TURNING BACK THE BUREAUCRATIC TIDE – CAN WE RECOVER SANITY IN ENVIRONMENTAL PERMITTING?

Roy Carryer

roy.carryer@alcatel-lucent.co.uk

Alcatel-Lucent, Christchurch Way, Greenwich, London SE10 0AG, United Kingdom

Abstract: Environmental permitting has become the most common source of delay in the implementation of submarine telecommunications projects, with potentially serious commercial effects. This Paper challenges the assumption that the trend towards longer and more complex environmental procedures results in higher environmental standards. It also asserts that the culture of public agencies tends to prevent delay being viewed as a serious problem. Although the bureaucratic tide probably cannot be turned back, there are strategies that the industry can adopt to encourage regulators to develop a more sensitive, proportional and efficient environmental permitting regime.

1 THE RISING TIDE OF ENVIRONMENTAL REGULATION

In common with other industries, proposed submarine cable projects are more and more often subject to complex and lengthy environmental analysis by governmental authorities as a precondition to the granting of permits. Initially confined to the more developed western countries, environmental assessment (EA) procedures have become widespread throughout the world, extending into South America and the Caribbean, and across much of Asia.

The introduction, and subsequent extension, of EA procedures, including associated consultation procedures, is the most important reason for lengthening permitting durations worldwide. The submarine cable industry is hit particularly hard by this trend for several interrelated reasons:

- Project implementation timescales are unusually short, sometimes as short as 12 months from contract signature to RFS. Long (especially unpredictably long) environmental permitting procedures therefore become critical more readily than in industries with longer times to market.

- Since submarine cables are installed within the territorial sea, in most countries they are subject to state and/or national permitting regimes, rather than the much simpler and quicker municipal procedures for permitting terrestrial works. Submarine cable projects therefore become bracketed with, and subject to the same permitting procedures as, much larger and potentially more environmentally significant projects such as submarine pipelines, marine aggregate extraction and port developments.

- Similarly, submarine cables are frequently "caught" by regulations that require all marine construction projects to be subject to full EA, often on the grounds that the marine and coastal environment is considered to be especially sensitive. In national regulations, such as those implementing the recent extensions to the European Union EA directive, there may be no discretion for the responsible agencies to "screen out" projects on the grounds that their potential impacts on key environmental resources are not significant. Cable projects may thus become subject to environmental permitting procedures that are out-of-proportion to their potential impacts.

The consequence of these trends is to place environmental permitting more and more frequently on a project's critical path, to the extent that permitting has become the most common source of delay in implementing projects. In some jurisdictions it is simply impossible to obtain the required environmental permits within planned project timescales; and in others it can only be achieved by time-saving strategies such as presenting pre-survey routes for permitting, or by yielding to pressure to implement extensive mitigation measures unrelated to the small scale of the impacts. If, despite best endeavours, implementation is delayed, the commercial implications for owners and their customers, as well as suppliers and installers, are often considerable.

2 ENVIRONMENTAL REGULATION DOES NOT EQUAL ENVIRONMENTAL PROTECTION

Perhaps these commercially damaging outcomes would be more readily accepted by the industry if, as a result of the increased complexity and duration of environmental procedures, there were a demonstrable improvement in the quality of environmental decision-

making and, as a direct result, improved environmental standards.

However, it is by no means inevitable that the extension of environmental procedures will lead to higher standards. This is because, in a bureaucracy, "improvement" is often equated with "more complex". It is those familiar Kafkaesque tendencies at work, where complexity becomes an end in itself. Instead of a more rigorous "hands-on" technical analysis of projects by experts, which might quickly yield practical results on the ground, we often find that "improvement" consists of more regulations supplementing or duplicating (but rarely replacing) existing regulations, more consultation and certification procedures running consecutively rather than concurrently, and more interventions from agencies aiming to stake out a position for themselves in competition with their rivals.

