



Your reference

Our reference HENSM/43283-4855

14 March 2025

National Infrastructure Planning
Temple Quay House
2 The Square
Bristol
BS1 6PN

Dear Sirs

DCO Scheme: Five Estuaries Offshore Wind Farm
Our client: Network Rail Infrastructure Limited

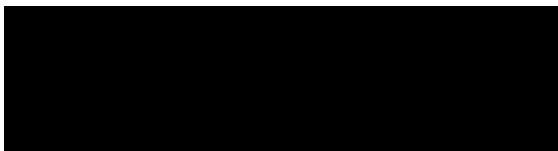
Subject: Final Submissions of Network Rail in respect of Protective Provisions
Deadline: Deadline 8A

This Firm is instructed by Network Rail Infrastructure Limited (**NR**) in relation to the application by Five Estuaries Offshore Wind Farm Limited (**Applicant**) in connection with the DCO Scheme.

We hereby enclose the Final Submissions of NR in respect of matters not resolved relating to the form of Protective Provisions for the benefit of Network Rail and the position of NR in respect of the Applicant's cases under s.127 and s.138 of the Planning Act 2008.


We hope this is self-explanatory but should you have any queries, please don't hesitate to contact us.

Yours faithfully



Addleshaw Goddard LLP

Direct line

Email @addleshawgoddard.com

10-92779762-143283-4855

Addleshaw Goddard LLP, 3 Sovereign Square, Sovereign Street, Leeds LS1 4ER
Tel +44 (0)113 209 2000 Fax +44 (0)113 209 2060 DX 12004 Leeds
www.addleshawgoddard.com

Addleshaw Goddard LLP is a limited liability partnership registered in England and Wales (with registered number OC318149) and is authorised and regulated by the Solicitors Regulation Authority (with authorisation number 440721) and the Law Society of Scotland. A list of members is open to inspection at our registered office, Milton Gate, 60 Chiswell Street, London EC1Y 4AG. The term partner refers to any individual who is a member of any Addleshaw Goddard entity or association or an employee or consultant with equivalent standing and qualifications.

Final Submission at Deadline 8A by Network Rail Infrastructure Limited in relation to The Five Estuaries Offshore Wind Farm Order 202[*] (DCO)

Planning Inspectorate Reference Number: EN010115

Unique Identification Number: 20049276

Introduction

Further to Network Rail Infrastructure Limited's (**Network Rail/NR**) Written Representations (submitted on 22 October 2024) which confirmed that Network Rail requires its standard protective provisions to be included in the draft DCO, the parties have agreed a substantial proportion of the form of Protective Provisions for the Protection of Railway Interests (**Protective Provisions**) and Network Rail is hopeful that the few outstanding matters will be able to be agreed within the next three to four weeks.

The key outstanding matter relates to the longstanding principle that any exercise of compulsory acquisition powers pursuant to the DCO in respect of railway property must be subject to NR's prior consent and a restriction to this effect must be included in the Protective Provisions. Network Rail's position is that an absence of such protection in the Protective Provisions will have a detrimental effect on Network Rail's ability to carry out its statutory undertaking, comply with its Network Licence and safely operate the railway network.

At this stage, NR and the Applicant (together the **Parties**) have been unable to agree the inclusion of the necessary provision in the Protective Provisions for this purpose and so NR must maintain its objection to the making of the DCO.

As detailed below, Network Rail has not issued technical or business clearance for the proposed works and has therefore not established that the proposed development and the proposed use of compulsory acquisition powers on railway is acceptable in the context of ensuring a safe and efficient railway.

We set out the reasons for Network Rail's position and a request for the inclusion of Network Rail's required form of Protective Provisions in the Order in this submission.

Provision 4 of the Protective Provisions

The Application includes provisions which would, if granted, authorise the Applicant to carry out works on and in close proximity to operational railway land belonging to Network Rail, to use such land temporarily and to acquire permanent rights over such land. Network Rail must accordingly ensure that the Application is granted subject to protective provisions which provide appropriate protection for the safe and efficient operation of the railway.

