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Planning
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Via email only to martin.friend@vincent-gorbing.co.uk
Copied to Tilbury2@pins.gsi.gov.uk for information

Dear Martin,

Draft Tilbury 2 DCO requirement in relation to operational noise

Gravesham Borough Council (GBC) has now had the opportunity to read your proposed requirement in relation to setting operational noise limits based on source rather than receptor. Unfortunately, our noise specialist is currently not available to comment and I am on leave from the 10 August. Given the desirability of finding a way forward in advance of the closure of the examination, I thought it prudent to send both you and the Examining Authority (ExA) an early response.

There are though a few issues that have arisen in looking at this where we think clarification is needed and this may also assist in helping the ExA in arriving at its decision.

Areas where clarification may be useful

Can you clarify who will be responsible for agreeing and enforcing any requirement in relation to operational noise? The reason for making this point is that we have been doing some further research on-line and it seems that the London Port Health Authority rather than Thurrock Council may become responsible for noise complaints within the port areas and on the river.

The attached appendix from a FOI Act request to Thurrock Council sets out that it has no environmental health jurisdiction within the Tilbury 1 dock area and goes on to list 80 complaints received between 27 July 2012 and 10 April 2017. This is available on-line at https://www.thurrock.gov.uk/sites/default/files/foi/foi_7013_-_appendix_a.pdf.

Whilst many of the complaints on investigation proved to be associated with construction rather than port operational matters, it does indicate that the level of complaint has been higher than suggested at the examination.

That aside, if Tilbury 2 is an extension to the existing port and it stands to come under the jurisdiction of the London Port Health Authority in terms of noise, presumably it should have been involved in discussions on the wording of the requirement as the future enforcing authority alongside Thurrock and Gravesham as potentially affected areas.

Also, there has been much discussion surrounding PoTLL making an s.61 application under Part III of the Control of Pollution Act 1974 to Thurrock Council to control construction aspects. However, if this is a port extension, would it fall under the jurisdiction of Thurrock or the London Port Health Authority?

It's difficult to work out the statutory powers of the London Port Health Authority on line but most recent Orders setting up such authorities appear to confer powers under Part III of the 1974 Act.

Whilst it may be that Thurrock would be responsible for such matters until such time as the new port becomes operational, it may be worth checking because to date discussions only appear to have been with Thurrock Council and it may have implications for the final wording of the DCO.

Please note that we have sent an e-mail to the London Port Health Authority to find out what their current and future responsibilities will be in respect of noise and Tilbury 2 and will forward the response.

Finally, whilst it was down to PINS to undertake consultations in relation to your EIA scoping, we note that regulation 10(6) of the the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 requires that the Secretary of State or relevant body must consult the 'consultation bodies' before issuing a Scoping Opinion. The 'consultation bodies' under regulation 3 includes local authorities as defined under s.43(5) of the Planning Act 2008, which includes the Common Council of the City of London.

As the Common Council of the City of London has jurisdiction as the London Port Health Authority under the 1965 Order that created it, it is arguable that it should have been consulted at the EIA scoping stage. Unfortunately, looking at the Appendix 2 to the Scoping Opinion, it appears it was missed. The 1965 Order is available on line at <http://www.legislation.gov.uk/ukxi/1965/617/article/1/made>

To be fair, it is noted that PoTLL did consult the London Port Health Authority as part of the Statutory Consultation but it's unclear whether there was any response. The only reference to it during the examination is a representation made on the 5 December 2017 relating to the position of the customs boundary; the potential need for an examination facility to carry out checks on food and feed; and the fact that the warehouse may need to be registered or approved by them. See <https://infrastructure.planninginspectorate.gov.uk/projects/south-east/tilbury2/?ipcsection=relreps&relrep=25487>

Requirement in relation to operational noise

As set out in previous comments, GBC is of the opinion that a noise limit condition is required to safeguard the amenity of affected properties in Gravesham and so as not to prejudice the future delivery of residential development at Gravesend Canal Basin. On this, we have the support of the ExA as set out in the Examining Authority's Response to Revision 4 of the draft Development Consent Order, 13 July 2018 at 5.8.19.

The schedule of complaints relating to Tilbury 1 appended confirms in GBC's opinion that such a requirement is necessary.

