

YG-DCO-134

# Yorkshire Green Energy Enablement (GREEN) Project

**Volume 8**

**Document 8.27.3 Application under section 127 and 138 Planning Act  
2008 – National Gas Transmission plc**

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## Version History

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11/07/2023	A	Final	First Issue
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# 1. Application under section 127 and 138 Planning Act 2008 – Statutory Undertakers' Land

## 1.1 Introduction

1.1.1 National Grid Electricity Transmission plc (“National Grid”) submitted in November 2022 an application for a Development Consent Order (“DCO”) to the Secretary of State for the Yorkshire GREEN Project (application reference EN020024). The application was accepted by the Planning Inspectorate on 8 December 2022.

1.1.2 The DCO includes provision for the compulsory acquisition of rights in land, including the acquisition of interests and rights in “statutory undertakers’ land”, as defined by section 127 of the Planning Act 2008 as amended (“the Act”). As the DCO will affect statutory undertakers’ interests in land, National Grid believes that section 127 of the Act is engaged by the DCO.

1.1.3 Section 127 applies to land (statutory undertakers’ land) if:

- the land has been acquired by a statutory undertaker for the purposes of its undertaking
- a representation has been made, and not withdrawn about an application for development consent;
- the Secretary of State is satisfied that
  - the land is used for the purposes of carrying on the statutory undertakers’ undertaking; or
  - an interest in land is held for those purposes; and

for the purposes of Section 127 "land" includes any interest in or right over land (as defined in Section 159 of the Act).

1.1.4 The relevant statutory undertaker for the purposes of this application is National Gas Transmission plc (“NGT”). National Grid propose to acquire interests and rights in land, such land or interest in the land having been acquired by NGT (“NGT’s Land”) for the purposes of its undertaking. The DCO does not include the compulsory freehold acquisition of land owned by NGT.

1.1.5 NGT has made a representation to the Planning Inspectorate in relation to the DCO. National Grid is in ongoing discussions with NGT regarding the DCO application, but its representation has not currently been withdrawn.

1.1.6 If that representation is not withdrawn and the Secretary of State is satisfied that the land or an interest in the land is used for the purposes of carrying on NGT’s statutory undertaking, then the DCO may include provision authorising the compulsory acquisition of a right over statutory undertakers’ land by the creation of a new right over land only to the extent that the Secretary of State is satisfied that the requirements of Section 127 have been met.

- 1.1.7 The DCO also includes the power for National Grid to extinguish the rights of, remove or reposition the apparatus belonging to statutory undertakers, and as such National Grid believes that Section 138 of the Act is engaged by the DCO.
- 1.1.8 Section 138 applies to land if:
- i. there subsists over the land a relevant right; or
  - ii. there is on, under or over, the land relevant apparatus.
- 1.1.9 Section 138 also provides that a DCO may include provision for the extinguishment of the relevant right, or the removal of the relevant apparatus only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the DCO relates.
- 1.1.10 National Grid is, therefore, making this application to the Secretary of State pursuant to Sections 127 and 138 of the Act.
- 1.1.11 The following documents were submitted as part of the DCO application in November 2022, have been updated throughout the examination, and are relied upon to support this application under Sections 127 and 138:
- Statement of Reasons (**Document 4.1**);
  - Draft Development Consent Order (**Document 3.1**);
  - Land Plans (**Document 2.5.1, 2.5.2, 2.5.3, 2.5.4, 2.5.5, 2.5.6**);
  - Works Plans (**Document 2.6.1, 2.6.2, 2.6.3, 2.6.4, 2.6.5, 2.6.6**); and
  - Book of Reference (**Document 4.3**).
- 1.1.12 The Statement of Reasons sets out the justification for seeking compulsory acquisition powers within the DCO.

