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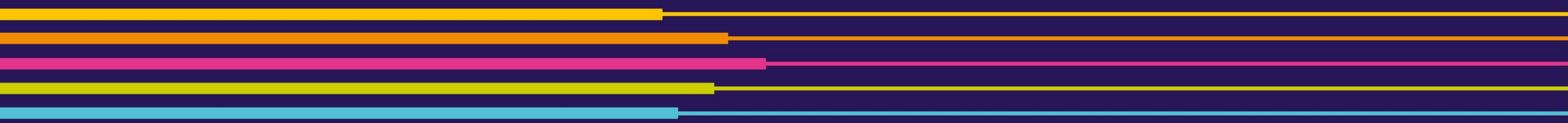
nationalgrid

Responses to matters raised in Rule 17 Letter

The Yorkshire and Humber (CCS Cross Country Pipeline) Development Consent Order



Application Reference: EN070001

Deadline 5

March 2015

The following table sets out the Examining Authority's requests for further information in relation to the draft Order granting development consent for the proposed Yorkshire and Humber CCS Cross Country Pipeline as set out in its letter dated 18 March 2015 (the "**Rule 17 Letter**"). Responses are required by **26 March 2015.**

Each request for further information in the table below has a unique number in Column 1 which corresponds to the item numbers set out in the Rule 17 Letter.

Column 2 identifies the organisations from which responses are sought. Column 3 sets out the request for further information and column 4 sets out National Grid's response.

REF NO.	RESPONDENT	QUESTION	RESPONSE
1	National Grid	Article 5: In order to make it clear that the works or activities involved in the maintenance of the authorised development do not exceed what has been assessed in the Environmental Statement, and having read the responses submitted at deadline 4, the ExA is inclined to insert "…to the extent that has been assessed in the Environmental Statement"; after the phrase "… serves the same purpose…" in the interpretation of "maintain" in Article 2. Does the applicant have any comments?	National Grid set out in the row of its Written Summaries of Oral Evidence and Supporting Information Report (document reference 12.1) in respect of Agenda Item 1 of the Agenda for the Issue Specific Hearing in relation to the DCO held on 29 January 2015 why it is considered that the wording "to the extent that has been assessed in the environmental statement" is neither necessary nor reasonable for the purposes of Overarching Policy Statement for Energy (EN-1) and is neither required by case law nor by environmental statute. Further detail is contained in that row but National Grid would summarise the position as follows: • case law requires that a consent should not permit the construction of a project which could be very different in scale or impact from that applied for, assessed or permitted. The existing definition of "maintain" in Article 2 (*interpretation*) of the DCO, in conjunction with the existing safeguards in Article 5 (*maintenance of authorised development*) prevents exactly that scenario occurring. • The Infrastructure Planning (EIA) Regulations 2009 require applications for development consent orders to be accompanied by an environmental statement which contains a description of the development, a description of the aspects of the environment likely to be affected by the development and a description of the likely significant effects of the development on the environment (Schedule 4 to the Regulations). The description of the development must be proportionate – clearly it would not be practicable to describe every movement or minor operation, no matter how small, which will be undertaken in order to complete the development. The emphasis in an environmental statement is on the main or significant environmental effects to which a development is likely to give rise – case law has made it clear that otherwise "there is a real danger that both the public when consulted and decision takers would "lose the wood for the trees", thereby causing the EIA process to become less effective as an aid to good environmental decision making" (*R (on the application of An Taisce) v Secretary of State for Climate Change & Energy* [2013] EWHC 4161 (Admin)). The additional wording proposed in the Rule 17 letter therefore goes beyond what is required by the Regulations. • National Grid notes that at the DCO issue specific hearing the Examining Authority commented as follows: "Something that I see as perhaps difficult to define, and whether this chimes with either party I am not sure, is a comprehensive list of activities which might be included within the definition of "maintain", **because it could be so wide ranging that one could say it would be almost unmanageable**. **But in seeking to be so prescriptive you might leave out something**. **You know, it is this issue of being about right <u>or precisely wrong</u>**. I am not sure whose side that is on, but that is coming at it from what I see." (emphasis added) • The definition has been subject to detailed review by National Grid engineers on several occasions to ensure that it covers necessary activities for this project and is not unnecessarily "wide ranging". Not all of the elements comprised in the definition of maintain from the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 were included in the DCO definition. • It appears to National Grid, however, that the issue of being so prescriptive as to leave something out is exactly the point: it is impossible at this stage to list every conceivable maintenance activity which could be required in the life of the project and to have assessed in the environmental statement every single such activity, something which is not required by applicable case law or statute. Nevertheless, that is exactly what the effect is of the words proposed in item 1 of the Rule 17 letter of 18 March 2015 - any minor element of any exact activity not explicitly identified and assessed would therefore fall outside of the DCO and make more difficult and costly, or potentially impossible, particular repairs to the project. Accordingly, as the limitation is not necessary or reasonable, and would in practice cause the difficulty identified by the Examining Authority of seeking to be so prescriptive as to leave out particular maintenance activities from the DCO, National Grid considers that it is essential for the project that the definition of "maintain" should remain as drafted.

