

Review of Palm Paper CCGT 3 draft Development Consent Order and Explanatory Memorandum

Introduction

Please see below the Planning Inspectorate's comments on the draft development consent order and explanatory memorandum. Please note that the comments provided are without prejudice to any decisions taken by the Secretary of State during acceptance or the Examining Authority during examination if the application is accepted for examination. Please also note that these comments do not constitute legal advice.

Explanatory Memorandum

It would be very helpful if the applicant could include here a brief, user friendly description of the development for which consent is sought as well as referring to the technical description contained within the ES. The purpose of the EM is to explain the DCO and it would be helpful for readers to have a general over-view of the project at the beginning of this document.

DCO

Article 2

Maintain

This definition is very wide. The applicant should explain why it is necessary to have a power to remove clear demolish decommission, reconstruct and replace as this effectively gives the undertaker the power to demolish the project for which consent is given and replace it with something else. This could permit substantial works and should be justified. Recent projects have either specifically limited the definition of maintenance to works assessed within the ES or limited the maintenance article to works assessed in the ES.

Undertaker

This is defined as Palm Paper Limited and any person with the benefit of the order in accordance with s.156. This means that any person with an interest in the land will fall within the definition of undertaker. The applicant may wish to consider whether this is appropriate.

Article 5

This article is effectively an attempt to circumvent the procedures put in place by the Planning Act 2008, namely s.153 and schedule 6. The applicant has not provided adequate explanation or justification for this. The Planning Act specifically applies different processes for obtaining non-material changes to NSIP application's than to other application's which are determined by the

LPA. This was considered necessary by parliament when the Act was passed. If the applicant disagrees with this approach then they need to provide detailed reasons to explain why they do not consider the relevant part of the legislation should apply in this case. The applicant should note the recent Daventry International Rail Freight Terminal (DIRFT) decision in which the Secretary of State upheld the ExA recommendation that a similar article should be removed from the DCO finding it “inappropriate and unacceptable for the Order, as secondary legislation, to seek to circumvent the provisions set out in the 2008 Act for amending development consent orders.”

The decision letter, recommendation report and all examination documents can be found here:

<http://infrastructure.planningportal.gov.uk/projects/east-midlands/daventry-international-rail-freight-terminal/>

Article 7

This article authorises the undertaker to operate the generating station comprised in the authorised development. The undertaker is defined as “Palm Paper Limited and any person with the benefit of the order in accordance with s.156.” This means that Palm Paper Limited and any person with the benefit of the land will all be authorised to operate and use the generating station. The applicant should consider whether this is its intention. If it is intentional an explanation in the EM is required to explain why it is necessary for the power to operate to be granted to all persons with an interest in the order land and who it is envisaged will exercise this power. If this is not the intention, the applicant will need to redraft the article limiting it to specific persons or amend the definition of undertaker.

Article 15

This article should include all the documents which the DCO requires compliance with. It should therefore include the ES, the design and access statement and the outline CEMP as compliance with these is secured by the requirements.

Schedule 1

It would be helpful if the applicant could differentiate between works which comprise part of the NSIP and works which are associated development.

Further associated development (a) – (d) should be limited to those works assessed in the ES for example by including something at the end such as:

“which are within the scope of the EIA recorded in the ES”

Schedule 2

Requirements – tailpieces

There are a number of tailpiece requirements in the DCO. Tailpiece requirements are similar to tailpiece conditions and the applicant is referred to the relevant case law as set out in *Mid-counties Co-Operative Ltd, R (on the application of) Wyre Forest District Council [2009] EWHC* and *R (on the application of) Warley v Wealden District Council [2010]*

Tailpiece requirements are not likely to be appropriate where the requirement deals with matters which go to the heart of the consent, for example, allowing post-consent changes to certified design drawings which set out the details of what is proposed to be consented.

This unacceptability is in part because the effect would be to allow a change (whether material or otherwise) to a consented DCO which should only be authorised in the prescribed way under s.153 and schedule 6 PA 08.

Tailpieces can create uncertainty as to what has been consented and enable development not applied for or assessed to occur. In addition it is important to remember that the public, and not only the parties directly concerned, are entitled to know from the DCO what is permitted, and what is not.

If the applicant wishes to have any tailpiece requirements they must ensure the provisions are drafted in as precise a way as possible so that the scope and limited circumstances in which they apply are clear. They should also ensure that any matters approved pursuant to these are within the scope of what was assessed in the environmental impact assessment.

The applicant needs to provide in their EM justification, by reference to relevant case law, for each tailpiece, clearly explaining the purpose of it and why it is considered that the details secured by the requirement do not go to the heart of the development consent.

If the applicant considers some tailpieces are necessary they may wish to consider a requirement limiting the power of the LPA to “agree otherwise in

writing" to non -material changes and changes that fall within the effects assessed in the ES, to ensure that they are legally compliant.

The applicant is also advised to consider the recent SoS decision and ExA report in DIRFT in which tailpiece requirements were removed.

Requirement 5

This tailpiece appears to go to the very heart of the consent, permitting the LPA to allow amendments to the consented plans which authorise the development. This could permit the LPA to authorise work that could be significantly different to that authorised by the order. If the applicant wishes to retain this tailpiece it will need to be justified in the EM by reference to relevant case law.

In the EM it states that the requirement requires works approved by the LPA to accord with the principles of the D&A and the ES. In the DCO there is no mention of the mention of the ES. It would be helpful for the applicant to amend the requirement to limit the scope of the works to that assessed within the ES as stated within the EM.

Requirement 6

The requirement specifies that the landscaping scheme shall reflect the proposals in s.8 of the ES. It is sometime difficult to locate plans within an ES referred to in a DCO and the applicant might like to consider submitting a separate outline landscaping plan to be certified in the order, so that it is easy to identify.

Requirement 10

This contains a tailpiece which will need justifying in the EM by reference to relevant case law if the applicant wishes to keep it in the DCO.

In the EM it says that the CEMP will reflect the draft CEMP in the ES. The requirement states that it will reflect the outline CEMP submitted with the order. It would be advisable for the applicant to amend the EM to ensure consistency with the DCO.

Requirement 13

This contains a tailpiece which will also need justifying, as currently drafted it gives the LPA the power to permit working outside of the hours specified.

Requirement 16

This also contains a tailpiece which will need justifying in the EM if the applicant wishes to keep it in the DCO.

General

It is very important that the development for which consent is sought and the limitations of this development are clearly identified through the DCO and works plans. The applicant is advised to check that that this is clear.

Planning Inspectorate

1 August 2014