Immingham Green Energy Terminal

TR030008

Volume 9

9.84 Applicant's Representation on Network Rail Protective Provisions

Planning Act 2008

Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (as amended)

July 2024

APPLICANT'S REPRESENTATION

ON NETWORK RAIL PROTECTIVE PROVISIONS

1 ACQUISITION OF RIGHTS FROM NETWORK RAIL

1.1 Work No. 6 comprises underground pipelines, pipes, cables and other conducting media running between the East Site and West Site for the transfer of ammonia, hydrogen, nitrogen and utilities, with cathodic protection against saline corrosion. The pipelines will be installed by way of horizontal directional drilling or micro tunnelling techniques which minimise surface disturbance.

1.2 There are 12 plots of land that Network Railway Limited (**NRL**) owns or has an interest in and that are identified in the Book of Reference, as the proposed pipeline would run beneath the Brocklesby and Immingham Branch railway line within Work No. 6.

1.3 The railway line was first opened in the early 20th century and over its lifespan various parts of the line have been closed. It is understood that the lines are used for freight serving Immingham Dock and nearby industries and are not currently heavily used. Nevertheless, such land has been acquired by NRL for the purpose of its statutory undertaking.

1.4 As stated in the Book of Reference, powers to acquire permanent rights and of temporary possession and use are sought over plots 5/23, 5/24, 5/25, 5/27, 5/28, 5/29, 5/30, 5/32, 5/33 being land owned and occupied by Network Rail. Network Rail also have the benefit of rights and restrictive covenants over plots 5/26 and 5/31 (where powers to interfere with rights are sought) and 5/34 (where powers to acquire permanent rights and of temporary possession and use are sought).

2 GUIDANCE: PLANNING ACT 2008 - CONTENT OF A DEVELOPMENT CONSENT ORDER REQUIRED FOR NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS

2.1 The guidance in respect of the content of a development consent order for nationally significant infrastructure projects (**Guidance**) was updated on 30 April 2024. The Guidance is primarily for applicants involved in preparing an application for development consent. Paragraph 012 (Reference ID 04-012-20240430) of the Guidance states:

"Most statutory undertakers have now developed their own preferred form of protective provisions which is very helpful to the preparation of the draft DCO. However, these must be adapted as necessary so they accurately reflect the proposed development. They should also not simply negate other provisions of the DCO, particularly concerning proposed compulsory acquisition of statutory undertakers' land."

2.2 The Guidance also sets out the duties of examining authorities, who are "expected to ensure that the final form of a recommended DCO contains protective provisions which are bespoke to the application under consideration".

3 PROTECTIVE PROVISIONS

3.1 NRL submitted written representations, together with a summary of those representations, at Deadline 1 [REP1-101 and REP1-102]. As part of its written representations, NRL requested that its standard protective provisions are included in the DCO and that an asset protection agreement is entered into in order to regulate the construction and maintenance of the specified work.

3.2 The parties agree, in principle, that the draft DCO should include specific provisions for the protection of NRL and that the parties should enter into a form of asset protection agreement to govern the construction of those parts of the proposed development which are located on operational railway land.

3.3 A form of protective provisions in favour of NRL was included at Part 5 of Schedule 14 of the draft DCO submitted with the Application (APP-006). Following exchanges with the solicitors for NRL on the terms of those protective provisions, the Applicant has updated Part 5 of Schedule 14 in the draft DCO submitted at Deadline 5 and shared a copy with NRL's solicitors on 2 July 2024. The protective provisions now at Part 5 of Schedule 14 are in substantially agreed form with the exceptions of paragraph 55(1)-(3) and paragraph 55(6), which are not agreed between the parties and thus set out in square brackets on the face of the draft Order. Paragraphs 55(1)-(3) state:

