

THE PLANNING ACT 2008

THE PROPOSED ABLE MARINE ENERGY PARK DEVELOPMENT CONSENT ORDER

**ANALYSIS: ASSESSMENT REQUIREMENTS FOR USE OF
KILLINGHOLME BRANCH LINE**

1. Introduction

- 1.1 A number of representations have been made during the course of the examination for the Able Marine Energy Park regarding the need - or legal requirement - for assessment before the Killingholme Loop could proceed. However, it is important to recognise that regardless of whether the Killingholme Loop proceeds there is already an extant railway line, the Killingholme Branch Line (the "Railway"), for which C.RO Ports Killingholme Limited ("C.RO") has a physical connection and connection agreements in place that allow it to connect to it, and to run freight trains on it.
- 1.2 Both the Railway and the proposed Killingholme Loop pass through the Killingholme Haven Pits, a Site of Special Scientific Interest.
- 1.3 To assist the Examining Authority, this paper makes legal submissions on the requirements that would need to be met, and in particular the assessment(s) that would be required, before C.RO could utilise its connection agreements and run trains on the Railway. There are two separate factors to be considered: physical works that may need to be carried out by Network Rail to allow trains to be run, and C.RO running those trains. They will be considered separately.

2. Summary

- 2.1 Only minor works would be required to allow a freight train to pass along the Railway, such as maintenance tasks and vegetation clearance. These do not comprise development.
- 2.2 Network Rail (through its contractors) would be responsible for carrying out any such works required. To the extent that they constituted development at all, these would be authorised as permitted development under Part 11 and/or Part 17 of the Town and Country Planning (General Permitted Development) Order 1995 ("GPDO") .

- 2.3 Environmental Impact Assessment ("EIA") would not be required for the works by Network Rail, either because the work would be authorised under Part 11 of the GPDO, or because the work does not meet the requirements of the EIA Regulations.
- 2.4 Given the scale of the works required, appropriate assessment under the Habitats Regulations would not be required either.
- 2.5 C.RO would not be required to apply for planning permission, or to carry out EIA, to run trains along the Railway. It has connection agreements in place that allow it to run trains, and it would not be carrying out works of any kind. The decision to run trains would be an intensification of an existing permitted use only. C.RO would not need to apply for planning permission to do so, as no 'development' is taking place.

3. Works required to Railway

- 3.1 C.RO has sidings and level crossings already in place. The Railway itself is in basic working order. Trains have been run on it in the past, as recently as 2005. This is outlined in greater detail in C.RO's submissions regarding rail issues, which is submitted to the Examining Authority concurrently with this document. Network Rail would only have to carry out very minimal work (such as the removal of vegetation) should C.RO decide to make use of its connection agreements and run trains. Should one of C.RO's customers require rail access, it is C.RO's expectation that it would be able to meet this requirement with only minimal delay.
- 3.2 Network Rail has rights to carry out works of this nature under the GPDO without applying for planning permission. These rights are explained in greater detail below.

Permitted development rights under the GPDO

- 3.3 Network Rail enjoys permitted development rights under:
 - 3.3.1 Part 11 of the GPDO - development under local or private acts or orders; and
 - 3.3.2 Part 17 of the GPDO - Class A: railway or light railway undertakings.
- 3.4 Part 11 permitted development includes development specially authorised by a local or private Act of Parliament. Works can be carried out in the ordinary course of Network Rail's operations as a statutory undertaker on its operational land.

- 3.5 Part 17 permitted development will include incidental works required in connection with the movement of traffic by rail. Railway construction is not included within Part 17, but as discussed, this is not required. The Railway has been constructed already, only minor works are required before the running of trains can be recommenced.
- 3.6 Given the minor nature of any works that may be required, on Railway that is owned by Network Rail and required to be maintained as part of the normal course of Network Rail's operations, they could be authorised under either or both of Part 11 and Part 17. An application for planning permission would not be required. The next question is whether EIA would be required before the works could be carried out.

EIA

- 3.7 Pursuant to article 3(12) of the GPDO, environmental assessment is not required for any development authorised under Part 11. However, the requirement is not excluded for Part 17 permitted development. If development authorised under Part 17 falls within the requirements of the EIA Directive¹ and the EIA Regulations² EIA will be required. The reason why the works could not be considered to be EIA development is set out below.
- 3.8 The EIA Directive is stated to apply to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment. A 'project' means the execution of construction works or of other installations or schemes, and other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources. Minor works of the nature under consideration here would not be considered a project.
- 3.9 Further, the EIA Regulations provide that EIA would be required if the works constitute EIA development. EIA development is development that is either listed in Schedule 1, for which EIA is required in every case, or in Schedule 2, for which EIA is required only if the particular project in question is judged likely to give rise to significant environmental effects.
- 3.10 Even if the works required could be considered a project, it could not be considered to be EIA Development. It does not fit within the railway projects listed in Schedule 1 (construction of railway lines of 2,100 metres or more only). Schedule 2 will include the construction of

¹ Council Directive 85/337/EEC, on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC and Article 2 of Council Directive 2003/35/EC/.