The Parties have agreed a substantial proportion of the Protective Provisions which are to be included in the DCO (if made). However, a key issue which the Parties have been unable to reach agreement on is the inclusion of a restriction in the Protective Provisions which requires the Applicant to seek NR's consent prior to the exercise of compulsory acquisition powers in respect of railway property. The

Applicant seeks the deletion of the parts of NR's required form of provision as shown in red text below, whereas NR requires the retention of these provisions for the reasons set out below:

(1) The undertaker must not exercise the powers conferred by—

- a) article 3 (development consent granted by the Order);*
 - b) article 6 (power to maintain the authorised development);*
 - c) article 18 (discharge of water);*
 - d) article 19 (authority to survey and investigate the land onshore);*
 - e) article 22 (compulsory acquisition of land);*
 - f) article 24 (compulsory acquisition of rights);*
 - g) article 26 (private rights);*
 - h) article 28 (acquisition of subsoil only or airspace only);*
 - i) article 31 (temporary use of land for carrying out the authorised development);*
 - j) article 32 (temporary use of land for maintaining the authorised development);*
 - k) article 33 (statutory undertakers);*
 - l) article 37 (felling or lopping of trees and removal of hedgerows);*
 - m) article 38 (trees subject to tree preservation orders);*
 - n) the powers conferred by section 11(3) (power of entry) of the 1965 Act;*
 - o) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;*
 - p) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;*
 - q) any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017;*
- in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.*

(2) The Undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.

(3) The Undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, article 32 (statutory undertakers), or article 26 (private rights), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.

(4) 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 extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

(5) The Undertaker must not under the powers of this Order do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.

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

(7) The Undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

Provisions 4(1) and 4(4) – Network Rail's position

The Applicant proposes to compulsorily acquire permanent rights over and temporarily occupy plots 05-014 (operational railway track), 05-016 (operational railway track), 05-017 (access track) and 05-019 (land adjoining operational railway) (together the **Plots**) for the purposes of installing and maintaining

cables underneath the operational railway, construction of a haul road, temporary construction accesses and working areas and laydown area, creation and improvement of accesses including works to junctions and visibility splays.

If NR has no ability to require its prior consent to such acquisition of rights over and temporary use of this land, it would give rise to a significant, unacceptable risk that the Applicant could compulsorily acquire a right over or temporarily use operational railway track (and other land owned by Network Rail) which would not be subject to the conditions, limitations and restrictions necessarily required by NR to facilitate and ensure the safe and efficient operation of the railway. The adverse implications of which are that NR will be compromised in its capacity as a statutory undertaker to ensure the safe and efficient running of trains on the railway which gives rise to a significant risk of NR being in breach of its Network Licence (further detail on which is provided below) a position which cannot be accepted by NR, nor would it be acceptable to the Office of Rail and Road (NR's regulator). This is particularly critical in circumstances such as this where NR has not issued the Applicant with technical or business clearance for works proposed on railway land. Accordingly, NR must have the ability to require that its prior consent is obtained before the Applicant exercises powers of compulsory acquisition on railway land and so the inclusion of provisions 4(1) and 4(4) is necessary on this basis.

Network Licence

NR operates under a Network Licence granted by the Office of Rail and Road (ORR). Under the Network Licence, NR is obliged to ensure compliance with a wide number of standards imposed by the Rail Safety and Standards Board that pertain to maintaining the safe and efficient running of trains on the railway. In order to regulate its ability to comply with such standards, NR must retain stringent restrictions, controls and procedures over any interferences with the railway by third parties, including by reason of persons exercising rights on or over railway land. NR imposes such restrictions through (i) a requirement to obtain its prior consent before rights are compulsorily acquired or railway land is temporarily used and (ii) by requiring third parties to enter into an asset protection agreement.

