



BIRCHAM DYSON BELL

Ms Katherine Chapman
Case Officer
Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Your Ref

Our Ref
IHM/Y055007

Date
27 September 2012

Dear Ms Chapman

**Network Rail (Norton Bridge Area Improvements)
Proposed Development Consent Order**

I am acting for Network Rail on its proposed application under the Planning Act 2008 (the Act) for a Development Consent Order to authorise this scheme.

The responses to the latest consultation on the scheme are being evaluated and Network Rail is progressing the preparation of the various application documents. Network Rail's intention is to submit the application for the Order in December 2012.

Proposed meeting

We would therefore now like to consult you and your legal colleagues on the terms of the draft Order. A meeting for this purpose has been arranged for 11 am on Wednesday 3 October 2012 at Temple Quay House by Malcolm Armstrong of Network Rail. The purpose of this letter is to send you with it copies of the latest drafts of the proposed Order and Explanatory Memorandum (enclosed) and to set out some particular issues that we would like to discuss with you. I also enclose some draft works plans and land plans which may assist our discussion.

This will be the fourth Development Consent Order to be promoted by Network Rail. It therefore borrows heavily from the form of Network Rail's earlier Orders, even though only one (the Ipswich Chord Order) has so far been made. As Network Rail expects to be a fairly regular promoter of DCOs, it is aiming for consistency between Orders promoted by it, save for where changes in law, developing best practice or scheme specific issues dictate otherwise.

When we meet, we can, if you or your colleagues wish, go through the draft Order article by article. There is, however, one particular feature of this scheme on which we would like to

50 Broadway London T +44 (0)20 7227 7000
SW1H 0BL United Kingdom F +44 (0)20 7222 3480
DX 2317 Victoria www www.bdb-law.co.uk

8917099.03



focus with you. It concerns the necessary diversion of two high pressure gas pipe-lines operated by National Grid.

Railway works

The main railway works to be promoted by the Order are an enhancement of the West Coast Main Line (WCML), comprising a spur or 'chord' of new railway which then divides, with one part passing over the WCML to join the Stone-Manchester Line and the other part re-joining the main line. This grade separation will improve the capacity of the railway junction at this location.

There is therefore no doubt that this constitutes a Nationally Significant Infrastructure Project (NSIP) under the terms of section 14(1)(k) and section 25 of the Act.

Gas pipe-line diversions

These railway works will necessitate the diversion of two high pressure gas pipe-lines operated by National Grid, which currently pass beneath the existing WCML. There need to be three diversions in all, as one pipe-line needs to be diverted in two places. The diversions are being planned in collaboration with National Grid.

Whether these pipe-line diversions constitute an NSIP (or three NSIPs) depends upon two factors:

- (a) Who carries them out; and
- (b) If National Grid carries them out, whether their construction is likely to have a significant effect on the environment.

As to (a) above, when a promoter wishes to carry out works that entail the diversion of a public utility, e.g. a water main, gas pipe-line or electricity cable, the usual practice is for the promoter to obtain the power to carry out the work but then to include in the authorising instrument a protective provision under which the statutory undertaker may itself carry out all or part of the relevant works, with the promoter retaining 'step in' rights, in order to guarantee the deliverability of the works and to ensure that they can be carried out in accordance with the promoter's requirements for the project. In practice, the diversion works are usually carried out by the statutory undertaker, either under powers it may itself have under primary or subordinate legislation or as a contractor for, or by authorised delegation by, the promoter.

In this case, the intention is similar in that it is intended that National Grid should carry out all or part of the diversion works on terms to be agreed with Network Rail.

We propose, therefore, that the Order should authorise both Network Rail and National Grid to carry out the works, with a view to National Grid being expected to carry them out but Network Rail still being able to do so, if necessary.

As to (b) above, if National Grid carries out the works, they may be an NSIP by virtue of section 20 of the Act (construction of a gas pipe-line by a gas transporter) but only if they are



BIRCHAM DYSON BELL

likely to have a significant effect on the environment. If they are not likely to have a significant effect on the environment, they will constitute associated development.

