

Our reference JOHNMD/43283-2630

9 April 2020

BY EMAIL

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The Planning Inspectorate
Temple Quay House
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Dear Sir/Madam

Application by Esso Petroleum Company Limited (Applicant) for an Order granting development consent for the Southampton to London Pipeline Project (Order)
PINS Reference: EN070005
Post- Deadline 7 Submission to address the Applicant's Case pursuant to Section 127 of the Planning Act 2008

1. We write to update the Examining Authority (**ExA**) further to Network Rail's Deadline 7 submission [**REP7-061**] and the publication of the Applicant's Section 127 Case [**REP7-049**].
2. The Applicant's case is that the tests in Section 127 of the Planning Act 2008 are met and that the Applicant can purchase the rights it needs in the land which Network Rail owns or in which it has an interest without serious detriment to Network Rail's undertaking. As confirmed in its Deadline 7 submission Network Rail strongly contests this position.
3. We do not repeat Network Rail's section 127 submission in this letter. However, with reference to the new points raised by the Applicant in its Section 127 case, we respond as follows, starting with the Applicant's proposal that a new Paragraph 21(6) be inserted into the Protective Provisions.

Proposed new paragraph 21(6) of the Protection Provisions - a time limit for the agreement of the voluntary agreements, after which the Order powers can be undertaken by the Applicant without the consent of Network Rail

4. Paragraph 21 of the Protective Provisions lists the articles in the Order that may only be exercised with Network Rail's consent and provides that rights over railway property may not be extinguished without Network Rail's consent.

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5. In its Section 127 Case, the Applicant states that in order to accept paragraph 21, as requested by Network Rail, paragraph 21 (6) should be inserted, which states:

"(6) This paragraph will cease to have effect if within 56 days of the making of this Order the interests and rights required by the undertaker in respect of any railway property in order to construct and maintain any specified works have not been completed by agreement with Network Rail".

6. Network Rail disagrees strongly with the proposed insertion of this sub-paragraph as the effect would be to limit the time available for the agreement of the voluntary property agreements, after which the Applicant would be able to exercise compulsorily the powers in the Order without Network Rail's consent.
7. For reasons already stated in its Deadline 7 submission, the Protective Provisions proposed by the Applicant, in the absence of paragraph 21, are not sufficient to safeguard Network Rail's statutory undertaking.
8. The key issue for Network Rail is that it would not be in control of whether or not agreement is reached before the expiry of the 56 day period. Reaching agreement is dependant as much on the conduct of the Applicant as it is on that of Network Rail. The inclusion of paragraph 21(6) would put Network Rail entirely at the mercy of the Applicant; for example, the Applicant could delay responding to Network Rail or take an unreasonable stance in relation to the property agreement negotiations and rely on the expiry of the 56 days following which it could rely on its compulsory acquisition powers in any event. This position is not acceptable to Network Rail and Network Rail strongly resists the inclusion of paragraph 21(6) in the Network Rail protective provisions.
9. From Network Rail's perspective, as the ExA is aware, Network Rail does not object to the principle of the Order, has continued to liaise with the Applicant regarding the asset protection agreements required, has obtained the relevant clearance conditions and entered into negotiations (at an early stage of the examination process) with the Applicant regarding the property agreements needed for the delivery of the pipeline scheme.
10. Network Rail's view is that the property document drafts are well advanced, that negotiations are now progressing well and considers that it is feasible that negotiations can be concluded during the course of the ExA's consideration of the Order.
11. We have explained in our Deadline 7 submission, why the circumstances of this scheme differ to the scheme referred to by the Applicant at paragraph 1.3.8 of the Section 127 Case (Hinkley Point C) and do not repeat those submissions in this letter.
12. Finally, we request that the ExA consider this paragraph in the context of the many other DCOs that have been approved by various Secretaries of State, which do not include such a time restriction; the parties are left to agree matters between them voluntarily.