² Town and Country Planning (Environmental Impact Assessment) Regulations 2011

railways where the area of works exceeds one hectare. The level of works required to the Railway is so minor that it could not be considered as 'construction of railway'. Moreover, the projects listed in Schedule 2 will only require EIA if they are judged to be likely to give rise to significant environmental effects. Again the scale of the work required means that this is not likely.

Appropriate Assessment

3.11 It is also relevant whether appropriate assessment under the Habitats Regulations³ is required. Pursuant to regulation 73, if the development permitted by the GPDO is:

3.11.1 likely to have a significant effect on a European site; and

3.11.2 is not directly connected with or necessary to the management of that site;

then Network Rail cannot begin work until it receives written notification of the approval of the local planning authority. The local planning authority could not grant approval until it had ascertained that it would not adversely affect the integrity of the site.

3.12 However when this test is applied to the works being contemplated here, they could not be said to have a significant effect on a European site. The works required to the Railway are minor only. Accordingly C.RO submits that appropriate assessment under the Habitats Regulations would not be required.

4. Use of the Railway by C.RO

4.1 The second relevant issue is whether planning permission would be required for C.RO to utilise its existing connection agreements and move freight by rail on the Railway. More specifically: if C.RO decides to run trains on the Railway, would the actual use of the Railway, and intensification of that use, amount to development in its own right under a material change of use? This is relevant because if a planning application would need to be submitted, an environmental assessment could be required. On review of the law, C.RO's decision to move freight by rail would not require planning permission.

³ Conservation of Habitats and Species Regulations 2010

Requirements under the Town and Country Planning Act 1990 ("TCPA")

- 4.2 For planning permission to be required, there must be 'development' of land pursuant to section 57 of the TCPA. 'Development' is defined at section 55 of the TCPA which outlines two strands of development: operational development, i.e. building, engineering, mining or other operations; and a material change in the use of any buildings or other land. The question is whether the running of trains, effectively an intensification of the use of the Railway, would constitute a material change of use.
- 4.3 Material change of use is not defined by the TCPA. However, Circular 03/2005 does provide guidance to Local Planning Authorities on assessing whether a material change of use has occurred. The guidance provides that intensification of a use is not development unless its effect takes the use outside the use class altogether. Railways are not within a use class however, they are *sui generis*. Further, the existence of a railway within a port for transshipment purposes is either part of the port use or ancillary to it.
- 4.4 The courts have provided some insight on material change of use for *sui generis* uses of land. The case of *Hertfordshire County Council v Secretary of State for Communities and Local Government and Metal and Waste Recycling Ltd*⁴ (on appeal), indicates that there would need to be a change in the definable character of the use made of the land in order for there to be a 'material change of use'. In that case Ousely LJ stated at paragraph 34 that the concept of a material change of use by intensification requires, as a necessary but not sufficient condition, an increase in the scale of all or some of the activities on-site. It is that increase which has to cause the change of use. To the extent that effects are relevant, it is the effect from that increase which matter. If such changes themselves do not bring about a material change of use, the activities as varied can be carried on as part of the existing or permitted use. Their effects are permitted effects.

Analysis

- 4.5 C.RO running trains on the Railway would have to result in a material change of the use of the land at C.RO's port, and it could only do that by bringing about a definable change in the character of the use made of the land. Pursuant to the *Hertfordshire* case above, the relevance of impacts comes in evidencing a material change of use of the land. A definable change in its

⁴ [2012] EWHC 277 (Admin)

character is required, but one which is defined by a material change in use, not by a change - however severe or minimal - in the effects of a use.

- 4.6 Applying this to the use of the Railway by C.RO, the running of trains along the Railway would not amount to a change in the definable character of the use made of the land as the land is a railway line, the purpose of which primarily is to run trains along it. The only difference being that trains would physically be present. The impact of those trains, in particular on the SSSI, will not amount to a material change of use in itself.
- 4.7 C.RO has the right to run trains along the Railway pursuant to its existing connection agreements. In light of the analysis above, C.RO would not need to apply for planning permission to do so, as no 'development' is taking place. An environmental assessment of the impact of train movements along the Railway on the SSSI at Killingholme Haven Pits would not, therefore, need to be undertaken.

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