

**TRITON KNOLL ELECTRICAL SYSTEM – COMPULSORY ACQUISITION HEARING (13<sup>th</sup>**

**NOVEMBER 2015)**

**JOINT SUBMISSIONS OF BLACK SLUICE INTERNAL DRAINAGE BOARD, LINDSEY MARCH**

**DRAINAGE BOARD AND WITHAM FOURTH INTERNAL DRAINAGE BOARD**

**1. Introduction**

- 1.1 Lincolnshire is characterised by its flat low-lying landscape and its complex network of drainage infrastructure, including main watercourses, rivers, main drains, minor watercourses, small drains, ditches and agricultural field drains, all of which are predominantly used to support a highly productive rural agricultural economy. Across the Fens as a whole the Inland Drainage Boards maintain 3,800 miles of watercourses and 286 pumping stations. These are required because the land is generally lower than the main rivers which discharge to the sea.
- 1.2 The proposed cable corridor passes across the drainage districts of three internal drainage boards, namely Black Sluice Internal Drainage Board, Lindsey Marsh Drainage Board and Witham Fourth District Internal Drainage Board (hereinafter called “the IDBs”). Each IDB has statutory powers to maintain or improve existing watercourses or to construct new works. Each IDB is responsible for, and has statutory powers in relation to, all watercourses within its district: see further below.
- 1.3 Each IDB is a statutory party for the purpose of section 88 (3) (c) of the Planning Act 2008: see Regulation 3 of, and Schedule 1 to, the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015; and also an interested party for the purpose of Chapter 4 of Part 6 of the Act.
- 1.4 The application is likely to increase the risk of flooding in the area for which the IDBs have responsibilities unless the electrical cables are installed at a suitable depth beneath all watercourses; no restriction is placed on the IDBs through the

imposition of Restrictive Covenants; and proper protection is given by the protective provisions.

## **2. Statutory duties and powers**

2.1 The IDBs have an overarching statutory duty in relation to the drainage of land within their districts.

Thus, section 1 of the Land Drainage Act 1991 (“the Act”) provides:

- (1) *For the purposes of the drainage of land, there shall continue to be—*
- (a) *districts, known as internal drainage districts, which shall be such areas within the regions of the Regional Flood and Coastal Committees (within the meaning of section 22 of the Flood and Water Management Act 2010) as will derive benefit, or avoid danger, as a result of drainage operations; and*
  - (b) *boards, known as internal drainage boards, each of which shall be the drainage board for an internal drainage district;*

.....

- (2) *An internal drainage board shall—*
- (a) *exercise a general supervision over all matters relating to the drainage of land within their district; and*
  - (b) *have such other powers and perform such other duties as are conferred or imposed on internal drainage boards by this Act.*

2.2 In order to discharge their statutory duty, the IDBs have a number of statutory powers, the most important of which are to be found in section 14 of the Act and which are exercisable over all watercourses within their respective districts, with the exception of main rivers or the banks of a main river.

Thus, section 14 of the Act provides that the powers of an IDB otherwise than in connection with a main river or the banks of such a river are:-

- (a) *to maintain existing works, that is to say, to cleanse, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work;*
- (b) *to improve any existing works, that is to say, to deepen, widen, straighten or otherwise improve any existing watercourse or remove or alter mill dams, weirs or other obstructions to watercourses, or raise, widen or otherwise improve any existing drainage work;*
- (c) *to construct new works, that is to say, to make any new watercourse or drainage work or erect any machinery or do any other act (other than an act referred to in paragraph (a) or (b) above) required for the drainage of any land.*

2.3 Although such powers can be exercised over any watercourse (except a main river), an IDB can only enter land of another without notice in order to maintain existing works. Otherwise, section 64 of the Act gives an IDB the right of entry with notice to carry out its section 14 functions. In ***R. (on the application of MWH&H Ward Estates Ltd) v Monmouthshire CC (No.2)***, [2002] EWCA Civ 1915, the Court of Appeal held that section 64 of the Act conferred on an authority (or persons authorised by the authority) the right to enter land for the purpose of exercising any of the authority's functions under the Act, including the construction of new drainage works.

2.4 There are other powers given to an IDB, including undertaking flood risk management works (section 14A); the power to serve a notice requiring works for maintaining the flow of a watercourse and the power to undertake such works in default of compliance (section 25).

