



The Planning Inspectorate
The Square Temple Quay
Bristol
Avon
BS1 6PN

Our ref: AE/2018/122977/01-L01
Your ref: *
Date: 03 July 2018

Dear Sir/Madam

APPLICATION BY PORT OF TILBURY LONDON LIMITED FOR AN ORDER GRANTING DEVELOPMENT CONSENT FOR A PROPOSED PORT TERMINAL AT THE FORMER TILBURY POWER STATION (TILBURY 2) - DEADLINE 5, FORT ROAD, TILBURY, ESSEX, RM18 7NR

Thank you for the opportunity to comment further on the application for the Development Consent Order for the proposed Tilbury 2 development.

In this letter we set out our comments in regards to the third draft Development Consent Order and provide an update in respect to the revised Environmental Mitigation and Compensation Plan (EMCP) dated 19 June 2018.

Development Consent Order

We have considered the latest draft of the Development Consent Order (DCO) reference number PoTLL/T2/EX/109 submitted by the applicant.

The applicant seeks to disapply certain legislation within the Environment Agency's remit. We have indicated to the applicant that we are content to do so in principle subject to satisfactory protective provisions being agreed. We discussed this issue further with the applicants after the hearing on 28 June and it was agreed to try to resolve this issue we would amend the draft provisions in the order to bring them in line with the Environment Agency's preferred form of protective provisions, which we sent to the applicant in March. Accordingly we returned a marked up version of the draft protective provisions currently in the draft DCO to the applicants on 3 July. These are attached to this letter for the Examining Authority's information. We hope these can be agreed and will inform the Examining Authority in due course whether agreement has been reached.

We are content with the conditions included in the Deemed Marine Licence which will address the concerns in relation to dredging and water quality that we raised in our

letter dated 20 March 2018, referenced AE/2018/122594.

Ecological Mitigation and Compensation Plan

We previously commented on an earlier draft of the Ecological Mitigation and Compensation Plan (EMCP) in our response dated 28 April 2018, reference AE/2018/122655, the comments in that response still remain valid. We have reviewed the updated EMCP, reference PoTLL/T2/EX/113 and our comments are outlined below.

We welcome the inclusion of fish and eel passages being retained under any crossings installed during the development of Tilbury 2. Additionally we note that we will have the opportunity to approve the detailed designs of eel-friendly control structures (eel flaps) via our Protective Provisions. We understand that a stand-alone application, reference 18/00448/FUL, to create new water vole habitat has recently been approved by Thurrock Council. We were consulted in regards to this application and were satisfied that it would provide suitable habitat for water voles relocated from the Tilbury 2 site.

Following a teleconference on 2 May 2018, we have been provided with a document entitled Tilbury 2 Thames outfall: note on ecological impacts and proposed mitigation (June 2018). As a result this further engagement we are now in a position to accept, in principle, the applicant's proposed mitigation in regards to intertidal habitat. We will continue to work with the applicant to review more detailed proposals and methodology as they are developed.

As there are plainly matters of importance to us in the ECMP which must be secured in the DCO we would ideally like to see a version of the ECMP produced before the end of the examination which can be certified by the Secretary of State. However if this is not possible we would like to be one of the statutory bodies to be consulted on any changes to the draft ECMP.

Yours faithfully



Mr. Pat Abbott
Planning Advisor

Direct dial 0208 4748011

Direct e-mail pat.abbott@environment-agency.gov.uk

End

PART 1

FOR THE PROTECTION OF THE ENVIRONMENT AGENCY

38. The following provisions apply for the protection of the Environment Agency unless otherwise agreed in writing between the Company and the Agency, in relation to construction of the authorised development and, within any maintenance period defined in article 33, any maintenance of any part of the authorised development.

