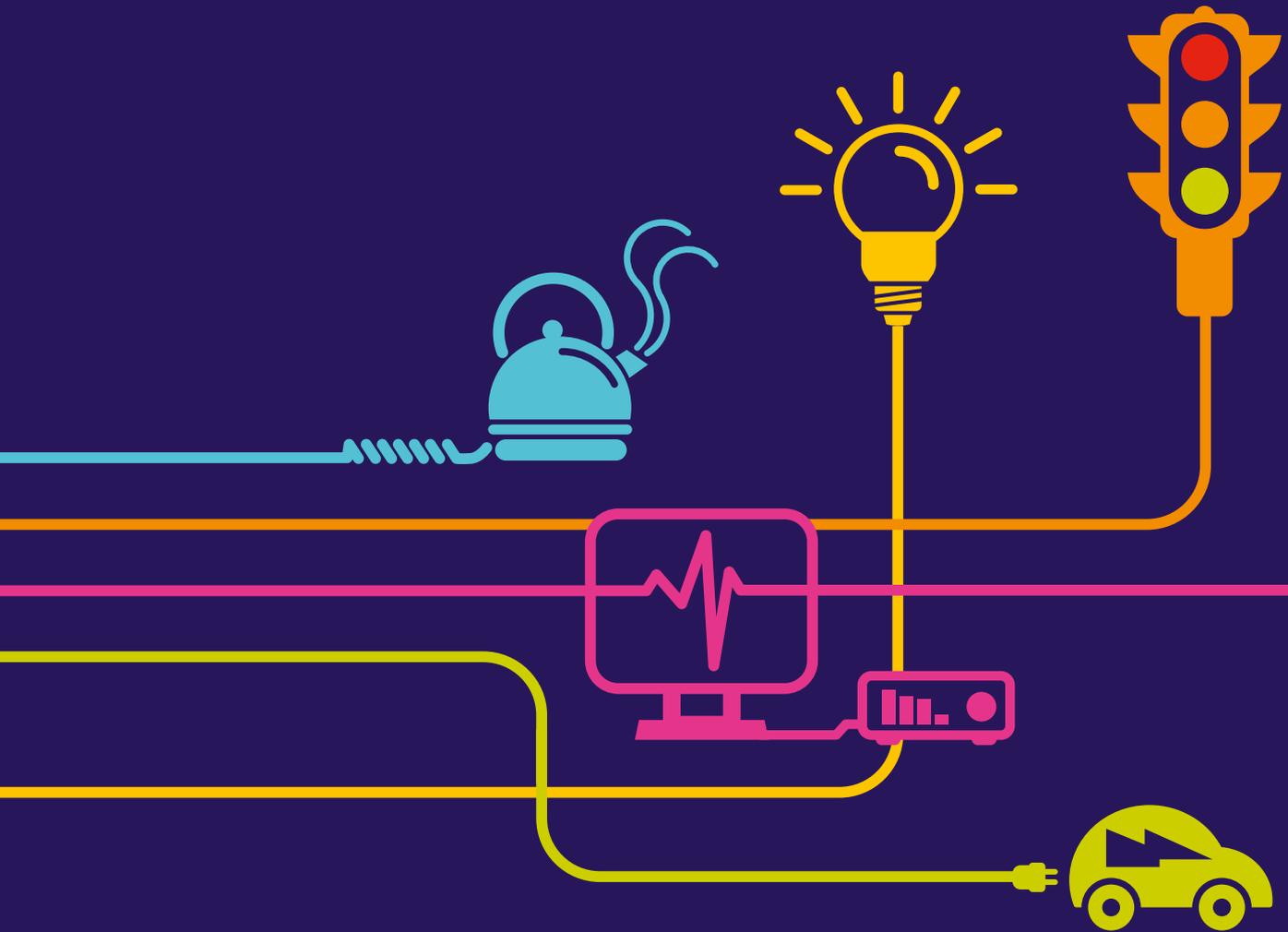


## Position Statements - South East Water

National Grid (Richborough Connection Project) Order





## **National Grid's position statement in respect of South East Water Limited and its aspirations for a reservoir at Broad Oak, Kent**

### **1 Introduction**

- 1.1 National Grid submits this document to the Examining Authority (ExA) as what it hopes is a helpful summary of National Grid's position in relation to South East Water Limited (SEW) and its aspirations for a reservoir at Broad Oak, Kent.