> *[(1) The undertaker must not exercise the powers conferred by—*
>
> *(a) Article 5 (development consent etc. granted by the Order);*
>
> *(b) article 6 (extent of certain works);*
>
> *(c) article 19 (authority to survey and investigate the land),*
>
> *in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.*
>
> *(2)The undertaker must not exercise the powers conferred by sections 271 (extinguishment of rights of statutory undertakers: preliminary notices) or 272 (extinguishment of rights of electronic communications code network operators: preliminary notices) of the 1990 Act or article 26 (private rights), article 27 (power to override easements and other rights) or article 33 (statutory undertakers) in relation to any right of access of Network Rail to railway property, but such right of access may be extinguished or diverted with the consent of Network Rail.*
>
> (3) *The undertaker must not under the powers of this Order acquire or use or acquire new rights over or seek to impose any restrictive covenants over, any railway property, or vary any existing rights of Network Rail in respect of any third party property except with the consent of Network Rail.]*

3.4 Paragraph 55(6) as required by NRL, states as follows:

(6) Where Network Rail is asked to give its consent under this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions but it will never be unreasonable to withhold consent [for reasons of operational or railway safety (such matters to be in Network Rail's absolute discretion)].

3.5 The effect of paragraphs 55(1)-(3) and 55(6) would be that the Applicant would be prohibited from acquiring compulsorily the interests it needs to implement the proposed development without first securing NRL's consent. That consent can be withheld at NRL's absolute discretion if NRL considers that there are matters related to operational or railway safety, i.e. there is no need for NRL to demonstrate the reasonableness of its position in those circumstances. In any event, NRL does not generally give consent to the use of compulsory acquisition powers over its interests and such consent would be complex, uncertain and time intensive to obtain via the DCO's arbitration mechanism. The purpose and practical effect of this wording is to provide NRL with a similar negotiating position to that which it would have absent any DCO compulsory purchase powers because an undertaker with the benefit of a DCO is thereby compelled to pursue only voluntary acquisition of the NRL interests in land required for its project. NRL's preferred wording therefore gives it an effective veto in any voluntary acquisition negotiations, potentially preventing the implementation of a project for which there has been established a compelling case in the public interest.

3.6 The requirement by NRL for "standard" provisions and particularly those which effectively negate the use of compulsory purchase powers, undermines the purpose of granting such powers in the public interest, and thus directly contravenes the Guidance identified above.

4 ACQUISITION OF EASEMENT ON VOLUNTARY BASIS

4.1 The solicitors for Air Products have made diligent effort in negotiation with those acting for NRL to seek to agree the terms of a voluntary easement to enable Air Products to install and retain the necessary pipelines and apparatus under the railway, so as to avoid the need to exercise compulsory acquisition powers and, in turn, be able to accommodate the wording of the protective provisions prohibiting use of those powers set out above. NRL is content in principle to grant an easement to Air Products. However, the parties have reached an impasse over the point explained below and paragraphs 55(1)-(3) and 55(6) cannot therefore be accepted.

4.2 The draft deed of easement prepared by NRL contains certain provisions which are unacceptable to the Applicant and Air Products as they enable NRL to exercise "lift and shift" rights over Air Products' apparatus and where necessary to terminate the right of Air Products to retain their apparatus in situ. The relevant clauses are clause 6.14 and 7.4(c) to (e) which are set out below (emphasis added).

6.14 Network Rail's works

For the purposes of enabling Network Rail to carry out works referred to in clause [ ] below, the Grantee further covenants with Network Rail as follows:

a) *at the Grantee's own cost, **to cease operating or to cut off the supply through the Service Media** for such duration as Network Rail may require;*

b) *at the Grantee's own cost, **to remove or to divert** (either temporarily or permanently) or to strengthen the Service Media at the request of Network Rail or (as applicable) to pay the sums due if Network Rail agrees to carry out such works;*

c) *to carry out any such alteration, removal, diversion, strengthening or making safe in accordance with the provisions of this Deed; and*

d) *to **reimburse Network Rail in respect of any expense, loss or damage howsoever arising from the Grantee's failure to carry out such alterations, removal, diversion**, strengthening or making safe within a reasonable time after written notice served on it by Network Rail, including in respect of any additional works resulting from such delay after the expiry of such notice. (emphasis added)*

