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The Examining Authority (Yorkshire Green)
National Infrastructure Planning
The Planning Inspectorate
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4th April 2023

[Submitted via 'Make a Submission' on National
Infrastructure Planning website]

Your Reference: EN020024

Dear Sir/Madam

**Issue Specific Hearing 1 (ISH1): Scope of the Proposed
Development and draft Development Consent Order (dDCO) –
Hearing Action Points.**

We write further to the Hearing Action Points published on 24th March
2023 following the conclusion of ISH1; specifically to action point no.25.
Where you ask the Local Authorities to:

*'Consider the wording of Schedule 3 Requirement 1(1)(n) in regard to
pre-commencement works and the activities which do not fall within
paragraphs (a) to (m).'*

For clarity the following response is provided solely by City of York
Council (CYC) and not on behalf of any of the other Local Authorities
who have an interest in the proposed scheme.

As presently drafted Requirement 1(1) (a) to (m) would already facilitate
a wide range of pre-commencement works in the event of the DCO
being granted. It is considered that the works set out in points (a) to (m)
would all constitute genuine pre-commencement works which could be
reasonably required in advance of the development proceeding.

Reviewing the works which are set out in (a) to (m) it is considered that
these generally fall into two categories. The first being works required to

allow the applicant to satisfy the requirements of the DCO or those which would facilitate them pursuing formal Discharge of Requirements submissions; these include matters such as further survey or mitigation works. The second category are matters which could be reasonably expected in advance of construction works commencing such as site set up and the delivery, installation or commissioning of plant and equipment required during the construction.

As currently drafted within the dDCO point (n) states: *'activities which do not fall within paragraphs (a) to (m) and are not likely to have significant effects on the environment'*.

During the recent ISH1 the applicant provided a brief rationale behind the drafting of point (n). The intention appears for point (n) to act as a 'catch all' type clause which would facilitate works which may have been overlooked in points (a) to (m) and provide the applicant and their contractors with a degree of flexibility should it be needed at the pre-commencement stage. Providing a mechanism by which any potentially unforeseen circumstances could be dealt with.

The LPA understands the desire of the applicant not wishing to unnecessarily restrict themselves from undertaking the development in the event of the DCO being granted; and that the applicant may need to have an element flexibility to deal with unforeseen circumstances. However, we do have concerns that the provisions of point (n) as currently drafted in dDCO could be too imprecise and therefore be a potential source of ambiguity for all parties.

There are two concerns with provision (n). Firstly, the term 'not likely to have significant effects on the environment'. This wording presents a number of concerns. The term 'not likely' feels somewhat imprecise. More generally the clause would introduce the need for an element of assessment or judgement to be applied in determining whether point (n) could be exercised. During ISH1 the applicant indicated that it would be them or their appointed contractors who would be the party responsible for determining whether any additional activities were 'not likely to have significant effects on the environment'.

The concern the LPA would have in this regard is whether the applicant and their appointed contractors are the correct party for making such assessments. There is the potential for the provisions in (n) to be quite open ended and facilitate a far wider range of pre-commencement works with the only 'control' being the determining of the likelihood of 'significant effects on the environment' occurring.

Given the matters that are covered in points (a) to (m), which cover a range of reasonable activities, could it be the case that point (n) is not required at all and that it would be more appropriate to remove this provision from the DCO; in the interests of precision.

Alternatively, if provision (n) is to remain the LPA would suggest that it needs to be amended to be more precise. If the provision is to retain the need for an element of assessment the LPA questions whether there needs to be some sort of independent review mechanism included in the provision which would move sole responsibility away from the applicant – this could also include some form of notification procedure to the relevant LPA in advance of the works being carried out. Under the circumstances of a standard planning application, it would not be for the applicant to determine whether they could make changes, even non-material, to the scope of an existing permission. Such responsibility is retained by the decision-making body and we would respectfully suggest that a similar principle should be employed in this case.

We trust that the above is of assistance to the Examining Authority.

Yours faithfully

Mark Baldry
Development Projects Senior Officer