Network Rail Protective Provisions: further proposals by the Applicant in its Section 127 Case

13. The Network Rail Protective Provisions attached to its Deadline 7 submission remain the Protective Provisions that Network Rail request be added to Part 3 of Schedule 9 to the Order.
14. With regard to the further proposals set out by the Applicant in its Section 127 Case in relation to the Network Rail Protective Provisions, we address below the points that have not already been addressed in Network Rail's Deadline 7 submission.
15. Regarding the points raised by the Applicant, using the Applicant's paragraph numbering:

Paragraph 1.3.9(1) We are in discussions with the Applicant regarding paragraphs 22 and 26 of the Protective Provisions, which address the construction of protective works by Network Rail in certain circumstances.

Network Rail's position remains that its standard wording is required to allow Network Rail to undertake works, if reasonably necessary, to safeguard and protect the railway. These provisions are standard for the protection of the railway.

Network Rail has no interest or remit to undertake works outside of its area of expertise, for example the construction of the pipeline, and it would equally not expect pipeline contractors to undertake certain works that require specialist railway knowledge.

Paragraph 1.3.9(2) The time period for seeking alterations to railway property is addressed at paragraph 16 of Network Rail's Deadline 7 submission.

Paragraph 1.3.9(3) We are in discussions with the Applicant regarding the insertion of the word "delay" at paragraph 28(5) of the Protective Provisions. Network Rail agrees, in its Protective Provisions, that its consent shall not be unreasonably withheld and we contend that this is sufficient. Network Rail, as a statutory undertaker and body regulated by the Department for Transport must act reasonably in any event.

This point is also addressed at paragraph 21(5) of the Protective Provisions, which states that any consent by Network Rail to the powers listed at paragraph 21 must not be unreasonably withheld, but may be given subject to reasonable conditions and, if relevant, subject to the consent of any leaseholder with an interest in the property affected. Therefore, in certain circumstances, third parties could cause delay to any consent given and Network Rail would not

wish to be held accountable. Network Rail is, however, agreeing that it should not unreasonably withhold its consent.

Paragraph 1.3.9(4) The wording of the indemnity (paragraph 32 of the Protective Provisions) is addressed at paragraph 17 (onwards) of Network Rail's Deadline 7 submission.

Should the Panel have any questions regarding any of the issues raised in this letter please let us know.

Yours faithfully

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Southampton to London Pipeline Project

Deadline 7

Section 127 Case

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Southampton to London
Pipeline Project



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1 Section 127 Case

1.1 Introduction

- 1.1.1 This document sets out the Applicant's case that it should be granted compulsory acquisition powers over land belonging to statutory undertakers who have made representations that have not been withdrawn. It does not expect to reach agreement with three such companies, and a fuller case is presented in relation to them; in respect of the remaining six, agreement has been reached and a briefer case is presented should their representations not be withdrawn by the end of the examination.

1.2 Affinity Water

- 1.2.1 Affinity Water are the water supply company for the northern end of the pipeline route; Thames Water are the sewerage authority for that portion. Affinity Water made a relevant representation that has not been withdrawn ([RR-219](#)) and hence a section 127 case needs to be made.
- 1.2.2 They are recorded in the Book of Reference as having an interest in 259 plots of land (listed in the Compulsory Acquisition Schedule [REP6-079](#)), although in every case they are a Category 2 owner, i.e. they have an interest in the land short of ownership, tenancy or occupancy. Nevertheless 'land' includes an interest in land by virtue of section 159 of the Planning Act 2008 so section 127 does apply. Their principal apparatus in proximity to the project is an 8" water main that runs along Turf Hill, and a 300mm water main that runs along Ashford Road.
- 1.2.3 A Statement of Common Ground was concluded between the Applicant and Affinity Water and submitted at Deadline 2 ([REP2-014](#)). Since then, whilst there have been discussions on more practical matters, Affinity Water has not engaged with the Applicant specifically on the issue of protective provisions, despite numerous attempts from the Applicant to achieve this. They did respond to the ExA's question TH.2.8 ([REP4-078](#)) stating that they had no objection in principle to the project but would wish consultation and agreement on the construction of the pipeline in the vicinity of their apparatus.
- 1.2.4 In the absence of agreement on alternative terms, Affinity Water are protected by Part 1 of Schedule 9, protective provisions for electricity, gas, water and sewage undertakers. The protective provisions are preceded in earlier made DCOs. These require, amongst other things, any diversion of apparatus to be approved by Affinity Water under paragraphs 7 and 8, and retained apparatus to be protected under paragraph 9 (including consulting them and accommodating their reasonable requirements). There is provision made for the payment of costs and expenses by the Applicant where Affinity Water incurs a loss as a result of any works (paragraph 10). In short, they provide an appropriate form of protection for Affinity Water, in circumstances where no agreement on alternative terms has been reached, despite numerous attempts by the Applicant.
- 1.2.5 The Applicant is only seeking an easement for its pipeline where the Order Limits interact with Affinity Water assets and so sections 127(5) and (6) are engaged rather