## 1.2 Need Case

- 1.2.1 The need for the Project has been established in the **Planning Statement (Document 7.1) [APP-202]** and the **Updated Need Case Document (Document 7.4) [APP-205]** and is underpinned by NPS EN-1.
- 1.2.2 In line with the UK government's legal commitment to reduce greenhouse gas emissions by at least 100% of 1990 levels (net zero) by 2050, growth in offshore wind generation and interconnectors to Europe has seen a significant number of connections planned in Scotland and coastal areas of the North of England.
- 1.2.3 The existing electricity transmission network was not designed to transfer the current and increasing volume of generation capacity from the North to major centres of electricity demand which continue to exist in central and southern England. The network will require significant reinforcement in the Yorkshire area to provide capacity for these connections and customers to ensure that power can be transferred securely to onshore demand centres in the south to meet the needs of Great Britain electricity consumers.
- 1.2.4 National Grid has obligations under its Transmission Licence to provide an efficient, economic and co-ordinated transmission system in England and Wales. National Grid is required at all times to plan and develop the transmission system in accordance with the National Electricity Transmission System Security and Quality of Supply Standard

(NETS SQSS) and to offer connections to and/or use of the transmission system via the National Grid Electricity System Operator (ESO).

- 1.2.5 The growth in generation and interconnectors to Europe and rising transfers of onshore and offshore wind from Scotland, alongside connections in the northern regions of England, means that by 2027, boundaries B7, B7a and B8 of the transmission system will exceed their current capacity.
- 1.2.6 This assessment is supported by both the Network Options Assessment (NOA) and the Future Energy Scenarios (FES) which are undertaken by the ESO, independently of National Grid as the transmission owner. The FES identified that from 10,000 MW to between 20,000 MW to 30,000 MW is required in increased capacity by 2040 driven by generation to achieve NET ZERO targets.
- 1.2.7 The National Grid ESO manages shortfalls in boundary capacity by reducing power flows and constraining generation. This is achieved by paying generators to reduce their outputs, known as 'constraint costs'. Ultimately, constraint costs are passed on to consumers and businesses through electricity bills. When constraint costs become higher than the cost of investment required to reinforce the network (and remove the need for constraint costs) it is considered right to proceed with investment for reinforcement. Without reinforcement by 2027 there can be no further unconstrained connections above boundary B8.
- 1.2.8 In addition, the following three contracted customers have connection offers which are reliant on reinforcement of the network:
- Continental Link – A 1.8GW Interconnector between England and Norway to connect in the Creyke Beck Substation, close to Hull, by 2027
- The Atlantic Superconnection - A 1GW Interconnector from Iceland expected to connect in the Creyke Beck Substation, close to Hull, by 2027
- Hornsea Offshore P4 - 2 phased connection application for 2.6GW (1.5GW in 2027 and 1.1GW in 2028) of offshore wind generation with an offer to connect in the North East in April 2027 and October 2028 for each phase respectively.
- 1.2.9 Establishing the need for reinforcement, as summarised above, is the first step in National Grid's project development process. For the Project, this is detailed in the **Updated Need Case Document (Document 7.4) [APP-205]**. On the basis of the need case established, National Grid review how the required reinforcement could be delivered, considering different strategic options, and assessing the options identified. This takes into account environmental, socio-economic, cost and technical considerations. The strategic proposal is then considered further through options identification and selection, taking into account feedback received. The design and assessment of the project in environmental terms is the subject of statutory consultation, with feedback considered, before the project taken forward is finalised and submitted in the DCO application.
- 1.2.10 Therefore, there is an urgent need to reinforce the network in the Yorkshire area by 2027 in order to enable connection of three contracted customers; ensure future connections of renewable generation can be connected without incurring significant constraint costs; facilitate net zero ambitions; and meet National Grid's transmission licence obligations.

## 1.3 Proposed Works

1.3.1 The works which are proposed over NGT's Land in connection with the Proposed Development include, in particular, the following:

- **Section D (Tadcaster Area):** Two new CSECs (Tadcaster East and West 275kV CSECs) would be installed approximately 3km south-west of Tadcaster and north-east of the A64/A659 junction where two existing overhead lines meet. One pylon on the existing 275kV Tadcaster Tee to Knaresborough (XD/PHG) overhead line would be replaced.
- **Section E (Tadcaster – Monk Fryston – existing 275kV Poppleton to Monk Fryston (XC) overhead line south of Tadcaster (Section D)):** Works proposed to the existing 275kV overhead line including replacing existing overhead line conductors, replacement of pylon fittings, strengthening of steelwork and works to pylon foundations.