Comment [BC1]: Given the maintenance period is limited to 5 years I think we can probably agree this but am taking instructions

Definitions

39. In this Schedule—

“the Agency” means the Environment Agency;

“authorised work” means any work forming part of the authorised development;

“construction” includes execution, placing, altering, replacing, relaying, removal and excavation and “construct” and “constructed” is to be construed accordingly;

“damage” includes (but is not limited to) scouring, erosion, loss of structural integrity and environmental damage to any drainage work or any flora or fauna dependent on the aquatic environment, and “damaged” is to be construed accordingly;

“drainage work” means any main river and includes any land which provides or is expected to provide flood storage capacity for any main river and any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage, flood defence or tidal monitoring or flood storage capacity;

“environmental duties” means the Agency’s duties in the Environment Act 1995, the Natural Environment and Rural Communities Act 2006 and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 (SI 2017 no 407);

“fishery” means any waters containing fish and fish in, or migrating to or from such waters and the spawn, spawning grounds or food for such fish;

~~“flood defence” means any bank, wall, embankment, bridge abutments, lock gates or other structure or any appliance (including any supporting anchorage system) that fulfils a function of preventing, or reducing the risk of, flooding to land or property;~~

~~“flood storage capacity” means any land, which, taking account of the flood defences, is expected to provide flood storage capacity for any main river;~~

Comment [BC2]: I think the definition in our Standard PP is simpler so have added this wording to the definition of ‘drainage work’ and deleted the above definition of flood defence which I don’t think we need?

“main river” “means all watercourses shown as such on the statutory main river maps held by the Agency and the Department of Environment, Food and Rural Affairs, including any structure or appliance for controlling or regulating the flow of water into, in or out of the channel;

“maintenance” has the same meaning as in article 2, save for the exclusion of the works of inspection;

“plans” includes sections, drawings, specifications, associated pre-construction ground investigation methodologies and method statements; and

“specified work” means so much of any permanent or temporary work or operation forming part of the authorised work (other than works required in an emergency) as is in, on, under or over a main river or drainage works or within 16 metres of a drainage work or is otherwise likely to—

- (a) affect any drainage works or the volumetric rate of flow of water in or flowing to or from any drainage works; or
- (b) affect the flow, purity or quality of water in any main river or other surface waters or ground water; or
- (c) cause obstruction to the free passage of fish or damage to any fishery; or
- (d) affect the conservation, distribution or use of water resources; or
- (e) affect the conservation value of the main river and habitats in its immediate vicinity.

Specified works

40.—(1) Before commencing construction of a specified work (excluding any piling works which comprise a “licensable marine activity” as defined in the 2009 Act), the Company must submit to the Agency for its written approval—

- (a) plans of the specified work together with the details of the positioning of any structure within the main river;
- (b) such further particulars as the Agency may within 208 business days of the receipt of the detailed designs reasonably require.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the Agency under subparagraph (1), or settled in accordance with paragraph 467 where applicable, and in accordance with any reasonable conditions or requirements specified under this paragraph.

(3) Any approval of the Agency required under this paragraph—

- (a) must not be unreasonably withheld;
- (b) is deemed to have been givenrefused if it is neither given nor refused within 8 weeks of the submission of the plans or within 4 weeks of the

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Comment [BC3]: Deemed refusal accepted by TfL in Silvertown Tunnel DCO – point argued before Panel on J10A M20 and Inspector agreed with EA that deemed refusal appropriate as consistent with EPR 2016m

receipt of further particulars if such particulars have been required by the Agency for approval;

- (c) in the case of a refusal, must be accompanied by a statement of the grounds of refusal; and
- (d) may be given subject to such reasonable requirements or conditions as the Agency may make for the protection of any drainage work, flood defence, fishery, main river or water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

(4) The Agency must use its reasonable endeavours to respond to the submission of any plans before the expiration of the period mentioned in sub-paragraph (3)(b).