Turning to your suggested wording for such a requirement based on noise at source under Requirement 10, the following comments are provided:

- As set out in previous comments, it is normal practice that controls are based on noise limits at receptors rather than at source. This is the approach that informed The Associated Ports (Hull) Harbour Revision Order 2006 and the requirement to submit measures for approval to limit noise under Schedule 6 to the London Gateway Harbour Empowerment Order 2008. The relevant Orders are available on line at See <https://www.legislation.gov.uk/ukxi/2006/1135/contents/made> and <https://www.legislation.gov.uk/ukxi/2008/1261/schedule/6/made>. GBC therefore remains to be convinced that an alternative approach is necessary in this case and considers that a decision would need to be made on the basis of further monitoring as per the ExA's suggestion.
- The requirement must pass the normal tests – i.e. it must be:
 - Necessary;
 - Relevant to planning and to the development to be permitted;
 - Enforceable;
 - Precise; and
 - Reasonable in all other respects.
- The fact that noise arising from Tilbury 2 may exceed acceptable levels at sensitive receptors in Gravesham means that such a requirement is necessary.
- For a requirement based on noise at source it would need to be shown that the limit was a close surrogate for an acceptable noise limit at the receptor itself for it to pass the above tests – the default position should always be measurement at the receptor because that is where the potential problem to be addressed arises. GBC would not concede therefore that the limit should not be set at the receptor until such time as further monitoring shows that this is impracticable or would lead to issues in relation to precision and enforceability.
- In terms of 9A(1) it is stated that operational noise limits would be set following noise monitoring carried out 'no later than two months after first commencing operation of any Work Nos 1 to 8'. This means that the baseline against which any operational noise limit would be set would be construction noise and not the actual 'without scheme' noise level. This is unacceptable for obvious reasons.
- In terms of 9A(1)(b) the source based noise limits would only relate to 'the operation of Work Nos 1 to 8'. There is no mention of noise which may arise from moored vessels only the operation of the of the land-side component of the port. As stated during the

examination, moored vessels are themselves a potential source of noise and these would be closer to Gravesham than the works themselves. The schedule of complaints relating to Tilbury 1 mentioned above clearly shows that noise from moored vessels can be a problem. It is necessary therefore that the requirement explicitly refers to the ships themselves as being included in the interests of precision. If they are not, it is likely that the requirement would be unenforceable anyway because there would be a potential noise source between the works and the receptors on the southern shore.

- 9(A)(2) is a cause for concern in that it states the agreed noise limits:

“must be capable of being achieved by operating plant, machinery and apparatus, and carrying out activities, of the same nature as the plant, machinery, apparatus and activities and their associated source noise levels set out in Table 17.3 of the environmental statement”

This seems to imply that noise limits can be set higher to meet the operational requirements of the port irrespective of impact on sensitive receptors where the port considers it necessary. GBC would argue that proper planning should seek to ensure that the impact of the development is appropriate to its context through the imposition of the requirement and not provide a ‘get out’ clause. If it is not possible to control unacceptable adverse impacts then the ExA should be considering the alternatives. It would then be for the applicant to determine whether it wishes to implement the scheme should additional constraints be applied.

- 9A(3) deals with management of noise limit exceedances. This requires that the ‘Company’ (defined in the draft DCO at the POTLL) should investigate any exceedance of noise limits and:

“Following the investigation carried out under sub-paragraph (3), if the Company determines that the source of the exceedance is plant, machinery, apparatus or any other activity under the Company’s control, the Company must, as soon as reasonably practicable –

- (a) Take remedial action to reduce noise emissions from that plant, machinery, apparatus or activity to a level within the applicable limit agreed under sub-paragraph (1)(b); and
- (b) Take all reasonable action to prevent any further exceedance of that limit by the plant, machinery, apparatus or activity that has caused the exceedance.”

A few points on this:

- Presumably the term ‘Company’ should extend to any other third party should POTLL dispose of their interest in the land because the permission and requirement runs with the land – this may require an adjustment within the definitions in the DCO. It may already be covered but worth checking. The

PoTLL has been clear that they will not be operating the CMAT – they have an interested party in mind for this – therefore the wording is a concern.

- The requirement only extends to ‘plant, machinery, apparatus or any other activity under the Company’s control’ – presumably most noise generating activities taking place at Tilbury 2 is capable of being under the Company’s control under the Port Byelaws (see Schedule 7 to draft DCO). Because of the potential for noise nuisance arising from moored ships / leased land and properties, it would be useful if any requirement makes it explicit that the POTLL is responsible for addressing noise nuisance arising from such sources.
- The wording of the requirement depends on the POTLL determining that the source of any exceedance is plant, machinery, apparatus or any other activity under its control. In other words, the POTLL becomes the responsible body for enforcing the requirement against itself – there does not appear to be any explicit fall-back position whereby either the London Port Health Authority or Thurrock Council can serve notice requiring steps to be taken to remediate should this mechanism fail. In other words, the requirement may be unenforceable and fail the necessary tests. Is there something else in the DCO that would cover this or should the requirement include something in addition to deal with such an eventuality?

A possible alternative way forward

GBC supports the Tilbury 2 application in principle subject to a proper consideration of impacts and their control where necessary through the imposition of appropriately worded requirements.

