

16th February 2011

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Dear Morag,

DIRFT III - 'Technical Questions'

Thank you for your email of 8th February 2011 and for the technical questions to the IPC attached to that email. As discussed in the meeting on 15th February, please see our replies below:-

1. Whether your proposed development should properly be described as a new RFI or an alteration to an existing RFI is a matter of fact and degree. For example, if following the construction of DIRFT III the totality of the RFI (including DIRFT I and II) are operated as a single RFI then arguably your proposed development should be regarded as an alteration to the existing interchange. Alternatively, if DIRFT III is proposed to be operated as a 'free standing' RFI then it would probably be more correct to describe it as a new RFI. As you mentioned in the meeting, all the rail infrastructure relating to DIRFT I, save for the transshipment facility, is proposed to be retained in the event of DIRFT III being constructed which suggests that the latter could not be operated independently.
2. As you know, associated development is defined separately in the Planning Act 2008 (the 2008 Act) (in s.115(2)) from development which is 'integral' to the project (in s.31). Paragraph 15 of the IPC Guidance Note 2 states that the draft Development Consent Order (DCO) should '...include a full description of the development for which development consent is required, including any necessary associated development'. In this regard, please note that the Model Provisions are guidance but are not mandatory.

Our view is that any necessary associated development should be identified as such in the Environmental Statement (ES) (as advised in our Scoping Opinion) and also preferably be set out separately in the draft DCO or Explanatory Memorandum (EM). There may be implications, for example in relation to any subsequent permitted development rights that might be enjoyed, depending on how constituent elements of the proposed scheme are described. The IPC would also wish to ensure that it adopts a consistent approach from project to project in deciding whether constituent elements should be treated as being integral or associated development.

3. As discussed, there is no requirement for a 'red line' plan per se. The nearest equivalent to this is the land plan, which has to show (inter alia) 'the land required for...the proposed development' (Reg. 5(2)(i)(i)). It would though be useful for the Commission to receive a separate 'red line' plan, which could be submitted under Reg. 5(2)(q) Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009 (the APFP Regulations).

With regards to the meaning of land 'affected by the development', please see the Commission's previous advice as set out in the minutes of our meeting on 3rd August 2010. That remains our best understanding of the meaning of this.

There is no need to identify ownership of the land on the Land Plan if no compulsory acquisition powers are being sought. It would though still be useful for the Commission to receive a plan showing land ownership. This could be shown either on the Land Plan or on a separate plan if preferred.

It should though be noted that the consultation obligation under s.42(d) requires that the applicant must, after making diligent inquiry, consult one or more of those categories of persons set out in s.44. The consultation report should identify any such persons and show how any relevant representations have been taken into account (s.37(7) and s.49).

4. Yes, we agree that this is a reasonable approach. We would also note that the approach used in drafting orders under the Transport and Works Act 1992 is a possible way of structuring a draft DCO. You could also look at draft DCOs in relation to accepted applications on the IPC website. The Model Provisions are intended as a guide for applicants in drafting orders, rather than a rigid structure. Paragraph 24 of IPC Guidance Note 2 states that any departures from the Model Provisions should be explained in the Explanatory Memorandum submitted with the application.

With regards the Works Plan, it would be acceptable for this to comprise multiple sheets. Please note though that a key must be provided where a plan comprises three or more sheets (Reg. 5(2)(4) of the APFP Regulations). If specific Works are to be shown separately on individual sheets then these should be cross-referenced to the relevant Works in the draft DCO. The Works Plan also needs to show any limits of deviation provided for in the draft Order.

5. As discussed, we note that in the schedule attached your email of 8th February ('Categorisation of Development') such buildings are shown as being integral to the project rather than being 'of an ancillary nature', although the schedule does refer to 'warehouses (including ancillary offices)'. In describing the proposed development it would be helpful if the word 'ancillary' was restricted to those matters that are ancillary to development as set out in Schedule 5 to the 2008 Act. If the erection etc. of any such building amounts to 'development' then it probably should either be 'integral' to the project or associated development, rather than an ancillary matter. In which case, any such buildings should be described in sufficient detail consistent with other elements of the proposed development. Where insufficient information is provided in the draft DCO then that may have EIA implications. Please see our Advice Note Nine, which has been published on the IPC website, with regards to

any flexibility that the Rochdale Envelope approach may allow, for example by way of requirements on the draft DCO.