7.4

c) Network Rail may at any time construct or erect any works on its railway or property that it may deem necessary over, under or adjoining the Service Media and raise, widen or alter its railway or property or works to its railway or property, without payment of any compensation to the Grantee and without being liable for any damage so caused to the Service Media and, if for any of these purposes, Network Rail shall require the alteration, strengthening or relocation of the whole or part of the Service Media it may, at the expense of the Grantee, effect such alteration, strengthening or relocation itself or require the Grantee to carry out such works without payment of any compensation to the Grantee, but:

in the case of any such relocation, Network Rail shall substitute other convenient service media and the substituted service media shall be subject to the provisions, covenants and conditions of this Deed; and

the cost of any such alteration, strengthening, relocation or substitution (as certified by Network Rail's Engineer) shall be repaid by the Grantee to Network Rail on demand.

(d) Network Rail may carry out or complete (to such extent as Network Rail's Engineer may deem necessary) any works as to which the Grantee shall be in default or may take whatever action Network Rail's Engineer considers necessary to safeguard Network Rail's interests, where Network Rail's Engineer considers the safety of the railway to be at risk (as to the existence of which situation the decision of Network Rail's Engineer shall be final), but:

the cost incurred by Network Rail in such works (as certified by Network Rail's Engineer) shall be repaid by the Grantee to Network Rail on demand; and

except in case of emergency or where Network Rail's Engineer so considers the safety of the railway to be at risk, Network Rail shall before so acting, give notice to the Grantee to remedy its default (if capable of remedy) and afford the Grantee such period of time as may be specified in Network Rail's Engineer's notice from the giving of such notice to complete the remedial action.

e) Where it is not possible to undertake any alteration, strengthening, relocation or substitution works to the Service Media under the provisions of clauses 7.4 (c) and 7.4 (d) above and Network Rail requires the site of the Service Media or any part of it for the purposes of its undertaking or for carrying out repairs for the proper operation of its undertaking (as to which requirements the decision of Network Rail's Engineer shall be final and conclusive) or for carrying out substantial works of demolition, reconstruction or redevelopment then, ***Network Rail may bring this Deed to an end at any time by giving to the Grantee [6 months'] previous notice in writing****. At the expiration of any such notice this Deed shall come to an end (but without prejudice to any subsisting rights or remedies of Network Rail) whereupon the Grantee shall cease to be entitled to exercise the Rights and the Rights shall be extinguished from the expiration of any such notice. (emphasis added)*

5 ISSUES

5.1 The proposed approach to the construction of the pipelines in Work No. 6 reflects a number of different factors.

5.1.1 The point at which Work No. 6 interacts with the Railway Line is also close to Queens Road, which itself crosses the Railway Line then bends to the north to the east of the Railway Line (see sheet 5 of the Works Plans [REP3-012]. A single solution is therefore required for the interaction of the pipelines with both pieces of infrastructure.

5.1.2 It is considered safest to run the pipelines under both Queens Road and the Railway Line, rather than above ground, as part of a single underground corridor connecting Work No. 3 and Work No. 7. This enables the pipelines to be as straight as possible, to minimise the length of the pipeline and the need for valves and joints which (in relation to the ammonia pipeline) introduce risk. This also minimises the construction timetable and associated impacts on the environment and local community.

5.1.3 An above ground section of pipelines, crossing the railway and Queens Road, would present the risk of damage to the pipeline (and associated leaks) through collision (for example through a derailed train or accident on the highway).

5.1.4 In contrast, the installation of the pipelines with aboveground and underground separate sections would significantly increase the complexity of the works. This approach would also lead to a longer construction period for Work No. 6 than the proposed approach, resulting in greater impact on the environment and local community.

5.1.5 Routing pipelines underground using a trenchless technology such as micro tunnelling requires a significant area of surface works at either end of the underground portion. This area of land is available in Works No. 3 and Works No. 7 which supports the proposed method. An alternative method, with an above ground section crossing the railway and Queens Road followed by an underground portion, would require a significant area of surface works to the West of the railway. This land is occupied by the Border Force building and is not available making such an approach unviable.