## 1.4 Section 127 Application

1.4.1 Section 127 applies where a statutory undertaker makes a representation (which is not withdrawn). In these circumstances the DCO may only include a provision authorising the compulsory acquisition of statutory undertakers' land where the Secretary of State is satisfied that the land may be purchased and not replaced without serious detriment to the carrying on of the undertaking or it can be replaced with other land belonging to or available for acquisition by the undertaking without serious detriment to the carrying on of the undertaking. Section 127(2) and (3) are set out below:

*(2) An order granting development consent may include provision authorising the compulsory acquisition of statutory undertakers' land only to the extent that the Secretary of State is satisfied of the matters set out in subsection (3).*

*(3) The matters are that the nature and situation of the land are such that—*

*(a) it can be purchased and not replaced **without serious detriment** to the carrying on of the undertaking, or*

*(b) if purchased it can be replaced by other land belonging to, or available for acquisition by, the undertakers **without serious detriment** to the carrying on of the undertaking.*

1.4.2 Section 127(5) and (6) of the Act contain equivalent wording in respect of acquiring rights over statutory undertaker's land.

*(5) An order granting development consent may include provision authorising the compulsory acquisition of a right over statutory undertakers' land by the creation of a new right over land only to the extent that the Secretary of State is satisfied of the matters set out in subsection (6).*

*(6) The matters are that the nature and situation of the land are such that—*

*(a) the right can be purchased **without serious detriment** to the carrying on of the undertaking, or*

*(b) any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.*



- 1.4.3 There is no statutory definition of "serious detriment." The test for "serious detriment" is wide and holistic and is more than a mere disadvantage. In the Examiner's Recommendation Report in the Lake Lothing (Lowestoft) Third Crossing Development Consent Order 2020, the Inspector recognised at paragraph 8.5.138 "*that serious detriment is a matter of judgement on the scale of impact on the undertaking and that the decision maker should take a holistic approach.*"

## 1.5 Statutory Undertakers' Land

- 1.5.1 No land owned by NGT needs to be compulsorily acquired; only rights over that land. Therefore, section 127(2) and (3) of the Act are not engaged.
- 1.5.2 Section 127(5) of the Act provides that a DCO may include provisions authorising the compulsory acquisition of a right over statutory undertakers' land by the creation of a new right over land only to the extent that the Secretary of State is satisfied of the matters set out in subsection (6).
- 1.5.3 The matters set out in subsection (6) are that the nature and situation of the land are such that-
- i. the right can be purchased without serious detriment to the carrying on of the **undertaking**, or
  - ii. any detriment to the carrying on of the undertaking, in consequence of the **acquisition** of the rights, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.
- 1.5.4 National Grid understands that the rights and interests in the plots set out in Table 1.1 below have been acquired by NGT for the purposes of its undertaking. Interests and rights in the plots set out in Table 1.1 are required by National Grid in order to deliver the Proposed Development.
- 1.5.5 Below is a broad description of the purpose for which NGT's land is required and the rights that would need to be acquired as set out in Table 1.1.
- Class 2 (Compulsory acquisition of rights for the authorised development) – acquisition of rights by the creation of new rights, the imposition of restrictions, or the acquisition of existing restrictions:
    - a. with or without vehicles, plant and equipment to enter and oversail the land to remove any buildings, structures, pylons, apparatus, equipment, and vegetation from that land;
    - b. with or without vehicles, plant and equipment from the surface or from the air to enter and oversail the land to construct the authorised development and thereafter to use, retain, inspect, maintain, repair, alter, renew and replace or remove the authorised development;
    - c. with or without vehicles, plant and equipment to enter and oversail the land to fell, trim, remove or lop trees, hedges and bushes which may obstruct or interfere with the rights sought by the undertaker;
    - d. with or without vehicles, plant and equipment to enter and oversail the land to access any adjoining land for the purposes of the authorised development;

