Triton Knoll Electrical System

Planning Inspectorate Reference: EN020019

Summary of Oral Representations made by the Environment Agency at the Compulsory Acquisition and Development Consent Order Hearings on 20th - 22nd January 2016

Comments on other submissions received at Deadline 4 – Comments on the Applicant's Appendix 32

Unique Reference Number: 10031799

29 January 2016

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At the Issue Specific Hearings on Compulsory Acquisition, held on 20th and 21st February 2016, Miss Carol Bolt made the following submissions on behalf of the Environment Agency (EA).

Agenda Item 5 – Statement of Common Ground
The EA has been progressing an update of the Statement of Common Ground with the Applicant, with a view to submitting this at either Deadline 5 or 6. This will include an update on the matters that were previously under discussion and the position in respect of protective provisions and restrictive covenants.

Agenda Item 8 – Position in respect of statutory undertakers
The EA advised that it has received an updated set of protective provisions from the Applicant and provided comments on these. There is currently one outstanding minor point to discuss. However, we can advise that we are now satisfied with the content of the protective provisions subject to this point and the caveat that we may need to add in further provisions depending on the outcome of negotiations in respect of the EA's land interests. We believe that we will soon be in a position to be able to agree to the disapplication of the legislation as set out in Article 6.

Agenda Item 12 – Potential risk or impediments
The EA has a standard form of letter that it will provide to the Applicant giving consent to the disapplication of the relevant legislation under Section 150 of the Planning Act 2008 as sought in the DCO. This will be provided on final agreement of the protective provisions.

Agenda Item 13 – Interference with the rights of those with an interest in the land
The ExA asked if anyone had an 'in principle' objection to the restrictive covenants. Miss Bolt said to the extent that the EA took the view that the covenants could not bind a statutory body in the exercise of its powers it had an 'in principle' objection.

The EA is unique in that it has a dual role of being a flood risk management authority and a landowner – it is a landowner **because** it is the flood risk management authority. She said that Appendix 32 submitted by the Applicant for Deadline 4, which responds to the EA's concerns over the Restrictive Covenant, and a subsequent telephone conference where the applicants explained their position further had both been helpful to the EA. The EA understood the Applicant's wish for possible future owners/tenants to be bound by the Covenant. The EA and the applicant were however in agreement that the covenants could not bind the EA in the exercise of its statutory powers.. She said the EA's concern was that as currently drafted the only clarification of this is in relation to paragraph (c) and the EA would want this clarification to apply to the Restrictive Covenant in its entirety. Otherwise the EA is content with the wording of the Restrictive Covenant.

At the Issue Specific Hearing on the Development Consent Order (DCO), held on 22nd February 2016, Ms Annette Hewitson made the following submissions on behalf of the EA.

Agenda Item 5 d) – Definition of "Commence"
The EA confirmed that it is pleased that the reference to 'remediation' has been deleted under the definition of "commence". The EA made the request for this deletion, in order to allow it to approve any necessary remediation scheme prior to works commencing.

Agenda Item 6) Possible New Requirements
Main river crossings - In response to the Examining Authority's question regarding an additional requirement in respect of main river crossings, the EA confirmed that it remains of the view that the crossing of these using trenchless methods is adequately secured in the DCO and does not need to be within an additional requirement.

Unexpected contamination – Ms Hewitson explained that the EA is largely in agreement with the wording of the additional requirement included in the draft DCO (Version E) at Requirement 15. However, there remains a disagreement as to where reference to consultation with the EA should be included. The Applicant's preference is that this takes place pre-submission of the scheme to the relevant planning authority and, as such, has included this in the current drafting. The EA requests this is moved to the end of the sub-section, securing that the relevant planning authority must consult the EA on the scheme before approval.

