

From: Simone Wilding
Sent: Tuesday, September 13, 2011 12:09 PM
To: 'Hugh.Morris@RWEnpower.com'
Cc: Adriana.Gasparini@RWEnPower.com; Matthew.Trigg@rwenpower.com;
SIMON.WELLS@RWEnpower.com
Subject: RE: NDEVWILLC_00638 - Willington C Gas Pipeline: Section 115 (2) PA 2008 -
Definitions of works: Associated Development

Dear Hugh,

At acceptance stage the acceptance Commissioner will need to be satisfied that the test in s55 3 (c) of the Planning Act 2008 (PA 2008) 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 a nationally significant infrastructure project (NSIP) (s.31 PA 2008). If and when an application is accepted the Examining Authority (ExA) considers all the individual elements included in the draft DCO in detail throughout the pre-examination and examination stages before formulating their recommendation to the Secretary of State.

The ExA when considering whether any works are integral to the proposed NSIP or would constitute associated development must have regard to the DCLG Guidance on Associated Development. 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*. The ExA must look carefully at the facts available and the information provided by the applicant in the Explanatory Memorandum to be submitted with the application. 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 PA 2008 and to express and explain their conclusion in the Explanatory Memorandum.

In your email of 16 August you have put forward a possible argument that the AGI and the NTS spur could be said to be integral to the proposed application on the basis that the development could not be used without the AGI and NTS spur. As the IPC cannot pre-empt or pre-judge the ExA's decision, it is not possible to state at this stage whether this is sufficient or whether the IPC agrees with you. With regards to each of the elements in part 1 of schedule A of the draft DCO you should set out detailed explanation and specific justification in the Explanatory Memorandum 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. You could consider whether or not any of the elements of the proposed development is an aim in itself; whether any are necessary and subordinate and if so whether they are in fact more rightly to be regarded as integral to the proposed NSIP. As part of this commentary you may also wish to consider in the Explanatory Memorandum the following factors: the location of the site and the scale and nature of the proposed pipeline; the functional relationship between the elements of the scheme; and whether the absence of any of these works might be fatal to the project.

All integral parts of any proposed development together with any associated development need to be included in the description of the authorised development. Therefore, should you consider the AGI and NTS spur to be integral to the proposed NSIP, you would need to list these within part 1 of schedule A of the draft DCO.

I also note that you've set out in your email that you consider the temporary construction works as associated development and a possible argument for this. As set out above, the IPC cannot pre-empt or pre-judge the ExA's decision, and is therefore unable to indicate at this stage whether this is sufficient or whether the IPC agrees with you. With regards to each of the elements in part 1 of schedule A of the draft DCO you should set out detailed explanation and specific justification in the Explanatory Memorandum as to why you consider these can be properly regarded as being either integral or associated development to the project.

PA 2008 does not distinguish between permanent or temporary works although the Model Provisions (see 28 and 29) do provide for temporary works to be carried out and access to land to be obtained in order to carry them out. Whether or not something needs to be included within a DCO is determined by whether or not it constitutes development which requires development consent as set out in s31 PA 2008: "consent is required for development that is or forms part of a nationally significant infrastructure project" (NSIP). Works which constitute associated development can also be included.

It follows therefore that temporary works which are either integral or associated development should be included in the draft DCO. If on the other hand works cannot reasonably be justified as either integral or associated development, then they may still be provided for in the draft DCO if they fall within the definition of development in s32 of PA 2008 (see s120(3) and s120(4) and Schedule 5 ancillary matters, subject to any prescribed consents that may be needed under s150). If they do not constitute development they may be described as ancillary works in Part 2 of Schedule A of the draft DCO.

You may also find it useful to take a look at the draft DCO for the North Doncaster Chord which is available from our website which contains temporary works in schedule 1 of the draft DCO ([http://infrastructure.independent.gov.uk/wp-content/ipc/uploads/projects/TR040001/2.%20Post-Submission/Application%20Documents/Draft%20Development%20Consent%20Orders/5.1%20-%20Draft%20Order%20for%20NWR%20\(North%20Doncaster%20Chord\)%20Order%20Application.pdf](http://infrastructure.independent.gov.uk/wp-content/ipc/uploads/projects/TR040001/2.%20Post-Submission/Application%20Documents/Draft%20Development%20Consent%20Orders/5.1%20-%20Draft%20Order%20for%20NWR%20(North%20Doncaster%20Chord)%20Order%20Application.pdf)).

This advice is without prejudice to any determination the Commission may make in accordance with s.55 and does not equate to a determination whether elements of the proposed development within the draft DCO submitted to us are integral to the NSIP or constitute associated development.

Also, at our meeting with the relevant local authorities for this project on 23 June 2011 you had asked to which degree an application could be changed following submission. I can now provide you with the following advice: The Infrastructure Planning (Compulsory Acquisition) Regulations 2010 regulate the procedure to be followed in circumstances where an application is amended to include additional land for compulsory acquisition. The Infrastructure Planning (Examination Procedure) Rules 2010 do not provide a procedure for the examination of any other material changes to the application. In respect of such material changes which may be proposed to the draft DCO submitted with the application, the Commission will act in accordance with principles established in case law concerning proposed changes to planning applications. Development may not be permitted which is in substance not that for which permission has been applied. A decision whether or not an amendment is substantial must not be perverse under the Wednesbury principle. It is fundamental to the exercise of a decision-maker's discretion whether those affected by a proposed change would have been deprived of an opportunity to be consulted about the change. This means the Examining Authority would need to come to a view on the materiality of the proposed change taking into account whether full consultation (rather than consultation within the examination process) would be required. Furthermore, the proposed change would need to have been considered in the Environmental Statement, and therefore it is possible that further information would need to be sought under Regulation 17 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009. The decision whether a change could be accepted would need to be made on the facts in each individual case.

I hope this advice is helpful and apologies again for the time it has taken us to get back to you on this matter.

kind regards

Simone

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