(5) Without limitation on the scope of sub-paragraph (3)(d) the requirements or conditions which the Agency may make under that paragraph include conditions requiring the Company at its own expense to construct such protective works (including any new works as well as alterations to existing works) whether temporary or permanent before or during construction of the specified work (including provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of banks, walls or embankments) as are reasonably necessary—

- (a) to safeguard any drainage work or flood defence against damage;
- (b) to secure that its efficiency or effectiveness for flood defence purposes is not impaired; or
- (c) to ensure the risk of flooding is not otherwise increased by reason of any specified work, maintenance work or protective work,

during the construction of or by reason of any specified work.

(6) Any dispute in respect of any approval or refusal under this paragraph is subject to the dispute resolution procedure in paragraph 467.

Construction and inspection

41.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the Agency under paragraph 40 must be constructed—

- (a) without unnecessary or unreasonable delay;
- (b) in accordance with the plans approved or deemed to have been approved or settled under this Part of this Schedule; and
- (c) to the reasonable satisfaction of the Agency,

and an officer of the Agency is entitled to watch and inspect the construction of such works.

(2) The Company must give to the Agency not less than 104 business days' notice in writing of its intention to commence construction of any specified

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work and notice in writing of its having been brought into use not later than five business days after the date on which it has been completed.~~is been brought into use.~~

~~(2)~~(3) If the Agency reasonably requires the Company must construct all or part of the protective works so that they are in place prior to the construction of any specified work.

~~(3)~~(4) If any part of a specified work or any protective work required by the Agency is constructed otherwise than in accordance with the requirements of this Part of this Schedule, the Agency may by notice in writing require the Company, at the Company's own expense, to comply with the requirements of this Part of this Schedule or (if the Company so elects and the Agency in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and, where removal is required, to restore the site to its former condition to such extent and within such limits as the Agency reasonably requires.

~~(4)~~(5) Subject to sub-paragraph (34) if, within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (34) is served upon the Company, it has failed to begin taking steps to comply with the requirements of the notice and subsequently to make reasonably expeditious progress towards their implementation, the Agency may execute the works specified in the notice and any expenditure incurred by it in so doing is recoverable from the Company.

~~(5)~~(6) In the event of any dispute as to whether sub-paragraph (34) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the Agency must not except in an emergency exercise the powers conferred by sub-paragraph (45) until the dispute has been finally determined.

Maintenance of drainage works

42.—(1) Subject to sub-paragraph (56), the Company must from the commencement of the construction of a specified work until its completion ("the maintenance period"), maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land held by the Company for the purposes of or in connection with the specified work, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any such drainage work which the Company is liable to maintain is not maintained to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the Company, or (if the Company so elects and the Agency in writing consents, such consent not to be unreasonably withheld or

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delayed), to remove the work and restore the site to its former condition, to such extent and within such limits as the Agency reasonably requires.

(3) If, within a reasonable period being not less than 208 business days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on the Company, the Company has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the Agency may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the Company.

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(3)(4) If there is any failure by the Company to obtain consent or comply with conditions imposed by the Agency in accordance with these Protective Provisions the Agency may serve written notice requiring the Company to cease all or part of the specified works and the Company must cease the specified works or part thereof until it has obtained the consent or complied with the condition unless the cessation of the specified works or part thereof would cause greater damage than compliance with the written notice.

(4)(5) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the Agency must not except in a case of emergency exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined.

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(5)(6) This paragraph does not apply to—

- (a) drainage works which are vested in the Agency, or which the Agency or another person is liable to maintain and is not proscribed by the powers of this Order from doing so; and
- (b) any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this Part of this Schedule.

Alternative Access

43. If by reason of construction of the specified work the Agency's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, the Company must provide such alternative means of access that will allow the Agency to maintain the flood defence or use the equipment no less effectively than was possible before the obstruction within 24 hours of the Company becoming aware of such obstruction.

Emergency powers

~~43.44.~~—(1) Subject to sub-paragraph (2), if by reason of the construction of any specified work or of the failure of any such work the efficiency of any drainage work for flood defence purposes is impaired, or that drainage work is otherwise damaged, such impairment or damage must be made good by the Company to the reasonable satisfaction of the Agency.

