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To:
Mr Morris
RWE Npower

Your Ref:

Our Ref: EN060001

BY EMAIL ONLY

Date: 03 May 2012

Dear Mr Morris,

**Proposed Application for Development Consent by Rwe Npower for the Willington C – Gas Pipeline
Draft Development Consent Order and Explanatory Memorandum**

I refer to your letter dated 13 February 2012 seeking the IPC's now the Planning Inspectorate's comments on the draft Development Consent Order (DCO) and draft Explanatory Memorandum. As you know we're not able to prejudge the eventual decision of the Secretary of State, but welcome the opportunity to raise any technical issues. I set out below the points discussed at our meeting on 22 March 2012.

Please note, the following is advice and is not intended to be prescriptive. It is for developers to satisfy themselves that they have complied with relevant legislation and had regard to relevant guidance. The Inspectorate provides advice but the final decision as to whether or not to accept an application or grant or refuse development consent lies with the Secretary of State.

Draft Development Consent Order

Although we note that at the meeting you explained that the draft DCO has been based on your experience with the Pipeline Act 1962 as amended, you will wish to satisfy yourself that this proposed approach is relevant to the regime established by the Planning Act 2008 as amended (PA 2008). If you consider that these provisions are necessary for this particular project then explanation and justification for this approach should be fully set out in the Explanatory Memorandum (ExM).

The font size and numbering of Articles and paragraphs should be consistent with SI drafting. The Rookery South DCO demonstrates this. With the Localism Act now having come into force, please ensure that all references to 'the Commission' are removed and appropriately replaced.

Article 2

Definition of "maintain": As we mentioned at the meeting, we consider that this definition is very broad in scope. You confirmed that you would consider redrafting this definition and providing a full explanation in the ExM.

Definition of "order land": You need to ensure that this definition is consistent with the Book of Reference (BoR) and clearly described in the DCO. You may wish to take a look at how order land has been defined in other draft DCOs submitted to the IPC/Planning Inspectorate to date (eg Ipswich Rail Chord) which are available on the Planning Portal web-site: <http://infrastructure.planningportal.gov.uk/projects/>.

Definition of "pipeline": We understand that you intend to insert a definition of pipeline for clarity.

Definition of relevant planning authority: You will wish to satisfy yourself that what you're proposing is consistent with PA 2008 and in particular s173.

Definition of "undertaker": We discussed the impact of this provision in combination with Article 9 (4) to potentially introduce 2 undertakers with possible implications for the rest of the DCO. You therefore indicated that you would reconsider the drafting of this definition.

Article 3 (a)

It is likely that the Examining Authority will ask for details of hedgerows which may be affected by this provision and the views of the LPA on this provision.

Article 3(b)

We discussed the drafting of this provision which appears to be very complex. You may wish to look at the provision in the proposed DCO for Rookery South. Similarly, you may wish to consider whether article 3(b)(iv) is needed as this would seem to be dealt with by s161 of PA2008.

Article 5

The reference to 'divert' in this Article will need to be fully explained and justified in the ExM.

Article 7 – Limits of Deviation (LOD)

In the meeting we highlighted two points of principle (which equally apply to the entire DCO):

- 1) Everything included in the DCO must have been assessed in the ES; and
- 2) Provisions need to be sufficiently well defined so that it is clear exactly what the application is for. We would therefore encourage you *inter alia* to consider specifying an upwards limit on the AGI and 'nominal depth' in the light of this.

You confirmed that you would consider redrafting this Article to make the position clear.

Article 9 (4) – Transfer Benefit of Order

We note that at the meeting RWE Npower explained that the reason for including clause (4) was to ensure that National Grid will have the power to do what they need to do to connect the pipeline to the National Grid, without having to come back to the Planning Inspectorate/Secretary of State in order to speed up implementation. You may wish to (re)consider whether the drafting of this Article could be simplified taking into account:

- o that a transfer of the land would in any case include the transfer of the power to construct the development proposed on this land;
- o how this relates to the definition of "undertaker" (see above);
- o the need to avoid having two defined undertakers; and
- o Who would be responsible for funding any compulsory acquisition, if compulsory acquisition powers were also to be transferred and provide appropriate explanation in the Funding Statement.

Article 12 – Public Rights of Way

We suggest that "The undertaker may extinguish" is inserted at the beginning of 12(1). The views of the Highway Authority should be sought on this provision.