than sections 127(2) and (3). It is the Applicant's case that it can purchase the rights it needs in the land in which Affinity Water has an interest without serious detriment to Affinity Water's undertaking (i.e. limb 127(6)(a)), due to the protection afforded by Part 1 of Schedule 9 of the DCO, which requires any diversion of the apparatus to be approved by the statutory undertaker before it can take place, and any work in the vicinity of apparatus to be subject to consultation and the accommodation of reasonable requirements made by the statutory undertaker.

- 1.2.6 The Applicant therefore considers that, in relation to Affinity Water, the test in section 127(5) is met.

1.3 Network Rail

- 1.3.1 Network Rail Infrastructure Ltd are authorised to carry on a railway undertaking. They made a relevant representation that has not been withdrawn ([RR-268](#)) and hence a section 127 case needs to be made.
- 1.3.2 They are recorded in the Book of Reference as having an interest in 56 plots of land (listed in the Compulsory Acquisition Schedule [REP6-079](#)); in 20 cases they are the owner and occupier of the land, and in the other 36 cases they are a Category 2 owner, i.e. they have an interest in the land short of ownership, tenancy or occupancy. Their principal apparatus in proximity to the project is where the pipeline will run under seven operational railways; Network Rail also own land in two other locations, Ashford Station and to the rear of West Heath Road, Covethat are intersected by the pipeline route.
- 1.3.3 A Statement of Common Ground was concluded between the Applicant and Network Rail and submitted at Deadline 2 ([REP2-023](#)). Since then, Network Rail have been negotiating with the Applicant on various agreements but agreement on protective provisions has not been reached to date.
- 1.3.4 The Protective Provisions for railway interests included at Part 3 of the draft DCO are the Applicant's preferred form of Protective Provisions and are the product of negotiations with Network Rail during the course of this examination. However, there are a small number of points in respect of which it has not been possible to reach agreement before Deadline 7.
- 1.3.5 The main sticking point relates to the terms of paragraph 21 of Part 3, which makes the exercise of any DCO powers in respect of railway land, including the powers to take temporary possession of that land to carry out the authorised development and to acquire a permanent easement to maintain the pipeline in that land, subject to obtaining the prior consent of Network Rail.
- 1.3.6 The Applicant does not object in principle to the inclusion of this paragraph, but is understandably concerned that, in circumstances where the rights required to carry out and maintain works on Network Rail property are still being negotiated and have not been secured, paragraph 21 effectively acts as a power for Network Rail to veto any works on its land. It is for this reason that by way of compromise, at paragraph 21(6) of Part 3, the Applicant has included a time limit on the application of the consent requirement in paragraph 21(1). This means that, if the interests and rights in land required to construct and maintain the authorised development over Network



Rail land have not been secured within 56 days of the making of the Order, then paragraph 21(1) ceases to have effect and the Applicant will have the ability to exercise the Order powers over that land instead, subject of course to the other elements of the Protective Provisions which apply for the benefit of Network Rail as noted below.