(2) If such impaired or damaged drainage work is not made good to the reasonable satisfaction of the Agency, the Agency may by notice in writing require the Company to restore it to its former standard of efficiency or where necessary to construct some other work in substitution for it.

(3) If, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of impaired or damaged drainage work is served under sub-paragraph (2) on the Company the Company has failed to begin taking steps to comply with the requirements of the notice and has not thereafter made reasonably expeditious progress towards its implementation, the Agency may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from the Company.

~~(3)~~(4) In any case where immediate action by the Agency is reasonably required in order to secure that imminent flood risk or damage to the environment is avoided or reduced, the Agency may take such steps as are reasonable for the purpose and may recover from the Company the reasonable cost of so doing.

~~(4)~~(5) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph ~~(4)~~(2), the Agency must not except in a case of immediate foreseeable need exercise the powers conferred by sub-paragraph (1) until the dispute has been finally determined in accordance with paragraph ~~46~~7.

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Free passage of fish

~~44.45.~~—(1) The Company must take all such measures as may be reasonably practicable to prevent any interruption of the free passage of fish in the fishery during the construction of any specified work.

(2) If by reason of—

- (a) the construction of any specified work; or
- (b) the failure of any such work,

damage to the fishery is caused, or the Agency has reason to expect that such damage may be caused, the Agency may serve notice on the Company requiring it to take such steps as may be reasonably practicable to make good the damage, or, as the case may be, to protect the fishery against such damage.

(3) If within such time as may be reasonably practicable for that purpose after the receipt of written notice from the Agency of any damage or expected damage to a fishery, the Company fails to take such steps as are described in sub-paragraph (2), the Agency may take those steps and may recover from the Company the expense reasonably incurred by it in doing so provided that the notice specifying those steps is served on the Company as soon as is reasonably practicable after the Agency has taken, or commenced to take the steps specified in the notice.

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Indemnities and Costs

~~45.46.~~—(1) The Company must indemnify the Agency in respect of all costs, charges and expenses which the Agency may reasonably incur or have to pay or which it may sustain—

(a) in the examination or approval of plans under this Part of this Schedule; and

(b) in the inspection of the construction of the specified works or any protective works required by the Agency under this Part of this Schedule

~~(b)~~(c) in the carrying out of any surveys or tests by the Agency which are reasonably required in connection with the construction of the specified works.

(2) Without affecting the other provisions of this Part of this Schedule, the Company must indemnify the Agency from all claims, demands, proceedings, costs, damages, expenses or loss, which may be reasonably made or taken against, recovered from, or reasonably incurred by, the Agency by reason of—

(a) any damage to any drainage work so as to impair its efficiency for the purposes of flood defence;

(b) any damage to the fishery;

(c) any raising or lowering of the water table in land adjoining the authorised development or any sewers, drains and watercourses;

(d) any flooding or increased flooding of any such lands; or

(e) inadequate water quality in any water in any watercourse or other surface waters or in any groundwater,

which is caused by the construction of any of the specified works or any act or omission of the Company, its contractors, agents or employees whilst engaged upon the work.

(3) The Agency must give to the Company reasonable notice of any such claim or demand and no settlement or compromise may be made without the agreement of the Company.

(4) The fact that any work or thing has been executed or done by the Company in accordance with a plan approved or deemed to be approved by the Agency, or to its satisfaction, or in accordance with any directions or award of an arbitrator, does not relieve the Company from any liability under the provisions of this Part of this Schedule.

Dispute resolution

~~46.47.~~ Any difference or dispute arising between the Company and the Agency under this Part of this Schedule shall, if the parties agree, be determined by arbitration in accordance with article 60 (arbitration) of the Order but shall otherwise be determined by the Secretary of State for the Environment or its successor and the Secretary of State for Transport or its successor acting jointly on a reference to them by the Company or the Agency after notice in writing to the other.-

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Comment [BC4]: If as discussed we could check with PINS if they have any view on this type of clause