Article 17 – Compulsory Acquisition of Land

As mentioned by us in the meeting, different approaches to compulsory acquisition have been adopted by the various applications for development consent submitted to the IPC. RWE Npower will, however, need to clarify whether it is intending to extinguish all existing rights over land under Article 17, Article 19 and Article 20 or whether its approach is to rely on statutory authority under s152 and s158 of the 2008 Act to interfere with existing rights. You will need to be satisfied that what is proposed in the application is consistent.. It would be helpful to explain the approach taken in the ExM. You confirmed that you will reconsider the need for Article 20(7).

Article 21 – Private Rights of Way

You indicated that you would check if this article is still necessary to be included depending on the approach you decide to take to extinguishment of rights. The last sentence of article 21(7) you agreed to revisit.

Article 23 – Acquisition of Subsoil

You explained in the meeting that you had looked at Model Provisions 24 and 25 in drafting this article and amalgamated these into one as you may need to go further down than 40m. You will wish to satisfy yourself that this has been adequately assessed in the Environmental Statement and fully justified in the Explanatory Memorandum.

Article 24 – Rights under or over Streets

We note your explanation that you're proposing separately to obtain consent for the works to the A38 due to its status as a trunk road. We understand that for all other roads, you're intending to consent the works through the DCO but to follow the same process as if you were obtaining a street works licence. You may wish to explain this approach in the Explanatory Memorandum.

Article 25 – Temporary Use of Land for Carrying out the Authorised Development

As we mentioned in the meeting the draft DCO needs to distinguish clearly between temporary and permanent works, including through identification in the appropriate schedules. In connection with article 25 only the land to be occupied temporarily should be identified in Schedule D.

Article 26 – Temporary Use of Land for Maintaining the Authorised Development

You may wish to consider your approach to compulsory powers in the DCO where land is not being acquired outright. You may wish to consider the approach other applicants have taken to date (eg Network Rail on Ipswich Rail Chord, see Statement of Reasons section 3). We also note that the draft DCO does not include Model Provision 26 (acquisition of part of certain properties) and understand that you don't perceive a need for such a provision.

Article 27 – No Double Recovery

You indicated that you would look at this Article again to ensure compliance with s126 of the PA 2008. .Furthermore, you will wish to satisfy yourself that the article does not breach fundamental fairness principles and complies with Human Rights legislation.

Article 32 – Felling or Lopping of Trees

You confirmed that you would consider amending this Article so it refers to trees within the Order limits.

Article 33 – Crown Rights

You indicated at the meeting that you would re-consider the exact wording of Article 33, particularly whether it is appropriate to include 'take', to ensure its consistency with s135 of PA2008. In relation to land where you're not certain whether or not it is Crown land, you may wish to consider taking a cautious approach of highlighting this on the land plan.

Schedules

As mentioned at the meeting, there are some general points we highlighted in relation to the schedules:

- 1) You will wish to satisfy yourselves that the Schedules clearly distinguish between those elements of the proposal which are integral to the development to be authorised and those which are associated development. While we note your explanation that under the Pipelines Act all listed works would be integral, you will need to ensure consistency with PA2008.
- 2) All Schedules should refer to the relevant article of the draft DCO which grants the power for the inclusion of the works.
- 3) Provide as much detail as possible on each of the works and ensure that the descriptions and limits are clear.
- 4) Ensure that all works included have been assessed/remain within the worst case assessed in the Environmental Statement.

We also note your explanation that you treated all temporary works as associated development and all permanent works as integral. You will need to explain and justify your approach in the ExM as the Planning Inspectorate cannot pre-empt or pre-judge the Secretary of State's decision. Furthermore, with regards to each of these elements in works 2 to 6 in Schedule 1 of part 1 of the draft DCO you should set out detailed explanation and specific justification in the ExM as to why you consider these can be properly regarded as being integral to the project. This should take into account the principles in the Guidance relating to associated development.

At acceptance stage the Secretary of State will need to be satisfied that the test in s55 3 (c) is met i.e. that development consent is required for any of the development to which the application relates. Consent is required for development that is or forms part of an NSIP (s.31).