5.1.6 Further, running pipelines above the Railway Line clearly could have the potential to impede any future development of the Railway Line, compared to underground pipelines.

5.2 As such, the Applicant and Air Products have optimised the approach to the pipelines adopting an underground pipeline route from Work No. 3 to Work No. 7, passing underneath the Railway Line and Queens Road. If NRL sought to relocate the pipelines in the future, Air Products would need to try to find an alternative routing solution, which would be a major exercise in terms of engineering and would also be likely to require acquisition of further land and rights. There is no certainty that any such solution could be found. It would be open to NRL simply to terminate the rights and require removal of the pipelines.

5.3 This would mean that the entire pipeline in Work No. 6 could not be used. The connection from the ammonia storage tank to Work No. 7 would be lost, rendering those entire works obsolete. In the absence of Work No. 7 (which includes facilities for the storage and distribution of hydrogen), the entire hydrogen production facility could not operate. As such, the exercise by NRL of the relocation and removal powers proposed to be included in the easement would undermine both the viability and the functionality of the Project.

5.4 In contrast, it is difficult to identify any potentially serious detriment to the carrying on of NRL's undertaking arising from the exercise of the powers included in the dDCO. The pipelines and apparatus will be at least 5m beneath the Railway Line, with the design agreed in advance with NRL. As such, there would be no impediment to the safety or operation of the Railway Line, and none has been identified by NRL. If future works to the Railway Line were to be required (although no plans for any such works have been identified), it is possible that the location of the pipelines may affect the ability to install deep piles in the precise location of the pipelines or in land adjacent to them. An engineering solution could likely be found however, including by adjusting any piling to reflect the location of pipelines. Network Rail have not grappled with these

matters to date, only indicating that these provisions are “standard” and must be included in all private easements granted by Network Rail as a matter of policy.

5.5 Furthermore, the use of horizontal directional drilling and micro-tunnelling techniques require the pipelines to be constructed as a single unit making it impossible to be dismantled and reconstructed in sections. As detailed in paragraph 2.1.3 of the Outline Decommissioning Management Plan [**APP-222**], the Applicant does not intend that the pipelines will be removed at any point given they are laid deep in the ground. On decommissioning, they will be purged and made safe as part of the decommissioning phase. The removal of the pipeline would pose a significant challenge and be at a substantial cost.

5.6 Given that Network Rail requires any easement granted to include the provisions referred to above, it is reasonable to anticipate that Network Rail would withhold its consent under paragraph 55(6) of the NRL protective provisions to the exercise of compulsory acquisition powers to acquire such a right or seek to impose equivalent conditions on any consent. If NRL raise concerns regarding safety, their judgement on such issues is at their absolute discretion and cannot be questioned by way of the DCO’s arbitration provisions or in any other manner.

5.7 The Applicant therefore proposes to remove paragraphs 55(1)-(3) which would be in line with the Guidance in not allowing NRL simply to negate the use of compulsory acquisition powers. Paragraph 55(4) still requires NRL’s consent in relation to railway property being temporarily incapable of being used and temporarily not running trains on the railway, which may be necessary for the carrying out of the works. Accordingly the Applicant proposes that paragraph 55(6) be retained to clarify that NRL must act reasonably in relation to those consents, acknowledging that ‘it will never be unreasonable to withhold consent [on reasonable operational or railway safety grounds]’, i.e. those grounds must be reasonable and capable of being articulated. The following words are proposed to be deleted because it would be inappropriate for such grounds to be unreasonable and incapable of articulation: [for reasons of operational or railway safety (such matters to be in Network Rail’s absolute discretion)].’