- e. with or without vehicles, plant and equipment to enter and oversail the land to exercise the rights over and across any access route;
  - f. construct, install, use, retain, maintain, inspect, modify, improve, adjust, repair, replace, extend, test, cleanse and remove temporary or permanent drainage and manage waterflows in any drains, watercourses and culverts;
  - g. to require the landowner not to do or suffer anything to be done upon the land which may interfere with or cause damage to the authorised development, including without limitation impose clearance restrictions to the authorised development, not to erect any building or structure or allow any plant or tree to grow within the land, not to change the level of the surface, ground cover or composition of the land or do or allow to be done anything that may cause the level of the surface, ground cover or composition to be altered, not to drill, dig or break up the land;
  - h. carry out any other works necessary or expedient to the land as listed in Schedule 1 of the Order; and
  - i. to carry out any activities ancillary or incidental thereto.
- Class 3 (Compulsory acquisition of rights of access) - Acquisition of rights by the creation of new rights, the imposition of restrictions, or the acquisition of existing rights or benefits of existing restrictions:
    - a. of way with or without vehicles, plant and equipment at all times over and oversailing the land;
    - b. to remove any buildings, structures, pylons, apparatus, equipment, and vegetation including trees, hedges and bushes from that land;
    - c. to require the landowner not to do or suffer anything to be done upon the land which may interfere with the undertaker's access, including without limitation not to erect any building or structure or allow any plant, tree or hedgerow to grow within the land, not to change the level of the surface, ground cover or composition of the land or do or allow to be done anything that may cause the level of the surface, ground cover or composition to be altered, not to drill, dig or break up the land;
    - d. construct, install, use, retain, maintain, inspect, modify, improve, adjust, repair, replace, extend, test, cleanse and remove temporary or permanent drainage and manage waterflows in any drains, watercourses and culverts;
    - e. to require the landowner not to do or suffer anything to be done upon the land which may interfere with sight lines associated with the undertaker's access, including without limitation not to erect any building or structure or allow any plant or tree to grow within the land insofar as it may interfere with sight lines, not to change the level of the surface, ground cover or composition of the land or do or allow to be done anything that may cause the level of the surface, ground cover or composition to be altered, not to drill, dig or break up the land;
    - f. to construct, use or maintain works (including the provision of means of access and drainage); and

- g. to carry out activities ancillary thereto.

Table 1.1 Land affected and interest or right to be acquired

Statutory Undertaker's land (plot number)	Interest or right to be acquired
D1-32, E3-08, E3-13	Class 2 (Compulsory Acquisition of Rights for the authorised development)
D1-28, D1-29, D1-39, D1-46, D1-56	Class 3 (Compulsory Acquisition of rights of access)

- 1.5.6 National Grid considers that there would be no serious detriment to NGT's undertaking if it were to acquire these rights and interests and that the criteria in section 127 are satisfied. This is because the rights would co-exist within the plots affected alongside those of NGT and, for the most part, the rights would cause minimal interference to NGT's undertaking. Other than during construction of the Proposed Development, which works would consist of crossing of the NGT's pipelines with temporary access roads, the only interference would be maintenance or emergency works to National Grid's equipment. On such occasions, National Grid would consult with NGT in order to cause as little disruption as practicable during the maintenance or emergency works.
- 1.5.7 In addition, National Grid will work with NGT regarding its operational requirements has included protective provisions at Schedule 15, Part 1 of the DCO with a view to protecting NGT's interests. As a result, it is National Grid's view that any interference caused (if at all) will not be a serious detriment to NGT carrying on its undertaking.
- 1.5.8 As the rights to be acquired will co-exist with those of NGT and, for the most part, cause minimal interference with NGT's undertaking, National Grid does not consider it necessary to replace the land over which interests are required for the Proposed Development.
- 1.5.9 The procedure under section 127(5) only applies to the compulsory acquisition of a right, so is not engaged by plots subject to Articles 36 to 39 inclusive of the DCO (temporary use).
- 1.5.10 Negotiations with NGT to acquire the interests and rights required for the Proposed Development and to manage any interfaces between the Proposed Development and apparatus and/or rights vested in NGT on, under or over the order land voluntarily are ongoing. However, it has not yet been possible to reach agreement. Private treaty negotiations with NGT will continue in parallel with the compulsory acquisition process with a view to concluding an agreement as soon as possible.
- 1.5.11 However, compulsory acquisition powers are still sought in the DCO over the plots for the following reasons:
- notwithstanding that diligent enquiry to establish all persons with an interest in land has been undertaken, and agreements concluded, if any person with an interest in land is identified or comes forward subsequent to the DCO having been made, National Grid must be able to rely upon compulsory powers under the DCO in respect of such interest if no voluntary agreement with that person can be obtained;
  - the voluntary agreement may later prove to have granted insufficient rights and the land owner may be unwilling to extend the rights as may be required; and

- compulsory powers are more readily enforceable so reducing additional risk, cost and delay. National Grid may consistently and uniformly enforce compulsory powers to deliver the Proposed Development in a comprehensive manner in relation to all persons with an interest in land.