When considering whether any works are integral to the proposed NSIP or would constitute associated development the DCLG Guidance on Associated Development should be considered. The Guidance states at paragraph 10 that *development should not be treated as associated development if it is actually an integral part of the NSIP and that the decision maker must decide on a case by case basis as to whether elements should be treated as associated development*. Please also note that revised draft guidance on Associated Development has been issued by DCLG:

<http://www.communities.gov.uk/publications/planningandbuilding/guidanceassociateddevelopment>

It is for applicants to justify whether a particular element of a proposed NSIP can be considered to be integral to the NSIP and therefore what constitutes development for which consent is sought under the Act and to express and explain their conclusion in the Explanatory Memorandum.

Works No. 1 and 2: As discussed at the meeting this needs to take account of the limits of deviation. You therefore may wish to consider inserting at the end of the paragraph "subject to the limits of deviation". You may also wish to reconsider in this context whether it is therefore appropriate to refer to the starting and end points as "approximate". Furthermore, as the Applications: Prescribed Forms and Procedure Regulations 2009 (APFP Regulations) require pipelines to have a start point you will wish to satisfy yourself that what you're proposing is consistent with Regulation 6(4) of the APFP Regulations. It would

also seem useful if you could show the grid references cited in the draft DCO on the corresponding plans using the same referencing methodology.

Works No. 3: As we mentioned at the meeting, you will wish to satisfy yourself that should there be a need for a degree of flexibility in the exact siting of the AGI, that this can be accommodated within the co-ordinates specified.

Works No. 5 and 6: You may wish to satisfy yourselves that it is sufficiently clear that the works to be authorised cannot go beyond the worst case assessed in the Environmental Statement.

Works No. 12: As mentioned by us at the meeting, please ensure you clearly distinguish between private access to works and access onto public highways.

Works No 14: For clarity purposes you may wish to consider including a grid reference.

Requirements

Requirement 1: As mentioned by us at the meeting, if terms are already defined in Article 2 ` Interpretation ` of the draft DCO, then there is no need to repeat this in Schedule A Part 2. For the latter it is sufficient to only list additional terms used in part two. This should also refer to 'Environmental Statement' and not 'environmental document', despite the latter term being used in the Model Provisions Order.

Requirement 4: You indicated at the meeting that you would re-consider the drafting of this requirement to ensure it is clear who consults whom at which stage.

Requirements 8(3), 10(2): As mentioned by us at the meeting you may wish to consider how and by whom "where appropriate" and "appropriately fenced" would be defined to ensure clarity and consistency in the DCO.

Book of Reference

As it is up to the applicant to decide on how much detail to provide in part 1 of the book of reference (BoR), you indicated at the meeting that you would re-consider whether all the detailed information provided in relation to the right to construct the pipeline is necessary. In doing so you will wish to satisfy yourself that the level of detail is tailored to the individual plot and proportionate. You may wish to look at the BoRs submitted with other applications to date including Ipswich Chord, Rookery South and Preesall which are available on the Planning Portal web-site.

Concerning private rights of way, the names of those entitled to the benefit of any private rights which are to be extinguished, suspended or interfered with should be listed in part 3 of the BoR (APFP Reg 7(1) (c)). If they are to be extinguished using compulsory acquisition powers or if they are not to be extinguished, but the land is to be subject to compulsory acquisition, then the names and addresses will be set out in Part 1 (APFP Reg 7(1)(a)). If the rights are to be interfered with or suspended and the persons with the benefit may have a claim so that they fall within Category 3, then the names and addresses should be contained in Part 2 (APFP Reg 7(1)(b)).

In relation to part 5 of the BoR you informed us at the meeting that it is your understanding that you fall within s129(1)(e) of the PA 2008 as your generation licence includes 'activity to enable the generation of electricity'. By virtue of this RWE NPower has been considered a deemed statutory undertaker for the purposes of the Compulsory Purchase Act 1965 in relation to the consent for the Pembroke power station. S128(2) would not then apply. If this is the case, it would not appear necessary for RWE Npower to complete part 5 of the BoR, but to include detailed explanation and justification in the Explanatory Memorandum to support this course of action.

I hope you find this advice helpful. Should you have any queries in relation to the above or any other matter, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S. Wilding', written in a cursive style.

Simone Wilding
Principal Case Leader

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Advice may be given about applying for an order granting development consent or making representations about an application (or a proposed application). This communication does not however constitute legal advice upon which you can rely and you should obtain your own legal advice and professional advice as required.

A record of the advice which is provided will be recorded on the Planning Inspectorate website together with the name of the person or organisation who asked for the advice. The privacy of any other personal information will be protected in accordance with our Information Charter which you should view before sending information to the Planning Inspectorate.