Whether the diversions are likely to have a significant effect on the environment is uncertain and can only be properly or reliably established by obtaining a screening opinion under regulation 6 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

If Network Rail carries out the diversion works, they will not be an NSIP. They do not fall within the terms of section 20 because Network Rail is not a gas transporter and we are satisfied that, in this case, the works would not meet the conditions for an NSIP set out in section 21 (construction of a pipe-line other than by a gas transporter). In these circumstances, they will constitute associated development.

Incidentally, we are assuming that, under section 14(1)(f) and section 20 of the Act, the "construction" of a pipe-line includes the diversion of a pipe-line but there is still an added complication. It is the question of what works actually constitute the "construction of a pipe-line" in that it may be that Network Rail will carry out some of the works, e.g. the preparatory ground works, and National Grid the installation of the new length of pipe-line.

What is clear to us is that the diversions must be included in the Order in one form or another. Furthermore, whether or not a screening opinion is required to establish whether they will be an NSIP rather than associated development if National Grid carries them out, the potential environmental impact of the works is being assessed anyway as part of the environmental assessment as a whole.

The issue that we would like to discuss with you, therefore, is how we should frame the terms of the Order, having regard to these issues.

Whether the gas pipe-line diversions constitute an NSIP

Whether a development constitutes a NSIP is governed by the Act. Under the Guidance on associated development issued by the Secretary of State, whether development is 'associated development' is for the IPC (as it then was) to decide having regard to section 115 of the Act and any guidance issued by the Secretary of State. Presumably, in making any decision, the Secretary of State can be expected to have regard to the guidance that was addressed to the IPC. This Guidance states at paragraph 13 that the IPC should not treat as associated development a development that is an NSIP in its own right. Apart from this item of guidance, the diversions have all the characteristics of associated development in that they are not an aim in themselves but are subordinate to and necessary for the railway development; and they are not an integral part of the railway works but a necessary consequence of them.

As to obtaining a screening opinion, one would normally do this in order to ascertain whether an environmental impact assessment (EIA) must be carried out. In this case, the only purpose in obtaining a screening opinion would be to determine whether the diversions are an NSIP or associated development (in the event that National Grid undertakes the works).



That would seem rather pointless in this case, as the works are being environmentally assessed anyway as part of the whole scheme.

Determining which works constitute an NSIP and which works constitute associated development in this case would also seem pointless because nothing of substance or practice will turn on whether works authorised by the Order are an NSIP or not, if, as is intended, they are to be authorised by the Order (if granted) anyway.

Whether the Order must specify which works constitute an NSIP

The question, therefore, is how the works should be described in the Order – in particular, whether the Order should specify whether the diversion works are an NSIP or associated development in circumstances where, if Network Rail carries out the works, they will not be an NSIP but if National Grid carries out the works they *may* be an NSIP. It may also be that some of the works will be carried out by Network Rail and some by National Grid.

Proposed solution

Network Rail's proposed solution is to set out in detail the proposed works - mostly as numbered works - as it would do anyway, but not specify in the Order whether the pipeline diversions are an NSIP or associated development. Please see how this is currently set out in Schedule 1 of the draft Order.

The rationale for this approach can be explained in the Explanatory Memorandum. Please see section 2 of the enclosed draft.

Such an approach has no negative consequences in substance or practice. To put it another way, there appears to be no useful purpose in the circumstances of this case, in having to specify in the Order whether the diversion works are an NSIP or not.

An advantage of not specifying whether the diversions are an NSIP is that it retains the desired flexibility of allowing Network Rail and National Grid to determine at a later date which works will be done by which company.

This approach also avoids the need to obtain a screening opinion to determine whether the works constitute an NSIP but for no other purpose.

We have considered this approach in the light of *Advice note thirteen: Preparation of a draft order granting development consent and explanatory memorandum, April 2012, Version 2*, in particular the advice given at page 4, but, whilst that advice is that a draft Order should include a full, precise and complete description of each element of the NSIP and a full, precise and complete description of each element of any necessary associated development, and that each element of the NSIP and any necessary associated development should be clearly set out as separate numbered works in a Schedule, the advice does not in fact say that an Order must specify which work is an NSIP and which work is associated development.



