

From: [Colquhoun, Emma](#)
To: [Southampton to London Pipeline Project](#)
Cc: [steve.marshall-camm@dft.gov.uk](#); [marnix.e.senaar@add.eshawgoddard.com](#)
Subject: FW: Esso SLP Project- letter to Gareth Leigh Head of Energy Infrastructure Planning PINS Reference: EN070005
Date: 18 August 2020 13:44:08
Attachments: [Network Rail Deadline 7 submission.pdf](#)
[Network Rail Final Submission.pdf](#)
[Applicant_s Section 127 Case.PDF](#)
[letter to DBEIS re_ESSO DCO.pdf](#)

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Resending to correct email address.

From: Colquhoun Emma
Sent: 17 August 2020 19:08
To: SouthamptonLondonPipeline@planninginspectorate.gov.uk
Cc: steve.marshall-camm@dft.gov.uk; marnix.e.senaar@addleshawgoddard.com
Subject: Esso SLP Project- letter to Gareth Leigh Head of Energy Infrastructure Planning PINS Reference: EN070005

OFFICIAL

Application by Esso Petroleum Company Limited (Applicant) for an Order granting development consent for the Southampton to London Pipeline Project (Order)

PINS Reference: EN070005

Network Rail Infrastructure Limited

Dear Sir

Please find attached a letter relating to the above application. I apologise that I have not been able to print, sign, scan and attach a copy of this letter with my signature on it because I am working from home.

Please treat this as a signed letter from me.

Yours faithfully

Emma Colquhoun

Head of Legal

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Copy to Steve Marshall-Camm, steve.marshall-camm@dft.gov.uk Department for Transport
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17 August 2020

Dear Sir

Application by Esso Petroleum Company Limited (Applicant) for an Order granting development consent for the Southampton to London Pipeline Project (Order)
PINS Reference: EN070005
Network Rail Infrastructure Limited

I refer to the application for the Order the Examination of which closed on 9 April 2020. The Examining Authority issued its Report to the Secretary of State on 7 July 2020. I note that the Secretary of State is due to make a decision on the application by 7 October 2020.

In your letter dated 5 August 2020 you asked for an update on discussions between Network Rail and the Applicant in relation to the Protective Provisions for Network Rail's benefit.

I refer to the following submissions made to the Examining Authority prior to the close of the Examination:

1. Deadline 7 submission made on behalf of Network Rail [REP7-061] dated 2 April 2020 (**Deadline 7 Submission**);
2. Final submission [AS-094] made on behalf of Network Rail dated 9 April 2020 (**Final Submission**); and
3. Section 127 Case [REP7-049] made on behalf of the Applicant dated April 2020 (**Section 127 Case**).

I attach a copy of each document.

In its submissions to the Examining Authority, including its Deadline 7 Submission and Final Submission, Network Rail made detailed representations about the Protective Provisions for its benefit that it wishes to see included in the Order.

The Applicant's solicitors have confirmed to our solicitors, Addleshaw Goddard, that the Applicant's position on the Protective Provisions remains as set out in their Section 127 Case submitted to the Examining Authority at Deadline 7 of the Examination. They have not sought further to make any progress in reaching agreement with us on the Protective Provisions.

Our case in relation to the Protective Provisions remains as set out in our Deadline 7 Submission and Final Submission. However, I provide further details about our position in relation to paragraph 21 (compulsory acquisition) and 32 (indemnity) below. I emphasise in the strongest possible terms our request that our preferred form of those paragraphs is included in the order made by the Secretary of State.

I would like to draw your particular attention to a number of paragraphs of the Protective Provisions which are the subject of dispute between Network Rail and the Applicant and explain why, in our view, the inclusion of Network Rail's preferred paragraphs in the made order is essential for the protection of our statutory undertaking.

Paragraph 21 of the NR Protective Provisions (compulsory acquisition)

- 1 A paragraph of the Protective Provisions of significant importance to Network Rail is Paragraph 21. It provides that the Applicant may not exercise its compulsory acquisition powers under the Order to acquire Network Rail property without the consent of Network Rail.

The Protective Provisions also provide that Network Rail's consent may not be unreasonably withheld but may be given subject to reasonable conditions.

2 Paragraph 21 is included in almost all statutory orders where the land powers sought affect Network Rail. It reflects the key principle that there should be no compulsory acquisition of railway property; this is because it is important that Network Rail is able to regulate, by appropriate agreements with promoters, the manner in which works affecting railway property are carried out.

3 Network Rail has been working proactively to agree with the Applicant the necessary property documents to provide the Applicant with the rights it needs to carry out the works insofar as the works affect railway property.

4 The Applicant, in the final draft Order that it submitted to the Examining Authority prior to the close of the Examination, included a new provision, Paragraph 21(6), in the Protective Provisions for Network Rail's benefit which states as follows:

This paragraph will cease to have effect if within 56 days of the making of this Order the interests and rights required by the undertaker in respect of any railway property in order to construct and maintain any specified works have not been completed by agreement with Network Rail [Emphasis added].