Managing this complexity without reputation-damaging mishaps or headline-grabbing charges of incompetence can easily consume more and more of officials' valuable time. In some instances (town planning is a good example of this), understanding the complexities of the regulations, procedures and policies becomes a specialism in itself, as the professional staff evolve from technical specialists into bureaucrats devoted to processes rather than outcomes. Highly skilled biologists and chemists dedicated to environmental protection are diverted away from practising their professions and towards regulatory compliance and enforcement.

Many of us have been to meetings with senior scientists in environmental agencies at which all, or virtually all, of the time is taken up in discussing and clarifying complex inter-agency procedures that are not always fully understood even by the officials themselves. At best, these meetings may take the form of cooperative, and sometimes embarrassed, agency staff offering guidance on how to steer the project through a complex inter-agency procedural minefield, and encouraging project developers to have faith that the project will emerge intact at the other end at some time in the future. Such meetings dearly reveal that compliance with administrative procedures is the agencies' overriding concern, and the more arcane the procedures, the more all-consuming compliance becomes. It is not unusual to sit through one of these meetings without a single substantive environmental issue being raised.

So what is this doing for the environment? Probably not very much. While staff concern themselves with procedural compliances for projects with negligible impacts, major environmental issues remain neglected and inadequately researched. This is not the place to consider such issues in detail, but in the marine environment they include large-scale and chronic deterioration of protected habitats (coral, seagrasses, etc.) due to long-term environmental pollution mainly from terrestrial sources.

Also important in this regard, but rarely considered, is the damage resulting from the bureaucratisation of the environmental cause. The support of various stakeholders, including the general public, for measure to improve the environment must be won against competing demands for attention and resources. When "the environment" is seen as the inaccessible preserve of public officials obsessed by regulatory compliance and obscure inter-agency procedures, it becomes an instant turn-off for people instinctively sympathetic to the environmental cause. In the UK and elsewhere, this outcome can be seen in the parallel case of the built environment where the very poor public image of town planning and town planners has much to do with the public belief, however unjust it may be, that they operate a dry and dusty regulatory system which is designed to keep out and bewilder the public rather than to promote their interest and participation.

Turning back to our industry, the reputation of environmental agencies cannot be enhanced by some of the consequences of over-zealous environmental regulation that we have seen in recent years. Exposure to EA and other environmental procedures may result in a disconnect from reality and lead into the realms of surrealism. Project developers may find themselves asking:

- What has this multi-tiered web of procedures got to do with my plan to bring in an inert, non-polluting 35mm diameter cable into an established landing point on the coast?

- How can it take 10, 12 or 15 months to issue a decision on my uncontroversial cable's environmental effects, when the documentation is complete on first submission and all agencies agree that there are no significant impacts? How can it be that the cable industry could implement the entire project in less time?

- To comply with the EA regulations, do I really have to analyse the visual impact of my submarine cable or its effects on migrating birds? Must I pay a consultant to review the emissions to air of the cable ship? Why am I being asked to erect turbidity screens around my diver jet-burial operation when the sea is naturally so full of suspended sediment that it is almost impossible to video the operation?

- Don't those trawlers and clam dredgers running up and down the coast without restriction have a greater effect on the seabed every day than my single one-time ploughing operation along a carefully selected

and surveyed route? Are the fishermen required to submit multi-volume impact assessments before they leave port every morning?

3 CLASH OF CULTURES – PUBLIC AND PRIVATE SECTOR PRIORITIES

One of the key reasons for the departure from reality described above is the lack of technical understanding by environmental regulators of the industry in general and marine operations in particular. How can they assess projects if they do not understand them? While many agencies sensibly seek to educate themselves by asking questions, the more "evangelical" environmental regulators, some with an inbuilt hostility to private industry, may prefer to fill gaps in their knowledge by assuming the worst, sometimes including the belief that developers are concealing potential impacts from their applications and environmental studies. In a recent US example, an application for a new cable was presented to federal agencies containing, within its environmental assessment report, a description of shore-end installation from a cable ship. Some months later, an inter-agency letter (of which we obtained a copy) complained that, in the application, "…no details are provided regarding proposed anchor sites for the cable installation barge." No discussion with the project developer or their agent took place before this misguided complaint was committed to paper.