### **2 Consultation with South East Water and RCP route optioneering**

- 2.1 It is important to stress at the outset that National Grid undertook early and detailed engagement and consultation with SEW to understand its proposals for a reservoir at Broad Oak. National Grid's route optioneering process was, therefore, informed by SEW's emerging proposals and has sought to reflect a fair balance between those proposals, environmental considerations and the interests of the residents of Broad Oak. Inevitably, any such balance reflects a judgement between potentially competing issues, but National Grid considers that it has struck that balance correctly.
- 2.2 National Grid set out its route optioneering process in its Strategic Options Report (**APP-130**), Route Corridor Study (**APP-131**) and Connection Options Report (**APP-133**). National Grid undertook a specific study to consider the alignment of the proposed overhead line in the vicinity of SEW's proposed reservoir ('Proposed South East Water Reservoir Route Appraisal') that was published as an appendix to the Preliminary Environmental Information Report (published in February 2015 at Statutory Consultation) and replicated as an appendix to the Environmental Statement (**APP-061**). That study considered four route options (A to D) in the vicinity of the proposed reservoir.
- 2.3 National Grid also part funded two studies (Stage 1a and 1b) undertaken by Jacobs to help SEW develop its thinking on the requirements for any reservoir at Broad Oak so that potential interactions could be identified and designed out. That work by Jacobs identified certain design parameters for the proposed reservoir that National Grid's consultants, Mott MacDonald, were able to later use to identify some potential design solutions to any interactions between the two schemes. That work is reported in Mott MacDonald 'Interaction between RCP and the proposed Broad Oak Reservoir' report (**REP2-017** Appendix F).
- 2.4 National Grid's focus throughout has been to identify and resolve potential interactions to allow the two schemes to proceed with minimum cost and inconvenience to each party. National Grid explained how SEW's proposed Broad Oak reservoir was taken into account in that process in National Grid's response to the ExA's First Written Questions Q1.3.1 and Q1.3.3 (**REP2-016**).
- 2.5 In short, National Grid took SEW's proposed reservoir into account in its route optioneering process, sought to identify potential interactions between the two schemes, has proposed design solutions to those potential interactions and properly balanced SEW's interests with those of the Broad Oak village residents and environmental considerations.

### 3 Status of South East Water's proposed Broad Oak reservoir

- 3.1 The status of the Broad Oak reservoir proposal should be kept clearly in mind when considering SEW's representations. The following may be said in summary;
- 3.1.1 A 32.5m top water level (TWL) reservoir is identified as a "preferred option" in SEW's 2014 Water Resources Management Plan (WRMP), produced under the Water Industry Act 1991;
- 3.1.2 As a 'preferred option' it has a target date of 2033;
- 3.1.3 The 32.5m TWL reservoir in the WRMP does not have
- (a) any allocation in a local plan;
  - (b) a permissive planning policy context;
  - (c) planning permission; or
  - (d) funding;
- 3.1.4 Before it could get planning permission, a 32.5m TWL reservoir would have to overcome a number of serious planning and other obstacles, including
- (a) lack of allocation or policy support in any policy within the development plan;
  - (b) effects on the adjacent nature conservation interests, including SSSIs;
  - (c) diverting existing UK Power Networks overhead lines;
  - (d) obtaining regulatory approval and funding;
- 3.1.5 A 36m TWL reservoir does not exist in the WRMP, has not been through the WRMP process and does not, therefore, have any formal status;
- 3.1.6 The 36m TWL reservoir is nothing more than an SEW 'aspiration'.
- 3.2 Furthermore, it is clear that in going through the WRMP process for the 32.5m TWL reservoir, SEW has ascribed completely inappropriate costs to the necessary diversions of the UK Power Networks overhead lines. SEW has indicated that within its costings for the reservoir project it has included a priced element of £336,000 for the undergrounding of 1.4km of existing UK Power Networks 132kv overhead line. UK Power Networks has itself noted that there are in fact four overhead lines within the reservoir footprint and that undergrounding these beneath the reservoir would not be possible in this instance. UK Power Networks estimates that the cost of diverting the three lines would in fact be in the region of £9.725million (**Doc 8.55**, in particular Appendix C, submitted at Deadline 8). If the correct figures were used in any new WRMP there is no guarantee that a proposed reservoir at Broad Oak would even continue to be a 'preferred option'.
- 3.3 These issues were discussed in a number of the issue specific hearings (ISHs) and in answers to written questions: see **REP3-019** (response to SEW's written representation);