We therefore believe that this approach is not only expedient; it also conforms with the provisions of the Act and the Guidance and advice given under it.

Besides, if there is any issue of compliance either with the Secretary of State's guidance or with PINS' advice note, the unusual circumstances of this case justify a departure from the guidance or advice to this extent.

We therefore invite you to agree that this is an acceptable way to proceed in this case and, in particular, that you agree that there is no need for Network Rail or National Grid to seek a screening opinion in order to determine whether the diversion works are likely to have a significant effect on the environment, in order, in turn, to determine merely whether the works will be an NSIP if National Grid carries them out.

We would also like you to confirm that you do not regard the adoption of this approach as an impediment to acceptance of an application or to an Order in principle being subsequently made in this form.

Authorising National Grid as well as Network Rail

Would you also please consider our proposed way of authorising both Network Rail and National Grid to carry out the works?

As to who receives the benefit of a DCO, the Act provides for a DCO (like a planning permission) to have effect for the benefit of the land generally and anyone for the time being interested in the land (except to the extent that the Order provides otherwise), see section 156. This contrasts with the usual position with statutory powers which are normally conferred only on the body or person who applies for them. In this way, the benefit of a DCO can be conferred on a third party as well as on the applicant. Moreover, the position under the Act appears to apply in respect of any powers sought, not just the power to carry out the works, e.g. powers to acquire land or interests in land compulsorily.

For its own Orders, however, Network Rail generally seeks to adopt the approach taken in its other statutory authorisations that, in the case of the national rail network, there is no need for anyone other than Network Rail to benefit from the Order (save in particular circumstances, e.g. works intended to benefit a third party).

In this case, however, it is proposed that, in respect of the gas pipe-line diversion works, the necessary powers both to carry out the works and to acquire the necessary land interests to do so, should be conferred on National Grid as well as on Network Rail. This is currently to be achieved by article 8(3) of the draft Order.

This has certain advantages:

- (a) It overcomes a concern that a provision to authorise Network Rail to delegate to National Grid the diversion works may not be intra vires the Planning Act, if it were to offend the rule against sub-delegation.



BIRCHAM DYSON BELL

- (b) It avoids having to use a power in the Order to transfer powers to a third party, which is not compatible with sharing a power (for a 'transfer' connotes parting with the subject matter of the transfer).
- (c) It provides flexibility, as between Network Rail and National Grid, as to how and by whom the diversions will be carried out – for example if it were decided that Network Rail will carry out the ground works before National Grid carries out the disconnections and reconnections.
- (d) It enables National Grid to acquire the interests in land it requires both for the pipelines once diverted and for carrying out the diversions. National Grid's own undertaking can then be the dominant tenement in respect of the easements it would require. There is a potential difficulty for Network Rail in trying to achieve this for National Grid because, as a matter of land law, an easement is not a legal interest that exists in isolation; it must be for the benefit of the grantee. It is not therefore ordinarily possible for Network Rail to acquire the necessary easements and simply transfer them, or the benefit of them, to National Grid. It would have to acquire some greater interest, such as the freehold, which it would not otherwise need, and then itself grant the necessary easements to National Grid.
- (e) It safeguards Network Rail's need itself to acquire for its railway project interests in all or part of the land required for the diversions.

If you see any difficulty from PINS' perspective in Network Rail taking this approach, we would wish to be advised of it.

I might add that we have been discussing all of these issues with National Grid so that Network Rail can proceed on a consensual basis with National Grid.

Other matters

There are also some more practical questions that Malcolm Armstrong would like to raise when we meet.

I believe that the attendees from Network Rail will be Malcolm Armstrong (Consents Manager), Henry Long (In-house Legal Adviser), Lucie Anderton (Environment Specialist) and myself. We look forward to meeting you on 3 October 2012. If you or your colleagues have any queries in the meantime, do please call me or e-mail me.

Yours sincerely

Ian McCulloch
Partner
For and on behalf of Bircham Dyson Bell LLP