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			If the wording proposed in item 1 of the Rule 17 letter of 18 March 2015 were to be included in the DCO, because the Examining Authority or Secretary of State did not agree with this analysis of the law and the needs of the project, the most appropriate form of words in drafting terms would not be an amendment to the definition of "maintain" but as a revised Article 5: "5.(1) The undertaker may at any time maintain the authorised development pursuant to this Order— (a) provided that— (i) such maintenance does not give rise to any materially new or materially different significant effects from those assessed in the environmental statement; and (ii) following such maintenance, the authorised development may not, save in immaterial respects, vary from the description of it given in Schedule 1 (*authorised development*); (b) except to the extent that this Order, or an agreement made under this Order, provides otherwise. (2) Paragraph (a)(i) does not apply to— (a) maintenance which is not development; and in this article "development" has the meaning given in section 32 of the 2008 Act (*meaning of "development"*); or (b) emergency maintenance works; and in this article "emergency maintenance works" means works of maintenance whose execution at the time when they are executed is required in order to put an end to, or to prevent the occurrence of, circumstances then existing or imminent (or which the undertaker believes on reasonable grounds to be existing or imminent) which are likely to cause danger to persons or property." There is significant precedence in DCOs for the wording at Article 5(1)(a)(i) above, though it is normally used to caveat an open category of "any other works" at the end of lists of further associated development in DCOs, entirely uncontemplated in environmental statements, rather than categories such as maintenance which have been so contemplated. This wording would be used rather than that proposed in the Rule 17 Letter because it recognises that environmental statute and case law does not require the assessment of each item of development, or indeed of maintenance, no matter how small, but instead focuses on the significant effects of the development. National Grid would invite the Examining Authority and Secretary of State, however, to consider the practical effect of even this wording: before carrying out any maintenance whatsoever in future, no matter how small or urgent, National Grid would need to commission a review of the environmental statement, which was drafted as an assessment in accordance with the Regulations rather than the purpose now proposed to be given to it, namely as the extended terms of a statutory instrument, check if the maintenance activities give rise to materially new or different effects, for certainty consider whether it wished to agree its analysis with the local authority to arrive at some certainty that it is not considered to have breached a term of the DCO, which is a criminal offence, and only then carry out the maintenance activity. If the exercise above determined that it was not entirely clear whether an activity fell within the wording of the environmental statement, National Grid would need to obtain planning permission for those activities outside of the DCO, which would add cost, time and risk to the project. The activities undertaken would then be pursuant to the relevant planning permission and not covered by the protections of the DCO. National Grid considers that this process is not a requirement of statute or case law and could never be its intention. The words "pursuant to this Order" are included to make clear that the limitations apply only to maintenance *under the DCO* - otherwise, if maintenance activities were considered to fall outwith the tests in (1)(a)(i) and (ii), meaning that they required planning permission outside of the DCO, the wording of the Article as proposed to be amended by the Rule 17 letter would still prohibit those activities generally even if appropriate planning permissions were obtained. Article 5(2)(a) makes clear that the process above should not apply to maintenance activities that are not "development". This is because they would not need planning permission or development consent. They certainly would not need environmental assessment, as "EIA development" is defined in section 2 of the Regulations (*interpretation*) as only being for types of development which first meet the threshold of being "development". It is also important for Article 5(2)(b) to make clear that the process resulting from the proposed wording, which as described would be complex and