The ExA has clearly indicated that it anticipates maximum noise levels to be set following further monitoring and therefore not at this stage. It has not expressed an opinion on whether those noise limits should be defined at receptor or at source but it is logical that this itself should be addressed once such further monitoring (prior to the commencement of construction activity) has taken place.

We would suggest therefore that the DCO contain a simpler requirement that establishes next steps and a means by which a scheme of operational noise control can be enforced by the relevant authority. On this, the conditions imposed by Thurrock Council on the Tilbury Green Power scheme might be a suitable model.

For information, the report outlining the monitoring and proposed noise and vibration management plan for Tilbury Green Power is available on-line at <https://regs.thurrock.gov.uk/online-applications/applicationDetails.do?keyVal=ORWENWQGLIS00&activeTab=summary> .

Interestingly, this is a situation where the installation actually lies on the edge of the Tilbury 1 site and there is considerable potential for background noise arising from existing port activity etc. Monitoring and baseline were assessed at locations of sensitive receptors, with maximum permissible noise limits for day and night set accordingly.

We have drafted the following alternative for inclusion in requirement 10 for you to consider, which includes a provision that would allow the noise management plan to be reviewed should there be a change in the noise environment. A number of terms would need to be defined in the DCO for the purposes of interpretation – i.e. who would be the relevant authority for the purposes of approving the noise management plan etc. and what would constitute an ‘Emergency’:

Operational noise control

The development shall not come into operation until such time as there has been submitted to, approved by, and deposited with the relevant authority a noise management plan including provision for the on-going monitoring of noise generated by its commercial operation. In approving the said noise management plan, the relevant authority shall consult and have regard to comments provided by neighbouring local authorities within which potentially affected sensitive receptors are located.

The noise management plan shall specify:

- (i) The locations from which baseline noise and subsequent noise levels will be monitored;
- (ii) The method of noise measurement;
- (iii) The maximum permissible levels of noise at each such monitoring location for both daytime (07:00 – 23:00) and night time (23:00 – 07:00) periods; and
- (iv) The arrangements for making noise monitoring results available to the relevant authority and for notifying local residents affected by an Emergency (as provided for in Requirement X below).

Commercial operation of the site shall not commence until such time as all noise monitoring equipment required under the approved noise management plan is installed and operational. Thereafter it shall be maintained in a fully operational condition at all times.

The plan shall make provision for noise measurements to be taken as soon as possible following a request by the relevant authority and such measurements shall be given to the relevant authority within 2 working days. At the approved monitoring locations, noise levels during operation of the development (including noise arising from moored vessels) shall be controlled so as not to exceed the levels specified in the approved plan, unless otherwise agreed in writing in advance with the relevant authority or in an Emergency.

Situations where maximum permissible levels of noise are exceeded other than in an Emergency

Where on-going monitoring indicates that the maximum permissible levels of noise agreed within the noise management plan have been exceeded, the Company shall seek to identify the cause of such breach and take any necessary steps to remedy such breach and notify the relevant authority in writing within 2 days of such breach and the actions taken to remediate it.

Noise complaints procedure

In any instance where a third party makes a complaint about noise generated by the operation of the development or such complaint is passed on either by the relevant authority or the local authority whose area is affected, the Company shall carry out investigations to establish whether there has been a breach of the agreed maximum permissible levels of noise set out in the noise management plan, its likely cause and possible remedial measures. Thereafter, the Company shall take the necessary steps to remedy any identified breach and send a written report to the complainant as soon as reasonably practicable setting out the findings of the investigation and the actions taken. All such reports shall be kept in an appropriate location on site for a minimum period of 5 years and be made available to the relevant authority and/or the local authority whose area is affected upon request free of charge.

Exception in the case of Emergencies

In any instance where a maximum permissible noise level set out in the approved noise management plan is exceeded because of an Emergency, the relevant authority shall be provided within 2 working days with a written statement detailing the nature of the Emergency and the reason why the noise level could not be observed. If the Emergency is expected to persist for more than 24 hours then the relevant authority, together with the relevant local authority and residents and businesses within the affected area shall be informed of the reasons for the Emergency and its expected duration.

Review of the noise management plan

In the event of there being a change in the noise environment within the area likely to be affected by noise arising from the development, the Company is hereby allowed to submit a revised noise management plan for the approval of the relevant authority. Such approval shall only be given following consultation with neighbouring local authorities within which potentially affected sensitive receptors are located and their comments being taken into consideration. Upon approval, the revised noise management plan shall supersede that originally approved and the remaining provisions of this Development Consent Order apply.

For the sake of completeness, in terms of monitoring points to be agreed under (i) above, GBC's deadline 6 response anticipated that these would be in the same short-term and long-term locations as set out in the ES. It is also assumed by GBC at that stage this would include locations identified for the measurement of background noise for a period of not less than 6 months ending not later than the time when construction on site commences.

Yours sincerely

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