- 1.3.7 This provision is justified, since without it the Applicant has no guarantee whatsoever that it will be able to deliver the authorised development on railway land. It would, in effect, be entirely at the mercy of a third party. The provision is also justified because of the wide-ranging protections conferred by the other provisions of Part 3. For example, under paragraph 22, the Applicant would need to submit the plans of any works to Network Rail for prior approval and comply with any reasonable conditions imposed by Network Rail's engineer, such as the carrying out of protective works to Network Rail's property. Even if paragraph 21(1) of the protective provisions were to cease to have effect in accordance with paragraph 21(6), there is therefore substantial protection in place for Network Rail.
- 1.3.8 It should also be noted in this regard that the Secretary of State has previously approved Orders in which, notwithstanding detailed submissions by Network Rail, there was no provision requiring Network Rail's consent at all prior to the exercise of the Order powers (see for example the National Grid (Hinkley C Connection Project) Order 2016). The Applicant has not gone as far as this, since it has included the provision, but has sought to moderate the effect of the provision given the significant concerns cited above, while still allowing time for voluntary land rights to be negotiated.
- 1.3.9 In addition to the consent provision at paragraph 21, there are a small number of matters which remain outstanding between the Applicant and Network Rail, as follows:
- (1) Network Rail seeks the ability under paragraphs 22 and 26 to carry out specified works on behalf of the Applicant (including the construction of the pipeline itself) where its engineer considers that those works may endanger or affect the stability of railway property. The Applicant does not consider that this is necessary or appropriate. The construction of the pipeline is a matter for the Applicant and its contractors. The Applicant is concerned that Network Rail does not have the requisite expertise to make engineering decisions about the construction and supervision of a high-pressure oil pipeline. To the extent that Network Rail is concerned to protect the safety and stability of the railway, it can impose reasonable conditions on how those works are carried out, require that protective works are implemented in advance and supervise the Applicant's works. In the Applicant's view, this is sufficient protection.
 - (2) Under paragraph 26(1) of Part 3, the Applicant must make such alterations or additions to railway property as are reasonably necessary as a result of the Applicant's works, to ensure the safety of that property. As drafted, the obligation endures for 12 months following the completion of those works, however Network Rail seeks 24 months. The Applicant considers that 12 months is a reasonable period and that period has been approved before by the Secretary of State. No compelling justification has been advanced for the 24

month period requested, beyond the fact that it is Network Rail's preferred position.

- (3) In respect of those provisions which require the consent of Network Rail to be given (see for example paragraph 28(5)), the Applicant considers that such consent should not be subject to unreasonable delay. Network Rail resists that requirement; however it is the approach taken throughout the draft DCO and has been accepted by other parties to this examination. It is plainly not an unreasonable request for the Applicant to make and Network Rail has failed to elaborate clearly why it is not acceptable.
- (4) The Applicant has offered a very reasonable indemnity under paragraph 32. The Applicant does not consider that this indemnity should extend to the recovery of indirect and consequential losses, as set out in paragraph 32(3) of Part 3, and this is simply a reflection of the normal legal principles relating to the recovery of losses / damages. This provision has been approved by the Secretary of State before (see the Hinkley Point C Connection Order 2016). Network Rail seeks to exclude that provision but has again not fully justified that approach.

- 1.3.10 The Applicant is only seeking an easement for its pipeline in the relevant locations and so sections 127(5) and (6) are engaged rather than 127(2) and (3). It is the Applicant's case that it can purchase the rights it needs in the land which Network Rail owns or in which it has an interest without serious detriment to Network Rail's undertaking (i.e. limb 127(6)(a)), due to the protection afforded by Part 3 of Schedule 9 of the DCO, which requires any construction work to be approved by Network Rail before it can take place, which is sufficient protection for Network Rail.
- 1.3.11 The Applicant will, as noted, continue to negotiate with Network Rail following Deadline 7 in order to seek to reach an agreed position but for the reasons set out in this document considers that the Protective Provisions offered in Part 3 are appropriate and provide Network Rail with a high degree of protection. The Applicant therefore considers that, in relation to Network Rail, the test in section 127(5) is met.

1.4 Portsmouth Water

- 1.4.1 Portsmouth Water are the water undertaker for the southern end of the pipeline route; Southern Water are the sewerage undertaker for that portion. They made a relevant representation that has not been withdrawn ([RR-270](#)) and hence a section 127 case needs to be made.
- 1.4.2 They are recorded in the Book of Reference as having an interest in eight plots of land (listed in the Compulsory Acquisition Schedule [REP6-079](#)), although in every case they are a Category 2 owner, i.e. they have an interest in the land short of ownership, tenancy or occupancy. Nevertheless 'land' includes an interest in land by virtue of section 159 of the Planning Act 2008 so section 127 does apply. Their apparatus is crossed four times by the pipeline route near Bishop's Waltham, Hampshire.