The reason for this is that the Applicant would be under no obligation to take on board our pre-submission comments. It is also our opinion that pre-application consultation will delay the approval process and will also incur a charge for requesting the EA's advice in this way, as it must now recover costs incurred with providing pre-application planning advice. Also, as currently drafted, the relevant planning authority is under no obligation to consult us on this type of development (it is not the type of development listed in Schedule 4 of the Town & Country Planning (Development Management Procedure) Order 2015. Only through reference to the EA as a specific consultee to the relevant planning authority can we secure our regulatory position and ensure that due consideration/weight is given to our comments during the discharge process.

We have post consent experience of DCO Requirement discharge, which has demonstrated the importance of reference to consultation with us at the appropriate point. There has recently been an instance where such consultation was not undertaken by a planning authority as the need for post submission consultation was not specifically prescribed in the DCO.

(Post Hearing Note: The EA received an email from the Applicant (Sarah Chandler, RWE) dated 28th January 2016 which advised the following:

"I can now confirm that we can agree to amend the drafting of Requirement 15(1) as, on reflection, it seems this drafting will ensure the most expeditious way to get this requirement signed off which, given its nature, is very important. The amended drafting to be included in Revision F of the draft DCO (and to be submitted to Deadline 5) is as follows:

Unexpected contamination
1.—(1) If, during any stage of the authorised development, contamination not identified or addressed within the relevant code of construction practice is found to be present within the Order limits then no further development in the vicinity of the contamination shall be carried out until, ~~following consultation with the Environment Agency~~, a written scheme to deal with the associated risks has been submitted to and approved by the relevant planning authority following consultation with the Environment Agency.
(2) The scheme must include an investigation and assessment report, prepared by a specialist consultant notified in advance to the relevant planning authority, to identify the extent of any contamination and the remedial measures to be taken to render the land fit for its intended purpose, together with a management plan which sets out long-term measures with respect to any contaminants remaining on site.
(3) No remedial work identified in accordance with paragraph (2) is to be carried out until the scheme has been approved".

Accordingly, this matter is now agreed and confirmation will be included in the updated Statement of Common Ground between the Applicant and the EA.)

The EA provides the following comments in response to Appendix 32 of the Applicant's submission to Deadline 4

4. EA statutory powers and duties

The EA would point out Paragraphs 4.2 to 4.3 are not a correct interpretation of the law.

S165(6) of the Water Resources Act 1991 should be read in conjunction with s172, not in isolation. The EA's right of entry is not solely for the purpose of maintenance. This is confirmed in the Court of Appeal judgment in ***R (on the application of MWH & H Ward Estates Ltd) v Monmouthshire County Council - [2002] All ER (D) 463 (Oct)*** which considers the equivalent provisions in the Land Drainage Act 1991. This case has recently (20 November 2015) been cited with approval in the Administrative Court in ***R (Gary Sharp) v North Essex Magistrates Court and Environment Agency*** where the judge ruled that the EA had powers to carry out the works subject to the payment of compensation under s.165 of the WRA 1991 and that the EA had the power of entry under s.172 of the WRA 1991 to facilitate the exercise of that power. Judgment was handed down in this case last November but the official transcript of the judgment is not yet available but can be provided when it is if necessary.

Therefore the EA's powers are considerably wider than suggested by the Applicant.

Furthermore in paragraph 4.6 the Applicant states that as the holder of an electricity generation licence it will fall within paragraphs 1 and 2 of Schedule 22 to the WRA 1991.

The EA would point out also that paragraph 4.7 misinterprets paragraph 1 of Schedule 22 in that this imposes a restriction on the EA from doing work without the undertaker's consent which interferes with the undertaker's works and property or use of such property and works and the test of whether there will be 'injurious affection' applies to both limbs of this paragraph.

Therefore Schedule 22 protects the Applicant from the EA carrying out any works which would result in 'injurious affection' to their works and property or use of it.

The EA would clarify that as it has now agreed in principle to the imposition of the restrictive covenant sought by the Applicant it takes the view these issues are no longer material in this particular case but wishes to clarify the legal position to avoid confusion for the future.

The EA believes the Applicant now accepts the EA's view on this matter but would seek confirmation that is the case.

CAROL BOLT
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LEGAL SERVICES
29 January 2016