2.5 Section 72 of the Act is the definition section, which is of some importance in the context of the present case. Contrary to the sense in which it has been used in the

present case, “ordinary watercourse” does not mean a watercourse belonging to a private individual or a non-IDB maintained watercourse. Thus:

*“watercourse” includes all rivers and streams and all ditches, drains, cuts, culverts, dikes, sluices, sewers (other than public sewers within the meaning of the Water Industry Act 1991) and passages, through which water flows.*

*“ordinary watercourse” means a watercourse that does not form part of a main river.<sup>1</sup>*

### **3. Some examples of the work done by an IDB**

3.1. The table below gives examples of the types and frequency of work undertaken by the IDBs.

**Table 1**

Activity	Frequency	Location	Detail
Weedcutting / Flailmowing	At least annually	All Board maintained watercourses	Use of weed and grass cutting equipment mounted on hydraulic excavators and tractors to cut vegetation within the watercourse channel and along the bank tops. Arisings are placed at the top of the bank to degrade.
Desilting / reforming works	Infrequent – usually anywhere between 10 and 30 year intervals	Any watercourse	The use of heavy plant machinery, including hydraulic excavators to remove silt from the bed of the watercourse and re-profile the bank(s) to their original design profile. Arisings usually stockpiled on adjacent land to dry before spreading and working into land.

<sup>1</sup> Section 113 of the Water Resources Act 1991 defines a main river as “..... a watercourse shown as such on the main river map for England or the main river map for Wales...”

Deepening and widening of watercourses beyond their design profile	Unknown as this is led by new development in expanding towns and villages. Drainage schemes are often required after flooding events such as those experienced in 2007.	Any watercourse	Improvement works using heavy plant machinery, including hydraulic excavators to deepen and/or widen existing watercourses beyond their original design profile. Arisings usually stockpiled on adjacent land to dry before spreading and working into land.
New buildings or structures.  New cut watercourses  New flood storage areas etc.	Unknown	Unknown	New works such as new cut watercourses, flood storage areas etc.
Repairs to bank slips	Unknown	Unknown but it is certain that there will be bank slips on watercourses along the cable route.	The Boards' preferred choice is to drive piles several meters deep at the toe of the watercourse. Clearly this activity will be prevented where watercourses cross the cable route. It is envisaged that alternative methods, such as the installation of gabion baskets could be used to repair bank slips.

3.2 Two further, related matters should be borne in mind in the context of this hearing. First, the TKES will be in place and will potentially have implications for the drainage system in the respective districts of the three IDBs, not just for the present during construction, but over a much longer time frame. Second, there is the issue of climate change, which is a subject of increasing concern to the IDBs. It is instructive to note that, on new drainage schemes, the IDBs have in the past

allowed an extra 20% in flow capacity to take account of climate change. That figure has now increased to over 50%.

3.3 The first entry on Table 1 refers to “Board maintained watercourses”. There are a certain number of watercourses that one or other of the three IDBs, under their permissive powers, choose to maintain. These watercourses are generally the largest and most important ones and are crucial to the drainage and flood defences of the district. A Board maintained watercourse is not necessarily owned by the IDB concerned with its maintenance, although Witham Fourth IDB is unique out of the three affected IDBs as it also owns land in connection with a small number of watercourses.

#### **4. Concerns**

##### **(a) Construction method**

###### **(i) What has been offered.**

4.1 In respect of IDB maintained watercourses, the Applicant has offered to cross using a trenchless construction technique with the cable laid at a depth under the hard bed of the watercourse of 2m plus a safe working distance of 900mm. In respect of some non-IDB maintained watercourses, the Applicant proposes a cut and cover method of construction with the cable laid at a depth under the hard bed of the watercourse of 1m plus a safe working distance of 900mm.

###### **(ii) What is sought.**

4.2 The IDBs do not rule out using the cut and cover method of construction for non-IDB maintained watercourses, but require the cables to be laid to a depth under the hard bed of all watercourses of 2m plus a safe working distance of 900mm.

