cover Highways England's costs in considering the plans submitted.

B5.4. The draft DCO should also require the Applicant to provide a bond or cash security at an appropriate level to ensure Highways England (and therefore the public purse) are covered against the possibility of the Company failing to properly complete Work No 11 or meet the costs of Highways England,

B6. The content of the draft DCO in respect of Traffic Regulation Orders is inadequately drafted and does not properly protect the interests of Highways England and third parties.

B6.1. The Applicant should provide evidence that the police have been specifically consulted on any difficulties in enforcing the proposed Traffic Regulation Orders (TROs) and their response.

B6.2. The proposals in draft DCO Art 51 (3) and (4) are unacceptable to Highways England as they would result in interested parties having fewer opportunities to be aware of and object to modifications to the proposed TROs than would be the case if those TROs were proposed under the Road Traffic Regulation Act. It is incumbent on the Applicant to include in the draft DCO all TROs that are foreseeable, so that third parties have the opportunity to make representations against the draft DCO. If the Applicant fails to foresee the need for TROs or if those TROs are deficient, then the process for making, revoking or revising TROs contained in The Secretary of State's Traffic Orders (Procedure) (England and Wales) Regulations 1990 should be followed.

B6.3. Schedule 19 paragraph 3 of The East Midlands Gateway Rail Freight Interchange and Highway Order 2016 provides that temporary Traffic Regulation Orders will be made by Highways England rather than the undertaker. Schedule 19 paragraph 5(3) of the same Order, whilst referring to payments, demonstrates that Order envisages that any Traffic Regulation Orders other those specifically in the Order will be made by Highways England rather than the undertaker.

B6.4. The draft DCO should also contain provisions for a traffic authority to notify the Applicant, for a period of two years after the Proposed Development first comes into operation, that the authority proposes to promote new or to alter existing TROs on a street affected by traffic from the Proposed Development in order to mitigate the impact of the Proposed Development on that street. The cost of promoting and implementing such new or altered TROs should be met by the Applicant.

B6.5. Article 51(2) of the draft DCO provides an exclusion from speed limits but no exclusions are provided for clearways and other restrictions. The Applicant should amend the draft DCO to provide suitable exclusions in consultation with the police and street authorities. Article 19 of The East Midlands Gateway Rail Freight Interchange and Highway Order 2016 provides a good starting point.

B7. The draft DCO fails to have regard to contractual relationship between Highways England and the DBFO contractor for the SRN in the vicinity of the Proposed Development.

B7.1. There is a contractual requirement for the DBFO contractor to respond to request from Highways England in 28 days. All 'guillotine' clauses in the draft DCO relating to the SRN should be increased to 56 days in order that Highways England has adequate time to consider the response from the DBFO contractor before replying to the Applicant.

B7.2. The draft DCO should make explicit that the Applicant will compensate Highways England for any sums that are properly claimed by the DBFO contractor arising as a result of or in connection with Work No 11 and should acknowledge that the provisions of the third party additional works provisions of the DBFO contract must be complied with.

B8. The compensation payable by the Applicant to Highways England should include a commuted lump sum for additional maintenance costs.

B8.1. The proposed works to Asda roundabout and any other mitigation to the Strategic Road Network will result in Highways England incurring additional maintenance costs in the future. In line with normal practice and to avoid this additional cost falling on the public purse, the draft DCO should require the Applicant to provide a commuted lump sum to Highways England. This lump sum should reflect the additional sums that become due under the DBFO contract in the period up to the end of that contract and typical values thereafter, including administrative costs in all cases

B9. The draft DCO does not contain any provision for the collection of data by the Applicant and its transfer to Highways England.

B9.1. In order to maintain a safe and efficient network and make best use of public money, Highways England operates a rigorous system of Asset Management which includes the collection and storage of data to fixed formats. The draft DCO should require the Applicant to collect data in the required format and transfer it promptly to Highways England. The nature of the data to be collected and transferred will depend upon how and by whom works to the SRN are delivered.

B9.2. The draft DCO should also allow Highways England access to the area covered by work 11 to inspect the SRN and collect data.

B10. There is lack of certainty as to whether Traffic Regulation Orders created by a DCO can subsequently be modified by the procedures in the 1984 Act. The draft DCO should be amended for the avoidance of doubt in this case.

B10.1. Article 19(7) of The East Midlands Gateway Rail Freight Interchange and Highway Order 2016 provides helpful wording.

B11. There is lack of certainty as to whether highway Works permitted by a DCO can subsequently be modified by the procedures in the 1980 Act. The draft DCO should be amended for the avoidance of doubt in this case.

B12. The draft DCO allows the Applicant to carry out works to Asda roundabout in perpetuity.

B12.1. Article 41(2)(b) of the draft DCO allows the Company from time to time within the Order limits construct, carry out and maintain such other works as may be necessary or convenient for the purposes of, or in connection with or in consequence of, the construction, maintenance, operation or use of the authorised development,

B12.2. The Asda Roundabout is within the Order limits so that as written the Company may in perpetuity carry out works to Asda roundabout. As drafted the DCO is unacceptable. The SRN, like the River Thames, should be excluded from the provisions for ongoing construction, maintenance and operation.

B13 Protective Provisions needed to protect the interests of respectively Thurrock Council and Highways England are likely to differ and should be separated in the draft DCO.