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			lengthy, cannot apply in the event of emergency maintenance works. An appropriate definition has been taken from section 52 of the New Roads and Street Works Act 1991 (*emergency works*).
2	National Grid	Article 6(1)(b): In order to ensure that the "construction activities" permitted under this article are limited to those within the DCO, the ExA is inclined to include the phrase "… permitted by the Order" after "(b) carry out construction activities …". Does the applicant have any comments?	National Grid agrees the principle that construction activities may be qualified with the words "permitted by the Order" but for drafting purposes would change "the" to "this". Rev E of the DCO (document reference 3.1) has been amended accordingly.
3	Marine Management Organisation / National Grid	Article 9 The ExA is inclined to insert a new paragraph (2): "(2) Where the consent of the Secretary of State is required under paragraph (1), the Secretary of State must consult the MMO prior to granting consent if such transfer or grant relates to the exercise of powers within the MMO's jurisdiction." Do the MMO and the applicant have any comments?	In the row of the Commentary on Revision D of the Draft Development Consent Order (document reference 3.5) relating to paragraph 3(12) of Part 2 of Schedule 10, (*Deemed Marine Licence under Part 4 (Marine Licensing) of the Marine and Coastal Access Act 2009*) National Grid set out reasons for its preference for there to be provision only for notifications to the MMO of applications to the Secretary of State for transfers which include that Schedule. The wording proposed by National Grid was as follows: "(1) The undertaker must— (a) notify the MMO in writing of an application made by it to the Secretary of State for consent pursuant to article 9(1) (*transfer of benefit of Order*) of the Order no later than 14 days after the making of such an application where the application includes a request for consent for the whole of the benefit of this licence to be transferred or granted to another person; and (b) notify the MMO in writing of any transfer or grant of the whole of the benefit of this licence to another person made pursuant to article 9(1) (*transfer of benefit of Order*) of the Order no later than 14 days after that transfer or grant has been effected." If the Examining Authority and Secretary of State disagree with that analysis and wording, National Grid would instead propose the following wording as a new Article 9(2): "Where an application for consent pursuant to paragraph (1) includes a request for consent for the whole of the benefit of Schedule 10 (*deemed marine licence under Part 4 (marine licensing) of the Marine and Coastal Access Act 2009*) of this Order to be transferred or granted to another person, the Secretary of State must determine that request in consultation with the MMO and, in so doing, must have regard to any representations from the MMO made no later than 21 days after the date on which the application is made." This would provide the project with certainty on timing, which is key in bringing forward nationally significant infrastructure projects. If the Examining Authority and Secretary of State insert a new Article 9(2), there is no reason to include the wording originally proposed in paragraph 3(12) of Part 2 of Schedule 10, (*Deemed Marine Licence under Part 4 (Marine Licensing) of the Marine and Coastal Access Act 2009*) as well. It has therefore been removed so that the Examining Authority and Secretary of State may amend the DCO with whichever of the two provisions they consider appropriate.
4a	National Grid	Articles 23 and 24 (Crown Land) Can the applicant confirm whether they are seeking to compulsorily acquire any interest in Crown land which is for the time being held otherwise than by or on behalf of the Crown? If applicable can the applicant identify the extent of any such interest and the relevant plot number?	National Grid is not seeking to compulsory acquire an existing interest in Crown land which is for the time being held otherwise than by or on behalf of the Crown. However, it is seeking to compulsory acquire an interest over an existing interest in Crown land which is for the time being held otherwise than by or on behalf of the Crown by the creation of a new right over it. This still engages section 135(1) of the Planning Act 2008 because, further to the interpretation provisions in section 159(3), compulsory acquisition in either case would require consent of the appropriate Crown authority. However, the distinction is explained to be clear that National Grid is seeking to create new rights rather than to acquire existing ones. The new rights which National Grid is seeking to create are described as "Permanent-type 2" and set out in full at paragraph 7 of page 4 of the book of reference (as amended in the book of reference comparison received by the Examining Authority on 14 November 2014 and accepted at the preliminary