###### **(iii) Reasons**

- 4.3 The overarching role of the IDBs to provide for proper and safe drainage within their district encompasses all watercourses within that district. The need at any future time to deepen, widen, desilt or reform a watercourse might arise in respect of any watercourse, whether or not IDB maintained. The agreement in respect of cable crossing an IDB maintained watercourse is justified on the basis that it allows sufficient depth for such work to be safely undertaken in the future. But, as explained, such work is never limited to IDB maintained watercourses. It may be equally required for other watercourses - for example, deepening of a non-IDB maintained watercourse may realistically be required in the future as a result of climate change or the possibility of future development. It is simply illogical to agree a particular depth in respect of one type of watercourse but refuse to agree it in respect of another type.
- 4.4 The cable route bisects the Witham Fourth IDB's district by placing 17,000 ha. of the district, comprising nearly half of its total area and consisting of high quality arable land, upstream of a potential restriction, namely the cable route. It is therefore imperative that the Witham Fourth IDB retains its ability to deepen all watercourses within its district. The same is true of the other IDBs.
- 4.5 It is important to emphasise that the flow of water through the watercourses is generally gravity driven. That requires there to be a sufficient gradient throughout the length of the watercourse. An increase in flow cannot be accommodated simply by widening the banks of the watercourse, but usually necessitates deepening in order to maintain the flow. Nor is pumping always a viable option in rural areas due to lack of electricity supply. In any event, pumping is very expensive and would not be cost effective for relatively small scale schemes in rural areas.
- 4.6 At paragraph 5.6 of the SoCG, the Applicant asserts, in respect of non-IDB maintained watercourses, that *"the technical difficulty, health and safety*

*considerations and wider environmental impacts increase significantly when crossing at this [2m] depth...."* No particulars whatsoever are given in this generalised statement and the Panel is invited to reject it.

- 4.7 In the same paragraph, the IDBs refer to *"similar onshore developments"* where *"the 2m depth was agreed across all watercourses and did not prove problematic"*. The two schemes in question were the Covenham to Boston pipeline and the Hornsea cable route. However, the IDBs recognise that the consistency argument is limited, in that the other two schemes materially differed from the present. However, the argument for burying the cables at a uniform depth of 2m plus 0.9m appears stronger in the present case than in the Hornsea case. Hornsea is generally parallel with the catchment and future development is unlikely, whereas TKES effectively severs the catchment dividing it in two, with many towns, villages and large agricultural catchments left upstream.

**(iv) Relevant documents**

- 4.8 Reference to the construction method is found in the following documents:

- Requirement 5 (11) of draft DCO

*"Unless otherwise agreed by the relevant planning authority, following consultation with the relevant drainage boards, the Environment Agency and the highways authority, where identified in the crossings schedule for the purpose of passing under a relevant obstruction trenchless techniques shall be used to install the cable ducts and electrical circuits within Work Nos....."*

The numbers refer to the works numbers in Schedule 1 Part 1 to the draft DCO, but it is unclear how they relate to the numbers set out in the crossing schedule.

- Crossing Schedule (8.3)

Trenchless techniques are shown in respect of (a) IDB maintained drains, whose details were given to the Applicant; and (b) some non-IDB maintained drains where trenchless techniques are to be used in connection with the crossing of a road, for example the drains at DK 24, 25, 27 and 29 in connection with the road crossing DK 28.

There is an error in the crossing schedule. Drain Reference No. DK 202, named as Steeping River South Delph, is listed as a Witham Fourth IDB watercourse. The watercourse at the grid reference specified is a non IDB maintained watercourse within the Lindsey Marsh IDB district.

- Outline construction Method Statement paragraphs 5.8 & 5.9 (8.7.1):  
*“5.8 The depth of each cable at every watercourse or flood defence crossing will be determined through the Crossing Schedule (Application Document 8.3) <sup>2</sup> in consultation and agreement with the relevant consenting body. This will include any Internal Drainage Board..... owned/maintained watercourses on a case-by-case basis in collaboration with the respective owner / operator to ensure that routine maintenance, repairs and any engineering works to adapt to climate change can be undertaken in the future. 5.9 Cables will be buried at **a minimum of two metres underneath the bottom of any Internal Drainage Board owned or maintained drain, and any flood defence, to reduce potential construction effects.**”*

The IDB request that the words in bold be deleted and replaced with the following: “...2m plus a safe working distance of 900mm beneath the hard bed of all watercourses”.

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<sup>2</sup> At present, there is nothing about depth in the crossing schedule.