Equally worrying is the inability or unwillingness of some government agencies to appreciate the commercial impacts of delayed permits. When such impacts are explained to the agencies, the clash of cultures between the private and public sectors often becomes apparent. Where private industry sees bureaucratic delay, public agencies may see diligent attention to detail and fair, reasonable and even-handed treatment of all pending applications under conditions of serious under-resourcing. The conflict between administrative and commercial objectives can reach the stage at which officials openly declare that they will not be influenced in any way by pressure from applicants to speed up decisions. One memorable reaction by a US federal official to a routine "chasing" telephone call was to declare that he didn't care about the needs of our project or when the cable ship was scheduled to arrive: he would start to deal with our application in about 6 weeks time, when he expected it to reach the top of the pile.

This is only one illustration of the time element in decision-making being accorded little importance by government agencies despite it being an ever-present driver in submarine cable projects. Even permitting procedures with built-in time limits almost invariably have get-out clauses enabling a regulator, for example, to request more environmental information. The clock will normally stop until this information has been supplied. There may also be time limits only on parts of the procedure (typically consultations, public consultations or public inquiries), with no limits at all on other components such as the review of applications by officials, drafting of their reports or final signature of permits.

4 TURNING THE TIDE?

Permitting, and specifically environmental permitting, has become the most common source of delay in the implementation of submarine cable projects, due partly to the shortening of project timescales, but also to the increasing use of EA and the growing complexity of environmental regulations. The industry has been slow to recognise this trend and, even now, some projects are developed with no attention given to the management of these critical permitting processes. In extreme cases, the time required for permit acquisition may be longer than the planned duration of the entire project from contract signature to RFS. There are measures that can be taken at a project-level to reduce or mitigate the risks, but these are not the subject of this Paper.

Scaling back environmental regulation in general is probably a cause as hopeless as fighting the incoming tide. All that can probably be hoped for is for legislators and regulators to be more focussed on beneficial outcomes (to the environment and to "consumers" of the service) when proposing and implementing new regulations. Outcomes that divert limited expert scientific resources from active environmental protection work to the management of complex bureaucratic procedures are of no benefit either to the environment, to developers or to the public. Similarly, no benefits to any party accrue from regulatory outcomes that divert agencies' resources from the analysis and control of genuinely damaging activities and towards relatively minor projects with negligible, short-term environmental effects. Specifically:

- ***Sensitive*** environmental regulation would ensure proper screening of projects to exclude irrelevant analysis and allow a sharp focus on any genuine potential impacts and associated mitigation measures, whether these are, for example, effects on benthic habitats or possible conflicts with the commercial fishing.

- ***Proportional*** regulation would allow for different procedures to be followed depending on the scale of the project and its potential impacts. Where no significant potential impacts can be identified, no EA should be required. Development of an offshore gas field or a major port expansion would follow a different path from minor projects such as a

submarine cable landing. Consultation programs extending over many months and geared to highly controversial projects would no longer be applied to relatively uncontroversial projects such as submarine cables.

- ***Efficient*** regulation would recognise that public authorities have a duty to control development in a manner that takes account of commercial imperatives and the wider public interest. Under normal circumstances, it should never take 10, 12 or 15 months to grant an environmental permit for a submarine cable. Periods of three to six months are achieved in the most efficient jurisdictions where the procedures still include a consultation program with relevant agencies and an opportunity for public comment.

In its frustration over the commercial impacts of permitting delays, the industry must on no account resist subjecting its projects to properly focussed environmental scrutiny, conceal potential impacts or appear to be in opposition to environmental objectives which have overwhelming public support. We should by all means criticise the over-complex procedures, and the lack of efficiency in applying them, but we should not attack the objectives of environmental protection and improvement. If the industry can repeatedly and transparently demonstrate that it takes its environmental responsibilities seriously, that in most cases it has negligible impacts on the environment, and that it routinely builds impact avoidance and/or other mitigation measures into project design, it may start to receive a more sympathetic hearing for its requests for a more sensitive, proportional and efficient regime of environmental regulation.