6 SERIOUS DETRIMENT TEST – SECTION 127 PLANNING ACT 2008

6.1 Section 127 of the Planning Act 2008 applies where (a) land has been acquired by statutory undertakers for the purposes of their undertaking, (b) a representation has been made about an application for a DCO before the completion of the examination and the representation has not been withdrawn, and (c) as a result of the representation the Secretary of State is satisfied that the land is used for the purposes of carrying on the undertaking or an interest in the land is held for those purposes.

6.2 Section 127(2) and (3) of the Planning Act 2008 provide that a DCO may only include provisions authorising the compulsory acquisition of statutory undertakers’ land to the extent that (a) the land can be purchased and not replaced without serious detriment to the carrying on of the undertaking; or if (b) if purchased, it can be replaced by other land belonging to, or available for acquisition by, the undertakers without serious detriment to the carrying on of the undertaking.

6.3 Section 127(5) and (6) of the Act provide that a DCO may include provision authorising the creation by compulsory acquisition of a new right over statutory undertakers' land only to the extent that the Secretary of State is satisfied that the right can be purchased without serious detriment to the carrying on of the undertaking; or any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them.

6.4 The Applicant and Air Products consider there would be no serious detriment to NRL's undertaking it were to acquire the rights identified above. Air Products accepts that the use of the line may be affected during construction. However, NRL and Air Products have agreed in principle that there will be line closures during the construction period. In this context, it is noted that the Railway Lines are currently operated infrequently. As explained above, Air Products does not anticipate any other interference to the NRL's undertaking including during operation of the hydrogen production facility.

6.5 Under the protective provisions in favour of NRL at Part 5 of Schedule 10 of the draft DCO any consent or approval required of NRL is subject to compliance with any relevant railway operational measures and any obligations under its network licence. Before commencing construction of any specified work the Applicant must supply plans for the approval of the NRL engineer and work must be carried out in accordance with the plans. There is also a requirement for the Applicant to enter into an asset protection agreement before the carrying out of any specified works. The NRL engineer may specify any protective measures to ensure the safety and stability of the railway. That is sufficient to ensure that NRL's undertaking is adequately protected by the protective provisions in favour of NRL at Part 5 of Schedule 10 of the draft DCO, even without the wording in square brackets which the Applicant proposes be deleted. NRL has so far adduced no evidence to the contrary.

6.6 As a result, it is the view of the Applicant and Air Products that any interference caused (if any existed) would not be such as to amount to a serious detriment.

6.7 Given the rights to be acquired would not cause serious detriment to NRL's undertaking, the Applicant and Air Products do not consider it necessary to replace the land over which interests are required for the proposed development.

7 EXTINGUISHMENT OF RIGHTS – SECTION 138 PLANNING ACT 2008

7.1 If a DCO authorises the acquisition of land (including rights) compulsorily and there is either a "relevant right" over the land or any "relevant apparatus" on, under, or in the land, then the DCO may only provide for the extinguishment of such "relevant right" or removal of "relevant apparatus" where the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates (section 138(4) of the Planning Act 2008).

7.2 It is important to emphasise that section 138 is not concerned with freehold or leasehold interests in land, but with specified rights: a "relevant right is "a right of way, or a right of laying down, erecting, continuing or maintaining apparatus on, under or over the

land, which is vested in or belongs to statutory undertakers for the purpose of the carrying on of their undertaking" (section 138(2) of the Planning Act). "Relevant apparatus" is "apparatus vested in or belonging to statutory undertakers for the purpose of the carrying on of their undertaking" (138(3) of the Planning Act 2008). Paragraph 1.4 above sets out those plots that NRL owns and occupies and identifies the three plots over which NRL has the benefit of rights and restrictive covenants. Section 138 therefore would apply only to the rights in those three plots, and only if those rights fall within the definition of "relevant rights".

7.3 Article 33(1)(b) of the draft Order provides that the undertaker may extinguish the rights of statutory undertakers or the operators of any electronic communications code network over or within the Order land. The Applicant does not intend either extinguishing NRL rights or removing its apparatus. However, such a power is necessary as it provides certainty for the Applicant that it can extinguish rights/remove apparatus in the event that this were to be required for the purpose of carrying out the authorised project, and it would be imprudent to omit this standard form power from the draft Order for that reason.