6. 'Consultation bodies' are defined in Reg. 2(1) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (the EIA Regulations). Regulation 9(1)(c) persons are those bodies that the IPC may notify to the applicant under that Regulation. These are additional to the 'consultation bodies' that the IPC must consult under Regulation 8(6) in relation to scoping the ES. In relation to DIRFT III, no Regulation 9(1)(c) bodies were specifically identified although 'A' neighbouring Parish Councils were consulted in addition to the statutory bodies in relation to the Scoping Opinion consultation per the approach set out in IPC Advice Note Three. You are also referred to Regulations 13 and 14 of the EIA Regulations.
7. To clarify, those consents set out in s.33, if required for the development sought, do not need to be obtained separately. With regards to any s.150 consents, and those required under other legislation, please see Paragraph 22 of the IPC Guidance Note 2.

To use your example, as with the Town and Country Planning Act 1990, there are no direct references in the 2008 Act for entering into Agreements under s.278 of the Highways Act 1980. The 2008 Act also does not expressly amend the Highways Act 1980 in relation to s.278 provisions being included within a DCO. However, the 2008 Act does not prevent such matters being dealt with either in the draft DCO or by way of a separate s.278 Agreement with the relevant highway authority.

Highway works could therefore be dealt with by provisions in the draft DCO, for example in relation to the payment of contributions or the carrying out of civil engineering or other works, both of which are listed as ancillary matters in Schedule 5 of the 2008 Act. Such wording would most probably need to be agreed by the relevant Highway Authority.

Detailed specifications and drawings in relation to such works are not likely to be available at the application stage or even when a DCO is granted. It is therefore possible that even if such provisions were included in a draft DCO it would still be necessary to subsequently enter into a separate s.278 Agreement.

The IPC would not be a party to any s.278 Agreement. Any such Agreement would have to be entered into separately with the relevant highway authority in the same way as under the Town and Country Planning Act 1990 regime.

8. With regards s.33, if development consent is required, then those consents listed in s.33 do not need to be obtained separately, as is made clear in s.33(1) (and in Schedule 2) of the 2008 Act. They are not though 'deemed' consents (CF – ss.148 and 149) and there is no need to list these separately in the draft DCO or in the application form.

As for any s.150 consents, and those required under other legislation, please see Paragraph 22 of the IPC Guidance Note 2 (i.e. these should be dealt with in the EM or in Box 24 of the application form, respectively). As for ancillary matters, these are set out in Schedule 5 of the 2008 Act. The Model Provisions advises that any such matters be set out in a separate schedule to the draft DCO.

9. As we noted in the meeting, the 'parts' in question relate to the relevant box numbers on the standard application form for development consent applications.

As we mentioned in the meeting, the IPC would welcome receiving draft application documents at least 6 weeks prior to formal submission of your application for development consent, in particular drafts of the Development Consent Order, Explanatory Memorandum, Land Plan and Works Plan. It would also be helpful to receive a draft of your Consultation Report so that we can consider and give any s.51 advice on the layout/structure of this.

The IPC can advise on technical/drafting aspects of the draft DCO and other draft application documents but not on the merits of the application. Such advice is without prejudice to the Commission's eventual decision (under s.55) as to whether or not to accept a DCO application.

I trust that this letter answers your questions, but please let me know if you have any queries or further questions.

Yours sincerely,

Tim Hallam
Lawyer

The IPC gives advice about applying for an order granting development consent or making representations about an application (or a proposed application). The IPC takes care to ensure that the advice we provide is accurate. This communication does not however constitute legal advice upon which you can rely and you should note that IPC lawyers are not covered by the compulsory professional indemnity insurance scheme. You should obtain your own legal advice and professional advice as required.

We are required by law to publish on our website a record of the advice we provide and to record on our website the name of the person or organisation who asked for the advice. We will however protect the privacy of any other personal information which you choose to share with us and we will not hold the information any longer than is necessary.

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