- Code of Construction Practice (8.7)  
Reference to trenchless techniques are at paragraphs 3.23 – 3.25 and to other crossings at paragraph 3.26.

(b) Article 17 of, and Schedule 5 to, the draft DCO

**(i) Restrictive covenants**

4.9 Restrictive covenants can be imposed only upon landowners to prohibit them from using their land<sup>3</sup> in ways that would otherwise be lawful. The Book of Reference incorrectly lists one or other of the IDBs as owner or reputed owner of a watercourse which is then sought to be made subject to the restrictive covenants. By way of example, the main drain at number 02/07 is said to belong to Lindsey Marsh IDB and to be subject to the new (permissive) rights. However, number 02/07 is also said in Schedule 5 to be subject to the restrictive covenants. In fact, Lindsey Marsh IDB owns no land affected by the present scheme. It is clear that the entries in the Book of Reference and the cross references in Schedule 5 need to be checked for accuracy.

4.10 As presently drafted, the restrictive covenants set out in Schedule 5 would prevent those IDBs that own the land on which a watercourse is situated (in particular, Witham Fourth IDB and perhaps the other two IDBs<sup>4</sup>) from exercising their statutory powers. To take the most egregious example, paragraph (c) would prohibit Witham Fourth IDB from deepening or desilting those of its watercourses caught by the restrictive covenant provision. Paragraph (a) would appear to prohibit any works upon its land. Paragraph (d) would appear to prohibit cutting vegetation within the watercourse channel and along the bank tops. Paragraph (e) is vague in scope and excessively wide in extent and potentially could prohibit the legitimate exercise by Witham Fourth IDB of some or all of its statutory powers.

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<sup>3</sup> The restrictive covenants are badly drafted. They seek to prohibit certain uses of “the Order land” whereas they can only prohibit use of that particular parcel of land upon which the restrictive covenant is imposed.

<sup>4</sup> Their land ownership is presently being double checked.

4.10 It is no answer to the IDB's concerns to say that the Applicant could always consent to the relevant work. It would be unreasonably onerous to require the IDB to seek the Applicant's consent on every occasion before embarking upon work that it regarded as appropriate in order to discharge its statutory duty; it would give rise to uncertainty; and it would be contrary to statute which provides for no such consent.

4.11 The problem should be addressed by adding a further sentence to Article 17 of the draft DCO to read: - *"Save that no restrictive covenant shall prevent any IDB from undertaking such works as are reasonably required by that IDB in exercise of its statutory powers"*.

**(ii) Permissive rights**

4.12 At present, there is a potential conflict between the permissive rights sought to be acquired under Schedule 5 and the protective provisions of Schedule 8 Part 1. It is suggested that the conflict should be resolved by adding a further sentence to Article 27 of the draft DCO to read: - *"The rights sought to be acquired under Article 17 and Schedule 5 are subject to the protective provisions of Schedule 8."*

**(c) Schedule 8 (Protective Provisions)**

4.13 It can be seen from the definition of *"drainage work"* in paragraph 2 that the protective provisions apply to any watercourse *"which is the responsibility of the drainage authority concerned"*. For reasons already explained, each IDB is responsible for all watercourses within its district.

4.14 The IDBs have two principal concerns centring on paragraph 3.

- 4.15 First, as presently drafted, paragraph 3 (3) permits only two grounds for refusal –
- (i) *“it is necessary to safeguard any drainage work against damage”* or (ii) *“it is necessary to secure that its efficiency for flood defence purposes is not impaired”*. That is too restrictive. There may well be other grounds upon which an IDB could legitimately decline to sanction the proposed work, for example because of its adverse effect on other watercourses within the district or because it might prejudice the exercise by the IDB of its statutory powers. Indeed, the definition of *“specified work”* in paragraph 2 includes any work likely to *“affect”* rather than simply *“damage”* any watercourse or *“affect the flow of water in any watercourse”*.
- 4.16 That being so, the IDBs submit that paragraph 3 (3) should be deleted in its entirety. The Applicant would still be protected by the provisions of paragraph 3 (4) (a) which provides that consent must not be unreasonably withheld; and of paragraph 3 (4) (c) which requires that any refusal be accompanied by a statement of reasons.
- 4.16 As a fall-back position, the IDBs wish to see the grounds of refusal extended by the addition of the following: - *“to safeguard the proper functioning of other watercourses within its district or to ensure the satisfactory discharge of its powers under the Act.”*<sup>5</sup>
- 4.17 If specific reasons are to be retained, then there is no need for the provision in paragraph 3 (4) (a) requiring consent not to be unreasonably withheld.
- 4.18 In any event, if reasons for refusal or for imposing a requirement are to be retained under paragraph 3 (3), they must be consistent with the provisions of paragraph 3 (4) (d) and paragraph 4 specifying the circumstances in which requirements may be imposed. At present, they are inconsistent.

