

Infrastructure Planning Directorate  
Planning Inspectorate  
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**Our ref:** RA/2015/132060/11-L01  
**Your ref:** EN 60004  
**Our ID:** 10031562  
**Date:** 04 March 2016

### **DEADLINE 9 SUBMISSIONS**

Dear Sir/Madam,

**A REPLACEMENT HIGH-PRESSURE GAS PIPELINE WITHIN A BORED TUNNEL BENEATH THE HUMBER ESTUARY AND ASSOCIATED DEVELOPMENT, INCLUDING A CONNECTING PIPELINE, MINOR MODIFICATIONS TO PAULL ABOVE GROUND INSTALLATION AND ASSOCIATED TEMPORARY LAY DOWN, WORKING AND MITIGATION AREAS. FROM PAULL, EAST RIDING OF YORKSHIRE TO GOXHILL, NORTH LINCOLNSHIRE.**

We would like to provide the following deadline 9 submissions.

#### **Indemnity**

The latest version of the Environment Agency protective provisions in Document 3.1D 'Revised Draft Development Consent Order' are agreed with National Grid, save for the wording relating to the indemnity which we are seeking to be included as paragraph 23 of the protective provisions. National Grid have yet to confirm their final position on this indemnity. The wording of the indemnity that we have requested is as follows:

- 23.(1) Without prejudice to the other provisions of this part of this Schedule, the relevant undertaker must indemnify the drainage authority from all claims, proceedings, costs, damages, expenses or loss, which may be made or taken against, recovered from, or incurred by, the drainage authority by reason of the construction of any of the specified works or any act or omission of the relevant undertaker, its contractors, agents or employees whilst engaged upon the work.*
- (2)The relevant undertaker shall not be liable under sub-paragraph 2(1) to the*

*limited extent that the liability is a result of negligence on the part of the Agency or its duly authorised representative, employee, contractor or agent.*

*(3) The Agency must give to the undertaker reasonable notice of any such claim or demand and no settlement or compromise may be made without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.*

For background, National Grid expressed concern that the initial indemnity that we asked for (our standard indemnity that we put forward in our preferred form of protective provisions when flood defence consents are disapplied in DCOs) referred to specific heads of claim. We did not think that this should be any cause for concern for National Grid, but in order to finalise the protective provisions agreed to the amended wording above, adding a provision excluding any losses incurred due to Environment Agency negligence as extra comfort. For your information, our standard indemnity reads as follows:

*Without prejudice to the other provisions of this part of this Schedule, the relevant undertaker must indemnify the drainage authority from all claims, demands, proceedings, costs, damages, expenses or loss, which may be made or taken against, recovered from, or incurred by, the drainage authority by reason of—*

*Any damage to any drainage work so as to impact its efficiency for the purposes of flood defence;*

*Any raising or lowering of the water table in land adjoining the authorised works or any sewers, drains and watercourses; or*

*Any flooding or increased flooding of any such lands and where the drainage authority is the environment Agency inadequate water quality in any watercourse or other surface waters or in any groundwater which is caused by the construction of any of the specified works or any act or omission of the relevant undertaker, its contractors, agents or employees whilst engaged upon the work.*

*The Agency must give to the undertaker reasonable notice of any such claim or demand and no settlement or compromise may be made without the agreement of the undertaker which agreement must not be unreasonably withheld or delayed.*

For the reasons specified below, we request that you include the requested indemnity in the protective provisions. However, if you do not consider it appropriate to do so, we are prepared to agree to the protective provisions without its inclusion.

The detailed reasons that we require an indemnity are as follows:

- It is standard for an indemnity to be included in the protective provisions, for the benefit of the Environment Agency, of all DCOs where the need for flood defence consents under S.109 of the Water Resources Act 1991 and/or relevant byelaws has been disapplied. We are not aware of any DCO where an applicant has maintained an objection to the inclusion of an indemnity previously.
- Indemnities of a similar nature are provided in Transport and Works Act Orders.
- The DCO is granting authority for substantial works that could impact on vital flood defence works. It is therefore important that the Environment Agency is adequately protected should these be inadvertently damaged in construction of the authorised development.
- The protective provisions contain a paragraph enabling the Environment Agency to recover costs for making good any damage caused to flood defences by the applicant or their contractor. Although this enables the Environment Agency to recover the expense of making good the damage, it does not, as the indemnity does, protect it against any third party claims which may be made should the Environment Agency cause loss to that third party necessitated by the initial damage. The Environment Agency should not be required to compensate for any such loss from its grant, funded from general taxation, where it is directly consequent upon works undertaken in connection with the authorised scheme.
- The indemnity provides the Environment Agency with protection over and above that provided by the general law of tort. In the event of damage occurring, it enables the Environment Agency to make a wider claim than could otherwise be made. The indemnity also enables such a claim to be made considerably more easily and at less cost. As above, costs not recoverable under the law of tort should not fall to be recovered from the Environment Agency's grant, funded

from general taxation, where they are directly consequent upon National Grid's scheme.

- We consider that the indemnity requested is reasonable, in particular because it includes the following qualifications:
- The Environment Agency is required to give National Grid reasonable notice of any claim or demand;
  - Losses incurred due to Environment Agency negligence are excluded from the scope of the indemnity; and
  - The Environment Agency is prohibited from settling any claim or demand, or reaching a compromise in respect of it, without the prior consent of National Grid (subject to no unreasonable delay or withholding of consent by National Grid).

We note that National Grid seek indemnities when they are an interested party in other DCOs, for example, in relation to the Triton Knoll Electrical System DCO (Planning Inspectorate Reference; EN020019), the examination of which closes on 3 March.

The indemnity at paragraph 22 of the protective provisions relating to costs, charges and expenses sustained, is not in dispute.

### **Book of Reference & Schedule of Negotiations**

We highlighted in our Deadline 8 submission that we had received no request to enter into any agreement in respect of plots 33 and 34. National Grid have since confirmed their wish to add plot 33 to the previously agreed heads of terms for the pipeline easement. We have agreed to this provided the relevant payments are increased pro rata. The Book of Reference and Schedule of Negotiations will both need to be updated to reflect this.

In relation to plot 34 National Grid have stated that because the plot forms part of the road, they will be laying the pipeline in this plot using their statutory powers under the Roads and Street Works Act, and therefore they do not need any form of agreement with us for this.

The other corrections we requested to the Book of Reference and Schedule of

Negotiations in our Deadline 8 submission remain outstanding.

Should you require any additional information or clarification, please don't hesitate to contact me on the details below.

Yours faithfully

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