7.4 Paragraph 55(4) of the protective provisions is included within the protective provisions to provide, for the purposes of section 138 of the Planning Act, 2008 that the undertaker will not exercise the Article 33(1)(b) power without NRL's consent:

"(4) [The undertaker must not exercise the powers conferred by article 33(1)(b) (extinguishment of rights of statutory undertakers) in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.]"

7.5 Further, paragraph 55(5) of the protective provisions prevents the undertaker from doing anything under the Order which would (a) result in railway property being incapable of being used or maintained (save where this is temporary and with the consent of NRL); or (b) affect the safe running of trains on the railway (save for where NRL has consented temporarily not to run trains):

"(5) The undertaker must not under the powers of this Order do anything—

(a) which would result in railway property being incapable of being used or maintained except where the incapability of such use and maintenance is temporary and is with the consent of Network Rail; or

(b) which would affect the safe running of trains on the railway but, for the avoidance of doubt, this does not apply where Network Rail upon prior written request by the undertaker has consented not to run trains on the railway temporarily."

7.6 The relevant powers to extinguish rights/remove apparatus in the draft Order could therefore only be exercised by the undertaker to the extent that their use is agreed with NRL. It follows that the exercise of those powers would only ever be in circumstances where it was necessary for the purpose of carrying out the authorised project and there was no alternative to the Applicant, both NRL and the Applicant having agreed to it.

7.7 Accordingly, the Secretary of State can be satisfied for the purposes of the requirement in section 138(4) of the Planning Act 2008.

8 PRECEDENT

Hinkley Point C Connection Project

8.1 The position advanced by the Applicant is consistent with the decision by the Secretary of State for Energy and Climate Change relating to the National Grid (Hinkley Point C Connection Project) Order 2016 made on 19 January 2016. NRL objected on a number of grounds including an objection to the compulsory acquisition of operational land and the extinguishment of rights in operational or third party land on which it relied for the carrying out of its statutory undertaking. NRL sought protections to be put in place for the carrying out of works in the vicinity of the operational railway. The applicant's case was that no land owned by NRL would need to be compulsorily acquired, only rights over land, and that there would be no serious detriment to NRL's undertaking. The rights sought included the grant of a permanent easement over the airspace of the railway for proposed overhead lines.

8.2 The Examining Authority's Report of Findings and Conclusions and Recommendation to the Secretary of State for Energy and Climate Change ("Panel Report"; Appendix 2) addresses the matter at paragraph 8.4.115 to 8.4.121, 8.4.156 to 8.4.169 and 8.5.220 to 8.5.239.

8.3 NRL proposed the inclusion of its "standard" protective provisions in the DCO. Those provisions prevented compulsory acquisition without first obtaining the consent of NRL. The applicant proposed variations to the "standard" provisions, including the removal of the need for the consent of NRL to the use of compulsory acquisition powers.

8.4 The Panel concluded on the facts that there would be no serious detriment to NRL's undertaking (paragraph 8.5.224) subject to protective provisions being included in the DCO safeguarding NRL's assets. If the applicant were to acquire the rights sought, those rights would co-exist alongside those of NRL and the only possible interference would be on occasions when maintenance or emergency works were being carried out. NRL had not provided any substantial evidence to show that the grant of a permanent easement would in any way compromise or otherwise adversely affect the safe and efficient operation of the railway. NRL would still retain a right of approval over defined "specified works". The Panel therefore concluded that it was "not necessary, nor would it be reasonable" to include protective provisions preventing the use of compulsory acquisition powers without NRL consent (paragraph 8.5.230).

8.5 NRL had argued that the requirement for consent had been included in protective provisions for schemes across the UK and had drawn attention to other DCOs which affect railway land that included the provisions. The Panel "had regard to the merits of including this particular provision in the context of the scheme before it" (paragraph 8.5.229).