## 1.6 Section 138 Application

- 1.6.1 As noted at Paragraph 1.1.7 above, the DCO gives National Grid the power to extinguish the rights of, remove or reposition the apparatus belonging to statutory undertakers, including (but not limited to) NGT, over or within the order land. However, this is only permitted where the Secretary of State concludes that it is necessary to do so.
- 1.6.2 National Grid understands that a relevant right and/or relevant apparatus for the purposes of section 138 of the Act is vested in or belongs to NGT, on under or over the plots listed in Table 1.1 above.
- 1.6.3 For the purposes of this application, it is National Grid's case that:
- Works associated with the Proposed Development are necessary over the plots listed in Table 1.1 above and are described in Schedule 1 to the DCO (**Document 3.1**) and shown on the Works Plans (**Document 2.6.1, 2.6.2, 2.6.3, 2.6.4, 2.6.5, 2.6.6**) to carry out the Proposed Development;
  - the Proposed Development could affect relevant rights and/or relevant apparatus vested in or belonging to NGT which may be affected by the Proposed Development;
  - in the absence of powers for National Grid to extinguish such rights and/or remove or reposition such apparatus, the works associated with the Proposed Development (and summarised at Paragraph 3 above) could not be completed;
  - protective provisions are included at Part 1, Schedule 15 of the DCO; and
  - the nature of the proposed works and inclusion of protective provisions in the DCO means that the Secretary of State can be satisfied that NGT's rights, whilst potentially subject to interface, will not be affected to the detriment of its ability to carry out its undertaking.
- 1.6.4 National Grid is seeking to negotiate with NGT to acquire the rights necessary for the Proposed Development and to manage any interfaces between the Proposed Development and apparatus and/or rights vested in NGT on, under or over the order land by private treaty. Private treaty negotiations will continue in parallel with the compulsory acquisition process with a view to reaching an agreement as soon as possible.
- 1.6.5 NGT consider that the Protective Provisions within Schedule 15, Part 1 of the draft DCO (Volume 3, Document 3.1) for the benefit of gas undertakers are not sufficient and require bespoke Protective Provisions in respect of their assets. As mentioned, National Grid are continuing to negotiate and engage positively with NGT in order to agree bespoke Protective Provisions.
- 1.6.6 National Grid and NGT note a key issue with indemnity, in which both sides are trying to reach agreement upon. National Grid cannot agree to an uncapped indemnity. A legal side agreement is also being negotiated with an aim to reach an amicable conclusion for both parties. More specific details regarding points not presently agreed between the

parties can be seen within the Statement of Common Ground between National Grid and NGT.

- 1.6.7 However, in the absence of private treaty agreement, it is still necessary to seek compulsory powers in the DCO to ensure that National Grid is able to consistently and uniformly enforce powers to deliver the Proposed Development in a comprehensive manner in relation to all persons with an interest in land.

## **1.7 Conclusion**

- 1.7.1 Given the need for the Proposed Development (see in particular the needs case as set out in the Statement of Reasons), National Grid considers that there is a compelling case in the public interest for the inclusion of the compulsory purchase powers within the DCO.
- 1.7.2 For the reasons set out in this application, it is National Grid's position that, pursuant to section 127 of the Act, the Secretary of State can be satisfied that the prescribed tests of section 127 have been met and that the statutory undertakers' land may be included for compulsory acquisition in the DCO.
- 1.7.3 It is also National Grid's position that, pursuant to section 138 of the Act, the Secretary of State can be satisfied that the power for National Grid to extinguish the rights of, remove or reposition the apparatus belonging to NGT is necessary for the purpose of carrying out the Proposed Development, and that the test of section 138 has therefore been met.

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