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<sup>5</sup> Compare with the reasons provided to the EA under paragraph 3 (4) (d).

- 4.19 Second, the present requirement in paragraph 3 (4) (b) that the plans of the specified work must be approved within two months of the submission is potentially problematical, depending upon the number or volume of plans submitted for approval at any one time or close to each other. The IDBs are fairly confident that they could consider a limited number of plans within the specified time, but not any great number. There is no provision limiting the number of plans submitted or applications made within any particular time.
- 4.20 That being so, the IDBs submit that paragraph 3 (4) (b) should be deleted. The Applicant would still be protected by the provision of paragraph 3 (4) (a) that requires approval (or refusal) not to be unreasonably delayed.
- 4.21 Alternatively, if paragraph 3 (4) (b) is to be retained, there should be an additional provision limiting to a specific number the plans that could be submitted or the applications for approval that could be made at any one time and before the previous batch has been approved or refused.
- 4.22 A full list of the suggested amendments to Schedule 8 is set out in the Appendix to this submission.

12<sup>th</sup> November 2015

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**TRITON KNOLL ELECTRICAL SYSTEM – COMPULSORY ACQUISITION HEARING (13<sup>th</sup>**

**NOVEMBER 2015)**

**APPENDIX TO THE JOINT SUBMISSIONS OF BLACK SLUICE INTERNAL DRAINAGE BOARD,**

**LINDSEY MARCH INTERNAL DRAINAGE BOARD AND WITHAM FOURTH INTERNAL**

**DRAINAGE BOARD**

<b>Paragraph</b>	<b>Amendment</b>
<u>Para 2:</u>	
	Add: “the Act” means the Land Drainage Act 1991”
Definition of “drainage authority”	Delete “section 23” and replace with “section 1”
Definition of “main river”	Delete “the Land Drainage Act 1991” and replace with “section 72 of the Act”
<u>Para 3:</u>	
Para 3 (1)	Second line, after the word “authority” insert: “applications, including”
After para 3 (1) add new sub-para	“The undertaker shall not begin to construct such specified work until approval, unconditionally or conditionally, has been given as provided in this paragraph.”
Para 3 (2)	Delete “paragraph 10” and replaced with “paragraph 11”.
Para 3 (3)	Delete
Para 3 (4)	Re-number
Para 3 (4) (b)	Delete
Para 3 (4) (c)	Delete “within the period mentioned in sub paragraph 3 (b)”
Para 3 (4) (d)	At the end of the first line, add a full stop after the word “make”. Delete the remainder.
<u>Para 4:</u>	
Line 1	Delete “paragraph 2” and replace with “paragraph 3”.
After sub para 4 (b), add new sub para	“In respect of such protective works, save where the drainage authority itself submits plans of the protective works, the provisions of paragraph 3 shall apply as regards the submission of further plans by the undertaker”
<u>Para 5:</u>	
Para 5 (1) – second line	Delete “paragraph 3” and replaced with “paragraph 4”
Para 5 (1) (a)	Delete “or settled”
Para 5 (2)	Delete “on which it is brought into use” and replace with “of completion”
Para 5 (4)	Fourth line after the word “Schedule” insert “including compliance with the approved plans”.

	Penultimate line, delete “required” and replace with “agreed”
<u>Para 6:</u>	
Para 6 (5) (a)	Delete
Para 6 (5) (b)	At end of the sentence, add: “provided that in remains in place for as short a time as is reasonably necessary”.
<u>Para 7:</u>	
Third line, after the word “undertaker”	Add: “immediately or immediately upon being notified in writing by the drainage authority”.
<u>Para 9:</u>	
Para 9 (1) (a)	Delete “so as to impair its efficiency for the purpose of flood defence”