8.6 At paragraph 108 of the Secretary of State for Energy and Climate Change's response to Panel Report (Appendix 3), the Secretary of State agreed with the Panel's conclusion

that there would be no serious detriment to the carrying on of the undertaking of the statutory undertakers by granting the compulsory acquisition powers sought. The Secretary of State also found "no reason to disagree" with the Panel's conclusion that the offending provision (i.e. the requirement for NRL's approval) was not necessary or reasonable.

8.7 The Applicant considers the position in respect of the IGET project to be analogous to the Hinkley Point C Connection Project in this regard, and consistent with the Guidance that is now in place on this issue (see paragraph 2.1 above).

Yorkshire and Humber Carbon Capture and Storage (CCS) Pipeline

8.8 The Applicant is also aware that the prohibition in NRL's standard form protective provisions against use of compulsory purchase powers without NRL consent was considered during the examination of the Yorkshire and Humber Carbon Capture and Storage (CCS) Pipeline application. The application was promoted by National Grid Carbon Limited (**National Grid**), accepted for examination in July 2014 and sought development consent for a 75km long onshore pipeline and associated infrastructure for the transportation of carbon dioxide. The application was recommended for approval, but ultimately refused by the Secretary of State due to the withdrawal of government funding for the project and following a separate refusal of consent for one of the key carbon dioxide emitters that the need case was built around.

8.9 NRL sought inclusion of its standard protective provisions prohibiting National Grid from exercising powers of compulsory acquisition in relation to railway property without the consent of NRL. National Grid sought the exclusion of the relevant paragraph from the protective provisions unless the side agreements that were being negotiated were completed by the date on which the decision whether or not to confirm the Order was made. National Grid contended that the paragraph was an impediment to the delivery of the scheme absent the side agreements being completed. The examining authority's recommendation report to the Secretary of State dated 19 August 2015 (the **Recommendation Report**) recommended, as set out below, that if the side agreements were not completed that the protective provisions proposed by NRL be included on the face of the draft Order. This was only dealt with very briefly in the Recommendation Report and justified by the single Inspector simply by stating that he considered the safety and integrity of the operational railway to be paramount:

"7.5.45 The respective position in relation to the protective provisions of the applicant and Network Rail are set out in CR-019 [NB: being "National Grid Carbon Limited: 18.2: Joint Statement with Network Rail submitted 18 May 2015"]. Two alternative versions are submitted of a new Schedule 11 Part 3 "For the Protection of Railway Interests". They are identical with two exceptions[95]. The differences are explained and a track changed version for comparison purposes is also attached in CR019.

7.5.46 The parties intend to complete negotiations by 1 July in which case, if the outcome is successful and agreement achieved, the Secretary of State may be satisfied that any protective provisions subsequently agreed between the

*applicant and NR should be included within the order. However should there still be a dispute between the applicant and NR, **I consider that the safety and integrity of the operational railway is paramount and therefore**, in that event, I would recommend that the Part 3 as suggested by NR should be included in the DCO. With the inclusion of these protective provisions I recommend that Secretary of State can be satisfied that the grant of compulsory acquisition powers over NR's land would not cause serious detriment and that the tests under s127 of the PA2008 would be met. I have included the protective provisions in the recommended DCO.*

FN 95: CR-019 Paragraph 16" (emphasis added).

8.10 There was no further reasoning, and thus no attempt to explain why National Grid's suggested provision was not adequate to ensure the safety and integrity of the operational railway.

8.11 The Secretary of State's decision letter dated 12 January 2017 (the **Decision Letter**) did not refer to this matter, because it was a refusal and did not therefore need to grapple with terms of the Order.

8.12 The Applicant has drawn attention to what was said by the single Inspector in that case in order to ensure the Examining Authority is aware of it when considering this matter. Nevertheless, it is considered to offer little or no practical assistance to the Examining Authority in the present case on the following basis:

8.12.1 The reasoning in the Recommendation Report is very limited and makes no attempt to explain why National Grid's suggested provision was not adequate to ensure the safety and integrity of the operational railway. It does not therefore grapple with the key issue in any meaningful way, let alone provide a rationale that can be relied upon and replicated in subsequent cases. In effect it simply identifies what the Inspector considered to be the key issue (ensuring the safety and integrity of the railway) without then going on to examine the implications of the alternative provisions for that issue.