Accordingly, where a right is compulsorily acquired and may be exercised over railway land which is not subject to NR's prior consent, such a right is created outside of NR's control and would not be subject to the necessary restrictions and conditions that NR would regard as sufficient so as to enable it to comply with its Network Licence. For example, NR may require that rights granted to the Applicant are subject to reservations allowing NR to interrupt the exercise of such right in certain circumstances (such as enabling NR to deal with emergencies on the railway or carry out necessary works or the exercise of use right or temporary possession may not be safe to be exercised at a specified period of time due to railway operations). Where NR's prior consent is not required before exercising these powers over railway land, there is a risk that any such rights would not be subject to the required restrictions and as a result NR's control over its ability to appropriately manage the safety of the railway would be compromised. The consequences of NR not being able to effectively manage the safety of the railway could be catastrophic.

Network Rail is of course willing to engage with the Applicant to agree the terms of the rights sought and is under a duty (by way of provision 4(6)) to act reasonably in doing so. However, in order for NR to comply with its statutory duties, it cannot relinquish this degree of control over rights being exercised on the railway where the consequences of doing so could be significantly and catastrophically adverse. As mentioned above, the Applicant has unfortunately not been actively engaged in discussions with Network Rail to reasonably come an agreement as to the granting of the necessary rights through private agreement and discussions in respect of the same are yet to commence.

The restrictions that Network Rail are seeking on the exercise of compulsory powers over railway land is a widely accepted and longstanding principle which has been accepted by the Examining Authority and Secretary of State on numerous DCOs including but not limited to: the A47/A11 Thickthorn Junction DCO, Thurrock Flexible Generation Plant DCO, Yorkshire and Humber CCS Cross Country Pipeline DCO, Sunnica Energy Farm DCO, Longfield Solar Farm DCO and South Humber Bank Energy Centre DCO. The purpose of this restriction is not to impede the implementation of the Applicant's scheme, but to secure the necessary protection to NR as a statutory undertaker in order that it can properly regulate the rights to be exercised over its railway network and which is appropriate function and purpose of protective provisions.

For the reasons set out above, NR must maintain its objection to the application for the DCO and must insist on the inclusion of the form of protective provisions as set out in this submission. As mentioned above, discussions are ongoing between NR and the Applicant and NR is hopeful that the Parties will be in a position to agree the form of Protective Provisions within the next three to four weeks.

S.127 and S.138 of the Planning Act 2008

In addition to the points set out above, without the inclusion of the restrictions on compulsory acquisition that are contained in Network Rail's standard protective provisions, NR must also maintain its objection to the DCO on the basis that the proposed compulsory acquisition of rights over railway property does not satisfy the test in section 127 Planning Act 2008 in that:

- (a) the right cannot be acquired without serious detriment to the carrying on of the undertaking; and
- (b) such detriment cannot be made good by Network Rail by use of other railway property.

The reason for which is that:

- 1) all of the Plots (over which rights are proposed to be compulsorily acquired and temporary possession is proposed to be taken) comprise of, or are in close proximity to, an operational railway line;
- 2) unless NR has the ability to require its prior consent to the acquisition of such rights/temporary possession in order to ensure any such rights can be carried out in a manner which is contiguous with the operational railway the proposed rights/temporary use give rise to a risk of serious detriment to the carrying on of NR's undertaking as it could interfere with the operational railway line, in particular potentially compromising the safe running of trains and the safety of users of the railway. It is inconceivable that a third party should have compulsory powers to acquire the rights to use railway land without first seeking NR's consent and without NR's technical and business clearance; and
- 3) as the Plots include an operational railway line such detriment cannot be made good as the line cannot be relocated to other land in the possession of NR (and not least to say requiring NR to relocate its operational railway to facilitate such rights would be entirely disproportionate both in cost and nature).

Accordingly, in order for such proposed compulsory acquisition and temporary possession of the Plot to pass the test in section 127 Planning Act 2008, provision 4(1) and 4(4) of Network Rail's standard protective provisions (set out above) requiring NR's prior consent to be sought must be imposed before powers authorising the compulsory acquisition of such rights are exercised. Network Rail's position is that in the absence of such a Protective Provision, the test in section 127 is not satisfied.

In addition, to the extent that the proposed compulsory acquisition of rights and temporary possession over the Plots does involve the extinguishment of any rights or the removal of any apparatus belonging to NR, NR submits that the test in section 138 is not satisfied on the same grounds as set out above.