5 The inclusion of the Applicant's proposed paragraph 21(6) would mean that the need for Network Rail to consent to any compulsory acquisition of its property by the Applicant would cease to have effect if the property agreements that we are negotiating with the Applicant are not agreed within 56 days of the date of the making of the Order.

6 In our Final Submission, Network Rail explained that we strongly object to the inclusion of Paragraph 21(6) in the Order. We object strongly because if the property agreements have not been completed within the 56 day time limit, Network Rail would be subject to compulsory acquisition powers and Network Rail would have no certainty that the necessary agreements to safeguard the integrity and safety of the railway would be in place.

7 We have been working hard to reach agreement with the Applicant on the necessary property agreements and the associated "Framework Agreement".

8 However, the Applicant has been very slow at responding to our solicitors' amended drafts. For example, our solicitors sent an amended draft Framework Agreement to the Applicant's solicitors on 12 May 2020 but only received a response on 31 July 2020.

9 It is the Applicant's scheme. We would expect them to be driving forward the negotiations in respect of the agreements. However, it is our team that has been pressing the Applicant's team for responses. The Applicant's lack of engagement means that we have very little

confidence that the agreements will definitely be completed within the necessary 56 days. We assume that the Applicant has sought to include paragraph 21(6) in the Order to put pressure on Network Rail to finalise the agreements swiftly but of course we require the Applicant's full engagement and commitment in order to progress and conclude the negotiations. Meeting the 56 days deadline is not within our sole control and we are concerned that the Applicant may drag its feet so that it can exercise compulsory acquisition powers. To date, it has not, in our view, demonstrated the necessary engagement and commitment to progress the agreements.

- 10 Accordingly, we ask that paragraph 21(6) is not included in the Protective Provisions for Network Rail's benefit included in the Order when made and that Network Rail's preferred Protective Provisions, as set out in Network Rail's Deadline 7 Submission, is included at Part 3 of Schedule 9 to the Order.

Paragraph 32 (indemnity)

- 11 Paragraph 32 of the Protective Provisions included in Network Rail's Deadline 7 Submission sets out an indemnity by the Applicant in favour of Network Rail for any losses suffered by Network Rail as a result of the construction or maintenance of the specified work, for failures of such specified work, and for losses resulting from the acts or omissions of the Applicant. Additionally this indemnifies Network Rail for any 'relevant costs' that Network Rail is liable to reimburse to train operators for any losses incurred as a result of disruption caused by the specified works, under an agreement with the train operators. Paragraph 32 (of Network Rail's preferred paragraph 32) also extends the scope of the indemnity to consequential losses suffered by Network Rail.
- 12 As the Applicant has stated at paragraph 1.3.9(4) of the Section 127 Case, the Applicant agrees to the indemnity in principle, however it would like to limit the indemnity and has added a new sub-paragraph 32(3) which provides that the indemnity does not extend to the recovery of indirect or consequential losses or loss of profits.
- 13 The effect of the inclusion of paragraph 32(3) is that the only indirect or consequential losses to which the indemnity would apply is claims by train operating companies (although Network Rail notes that under law losses Network Rail suffers from such claims would constitute direct losses, being losses which naturally flow in the usual course of things). This means that should Network Rail suffer other indirect or consequential loss as a result of the Applicant's scheme, it would have no claim against the Applicant under the indemnity and would have to meet the loss from its own funds; as Network Rail is a public body that would mean a call on the public purse.
- 14 The full indemnity preferred by Network Rail is included in almost all confirmed Orders where Network Rail is an affected third party. The Applicant refers to the Hinkley Point C Connection

Order 2016 as example of where there was a deviation from this standard practice at paragraph 1.3.9(4) of its Section 127 Case. However, as with most instances where this indemnity was limited, the applicant in that instance was also a statutory undertaker. The Applicant fails to provide any further justification to the dilution of the indemnity, other than the indemnity should accord with legal principles for the recovery of losses.

- 15 By contrast, the Applicant for this Order is a private sector developer, not a statutory undertaker. Therefore, unless Network Rail is granted a full indemnity, losses caused by the Applicant's scheme would otherwise have to be paid for from Network Rail's own funds, and therefore from the public purse. Additionally, it is evident that all consequential losses would need to be justified in line with legal principles in any event; any suggestion that our preferred form of indemnity would result in an unlimited liability for the Applicant has no legal basis.
- 16 The nature of the works being carried out by the Applicant, by digging under the railway, and the significant risk this poses to railway property, mean that it is all the more important that this indemnity is not diluted. It must cover for a major incident which may affect Network Rail and any train operating company.

Accordingly, I ask that the Protective Provisions as set out by Network Rail in its Deadline 7 Submission are included at Part 3 of Schedule 9 to the made Order.

Please do not hesitate to contact me should you have any questions about this letter.

Yours faithfully

Emma Colquhoun
Head of Legal, Southern Region

Sent by email