- 1.4.3 A Statement of Common Ground was concluded between the Applicant and Portsmouth Water and submitted at Deadline 2 ([REP2-015](#)). Since then, the focus of discussion has been on the potential effect on a Special Protection Zone rather than on Portsmouth Water's apparatus.
- 1.4.4 In the absence of agreement on alternative terms, Portsmouth Water are protected by Part 1 of Schedule 9, protective provisions for electricity, gas, water and sewage undertakers. The protective provisions are preceded in earlier made DCOs. These require, amongst other things, any diversion of apparatus to be approved by Portsmouth Water under paragraphs 7 and 8, and retained apparatus to be protected under paragraph 9 (including consulting them and accommodating their reasonable requirements). There is provision made for the payment of costs and expenses by the Applicant where Portsmouth Water incurs a loss as a result of any works (paragraph 10). In short, they provide an appropriate form of protection for Portsmouth Water, in circumstances where no agreement on alternative terms has been reached.
- 1.4.5 The Applicant is only seeking an easement for its pipeline in this location and so sections 127(5) and (6) are engaged rather than 127(2) and (3). It is the Applicant's case that it can purchase the rights it needs in the land in which Portsmouth Water has an interest without serious detriment to Portsmouth Water's undertaking (i.e. limb 127(6)(a)), due to the protection afforded by Part 1 of Schedule 9 of the DCO, which requires any diversion of the apparatus to be approved by the statutory undertaker before it can take place, and any work in the vicinity of apparatus to be subject to consultation and the accommodation of reasonable requirements made by the statutory undertaker.
- 1.4.6 The Applicant therefore considers that, in relation to Portsmouth Water, the test in s127(5) is met.

1.5 Other statutory undertakers

- 1.5.1 The Applicant has also completed agreements with the Environment Agency (EA) and CLH Pipelines. r.
- 1.5.2 In the EA's case, agreed protective provisions have been included in Part 4 of Schedule 9 of the draft DCO (**Document Reference 3.1(8)**) and the Applicant therefore anticipates that the EA's representation will be withdrawn in due course.
- 1.5.3 In CLH's case, an agreement has been concluded and the Applicant understands that the representation will be withdrawn shortly.
- 1.5.4 The Applicant has also reached agreement with Thames Water, however that agreement is still to be completed and Thames Water have stated that the Covid-19 pandemic may make it difficult for them to complete the formalities in time. However, the Applicant remains hopeful that an agreement will be completed on or before 9 April, such that Thames Water is able to withdraw its representation.
- 1.5.5 Finally, the Applicant has also reached agreement South Eastern Power Networks ("SEPN") on the substantive terms of a private agreement, but is now awaiting confirmation from SEPN of the schedule of assets to be appended to that

agreement, before completion can take place. Again, the Applicant remains hopeful that an agreement will be completed on or before 9 April, such that SEPN can withdraw its representation.

- 1.5.6 Whilst agreements with Thames Water and SEPN are therefore still to be completed, the Applicant is very hopeful that representations will be withdrawn by those companies before the close of the examination and that section 127 would not apply.
- 1.5.7 However, in the unlikely event that those representations were not withdrawn for whatever reason, then the Applicant considers that the tests in section 127(2) and (5) are met, because in each case the protective provisions in Part 1 of Schedule 9 of the draft DCO would apply to those undertakers in default of an agreement. These provisions provide inter alia for any diversion of apparatus to be approved under paragraphs 7 and 8, and retained apparatus to be protected under paragraph 9 (including consultation and accommodation of reasonable requirements). There is provision made for the payment of costs and expenses by the Applicant where the statutory undertaker incurs a loss as a result of any works (paragraph 10).
- 1.5.8 These provisions therefore ensure that an appropriate degree of protection is given to affected undertakers, such that the Secretary of State can be satisfied that there would be no serious detriment to the carrying on of those companies' undertaking.