8.12.2 The Recommendation Report long pre-dates the Guidance and (unlike the decision in the Hinkley Point C Connection case) is not consistent with its requirement that the preferred protective provisions produced by statutory undertakers must be "adapted as necessary so they accurately reflect the proposed development" and "should also not simply negate other provisions of the DCO, particularly concerning proposed compulsory acquisition of statutory undertakers' land";

8.12.3 The Recommendation Report does not grapple with any of the same or similar points to those made by the Applicant in this note that:

(a) the proposed construction methodology for the pipelines in Work No. 6 reflect a number of factors as set out in paragraphs 5.1.1 to 5.1.6 above which mean that delivery of the project could be compromised if NRL's preferred prohibition on use of compulsory purchase powers

is allowed and it continues to insist on "lift and shift" provisions in easement negotiations. The Recommendation Report makes no mention of the implications of its conclusions for the scheme's delivery; and that

(b) even without the prohibition on the use of compulsory purchase powers, the protective provisions proposed by the Applicant provide NRL with sufficient approvals under both the terms of those protective provisions and an asset protection agreement to prevent any scope for compromising the safety and integrity of the operational railway.

8.12.4 It appears that the Recommendation Report gave weight to the fact that National Grid and NRL appeared to be close to reaching a voluntary agreement, which is not the case here notwithstanding the diligent efforts of Air Product's solicitors.

8.12.5 There was no consideration of this matter by the Secretary of State in the Decision Letter, who may have considered the implications for delivery of the scheme, as in the case of the Hinkley Point C Connection Project decision, where the Secretary of State found in favour of the DCO promoter.

8.13 Accordingly, the Applicant considers the approach of the Panel and the Secretary of State in the Hinkley Point C Connection Project to be the appropriate one, particularly because it is consistent with the Guidance now in place and for the reasons the Applicant has articulated in this note.

9 AMENDMENTS REQUIRED TO THE DRAFT DCO BEFORE IT IS MADE

9.1 If the Examining Authority agrees with the Applicant's submissions in this matter, it is requested to make the amendments to the draft DCO set out in the second column below. If it agrees with the position advanced by Network Rail, the Examining Authority should make the amendments set out in the third column below:

Paragraph No. (column 1)	Applicant's Approach (column 2)	Network Rail's approach (column 3)
Paragraph 55 of Part 5, Schedule 5	Deletion of sub-paragraphs (1)-(3) as currently presented in square brackets in the current draft of the DCO to be submitted at Deadline 5.	Retention of sub-paragraphs (1)-(3) as currently presented in square brackets, and removal of its square brackets, in the current draft DCO submitted at Deadline 5.
	Insertion of new subparagraph (4) currently presented in square brackets in the current draft of the DCO to be submitted at Deadline 5	We have not been informed of NRL's position on this point, however, we assume they would want this retained in any event.
	Deletion of the wording presented in the second set of square brackets at sub-paragraph (6) and retention of the	Retention of the wording presented in the second set of square brackets at sub-paragraph (6), and removal of

	wording presented in the first set of square brackets, and removal of its square brackets, as currently in the current draft of the DCO submitted at Deadline 5.	its square brackets, and deletion of the wording presented in the first set of square brackets as currently in the current draft of the DCO submitted at Deadline 5. Albeit the Applicant would submit that even if the Examining Authority were to find, contrary to current Guidance and the Hinkley Point C Connection decision, that NRL's approach at sub-paragraphs (1)-(3) is to be preferred, there is no reason for NRL's approval to be capable of being withheld in its absolute discretion on any subject, and the wording of this row in the column to the left in respect of sub-paragraph (6) should be preferred in any event.