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			meeting on 19 November 2014). The interest in Crown land over which "Permanent-type 2" rights are being sought is the leasehold interest of East Riding of Yorkshire Council ("ERYC") in plot number 1280, as set out on page 700 of the Book of Reference (document reference 4.3) and shown on sheet 25 of the Land Plans (document reference 2.1).
4b	National Grid	Articles 23 and 24 (Crown Land) If the applicant does intend the order to authorise the compulsory acquisition of any interest in Crown land which is held otherwise than by or on behalf of the Crown, the appropriate Crown authority must consent to this acquisition before the order can be made. Can the applicant confirm whether the Crown have provided such consent?	The appropriate Crown authority in respect of plot number 1280, as described on page 700 of the Book of Reference (document reference 4.3), is the Crown Estate Commissioners ("TCE"). National Grid notes that a letter dated 24 March 2015 has been submitted by Bond Dickinson LLP, solicitors acting for TCE (the "TCE Letter"). The TCE letter states that "in any event The Crown Estate do not normally consent to any provision authorising compulsory acquisition of 'an interest which is for the time being held otherwise than by or on behalf of the Crown' (see section 135(1)(a)) in order to enable the negotiation of suitable terms between the relevant parties)." Nevertheless, in the context that the Onshore Scheme is described in EN-1 as an "urgent priority for UK energy policy" and requires commensurate certainty, and ERYC has not objected in the course of the Examination to the principle of inclusion of rights over plot number 1280 in the proposed compulsory acquisition (including during hearings when the issue has been discussed) , National Grid has invited TCE to provide the consent in this case and a response is awaited.
4c	National Grid	Articles 23 and 24 (Crown Land) In particular can the applicant confirm whether they are seeking to compulsorily acquire the leasehold interest of the beach granted to East Riding of Yorkshire Council?	National Grid is not seeking to acquire compulsorily the leasehold interest of the beach granted to ERYC. As described in National Grid's response to item 4(a) above, it is seeking to compulsory acquire interests over that leasehold interest by the creation of new rights over it, namely "Permanent-type 2" rights. The lease of ERYC would therefore take subject to the rights to be exercised under the DCO. ERYC would still have its leasehold interest in the beach.
4d	National Grid	Articles 23 and 24 (Crown Land) Can the applicant confirm that all other interests in Crown land have been excluded from compulsory acquisition in the Book of Reference?	National Grid can confirm that all other interests in Crown land have been excluded from compulsory acquisition in the book of reference. Note, for example, the text "(save for those interests held by the Crown Estate Commissioners" in the column for "right to be acquired" in the row for plot number 1280 on page 700 of the Book of Reference (document reference 4.3). This conclusively excludes such interests from compulsory acquisition in the book of reference. The text requested on the face of the DCO by The TCE Letter and referred to in the response to item 4(e) below, inserted as a new Article 55 (Crown rights) in the draft DCO, adds a further layer of protection preventing such compulsory acquisition.
4e	National Grid	Articles 23 and 24 (Crown Land) Can the applicant confirm that the appropriate Crown authorities have consented to the inclusion of Article 23(4), (5) & (6) and Article 24(6) in the DCO as is required by section 135(2) of the 2008 Act?	The TCE Letter requested that Articles 23(4), (5) and (6) and Article 24(6) be deleted from the DCO and replaced with specified alternative text (which incorporates points agreed between Bond Dickinson LLP and National Grid's solicitors). The changes have been made in the DCO and the agreed text is now inserted as a new Article 55 (Crown rights). This issue is now therefore resolved.
4f	The Crown Estate	Articles 23 and 24 (Crown Land) Can TCE confirm that they consent to the inclusion of Article 23(4), (5) & (6) and Article 24(6) in the DCO and that they are satisfied that the wording of these articles adequately protects their interest? Can TCE also provide any other consent as is	In light of the response to item 4(e), National Grid considers that the question of text on the face of the DCO acceptable to TCE which protects its interests is resolved. As noted in the response to item 4(B) above, National Grid has invited TCE over the course of the Examination to provide consent for the purposes of section 135(1) of the Planning Act 2008 in relation to the creation of new rights over ERYC's interest in plot number 1280. Bond Dickinson LLP is understood to be taking instructions on the point. Similarly, National Grid has over the course of the Examination invited TCE to provide confirmation for the purposes of section 135(2) that it consents to the DCO applying to Crown land.

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		required in accordance with section 135(1)?	National Grid considers that negotiations with TCE in relation to the voluntary grant of rights for those elements of the Onshore Scheme that relate to Crown interests are progressing well and that TCE confirmation for the purposes of section 135(2) would form part of agreement reached. National Grid notes that there is already an agreement for lease in place for the storage site required for the Offshore Scheme.
5	National Grid	Please would the applicant indicate the latest position in the negotiations with regard to the respective protective provisions for statutory undertakers and others as listed in Document 13.4 receive at deadline 4.	Please refer to the document entitled "Position in respect of statutory undertakers and others" submitted at Deadline 5 (document reference 14.4)
6	National Grid / Selby District Council	Schedule 2 Plans: Part 6 Requirement 3 of Schedule 3 Parameters Table 1 Drax Pig Trap With regard to the Drax Pig Trap, the revised draft DCO received at deadline 4 and revised plans 2.18, 2.19, 2.20 and 2.22 also received at deadline 4 show an increase in the height of the security fence from 2.4m to 2.88m. This height appears to have been gained by the addition of three strands of barbed wire above the weld mesh security fence. These revised plans now reflect the fencing arrangements at other above ground installations (AGIs). Please can the applicant confirm how this increase in height will impact upon the assessment of visual impact made in the Environmental Statement? Please could Selby District Council comment on whether the additional 0.48m height of the security fence affects their assessment of the visual impact of the Drax Pig Trap?	National Grid can confirm that the submission of plans showing a security fence of 2.88m was made in error at Deadline 4. The security arrangements at Drax PIG Trap are different to those at other above ground installations because the site will fall within the curtilage of the White Rose CCS Project and therefore will be subject to additional security; accordingly it is not considered necessary to include the additional three stands of barbed wire at this site. A further revision to the plan, only to reinstate the fence height of 2.4m, will be provided at Deadline 6.