**REP3-017** (summary of case of ISH on 29 July 2016); **REP4-014** (National Grid's response to ExA's Second Written Questions Q2.3.35); **REP5-012** (National Grid's comments on third party responses to the ExA's Second Written Questions Q2.3.17); **Doc 8.55 Appendix C** (letter from UK Power Networks submitted at Deadline 8); **REP5-020** (summary of case of ISH on 28 September 2016); **REP6-010** (summary of case of hearing on 19 and 20 October).

3.4 In short,

3.4.1 the 32.5m TWL reservoir has very limited status in the planning system, it is nothing more than a material consideration that it exists in a WRMP; and

3.4.2 the 36m TWL reservoir has no status in the planning system, other than that of being an aspiration of a water company.

#### **4 Physical interaction between the RCP and the proposed reservoir**

4.1 The Mott MacDonald report ('Interaction between RCP and the proposed Broad Oak Reservoir' report – **REP2-017** Appendix F) demonstrated how the RCP and SEW's proposal for either a 32.5m or a 36m TWL reservoir could co-exist. The Mott MacDonald report uses Jacobs' own design parameters for both a 32.5m and 36m TWL reservoir.

4.2 What is important to note is that there has not been any real argument about whether the two projects could co-exist in engineering terms – it is clear that they can – the debate has been about:

4.2.1 The effects of the proposed RCP on the ecological mitigation for the diversion of the Sarre Penn river;

4.2.2 The costs of engineering out the potential interactions; and

4.2.3 The access and other rights sought by National Grid to construct, operate and maintain its overhead line.

4.3 In relation to these three points:

4.3.1 The first is dealt with below under the heading 'Interaction with SEW's ecological mitigation proposals for the Sarre Penn diversion':

4.3.2 The second is dealt with under the heading 'Additional costs'; and

4.3.3 The third is dealt with under the heading 'Protective provisions'.

4.4 It is worth stressing that the solutions identified in the Mott Macdonald report are just some examples; others exist. It is also worth stressing that such interactions as there are could be reduced by the alterations to the positions of PC/8 and PC/10 that were identified by National Grid and which are outlined below under the heading 'PC/8 and PC/10'. Furthermore, any such interactions could also be reduced or removed by reasonable alterations to SEW's own proposals.

## 5 Interaction with SEW's ecological mitigation proposals for the Sarre Penn diversion

5.1 Much discussion has taken place throughout the examination and between the parties as to the interaction with SEW's own ecological mitigation proposals for diversion of the Sarre Penn. A number of points may be made:

5.1.1 Whilst a major swathe of land has been identified by SEW on its plans for the Sarre Penn diversion, the diverted river itself is only about 1-2m wide;

5.1.2 There is no reason at all why the river itself would need to interact with any of the proposed pylon locations as there is ample space available for it to 'meander' away from the pylon foundations;

5.1.3 The wider swathe of land identified is simply that land that SEW has identified as necessary to engineer a cutting to allow the gradients necessary to achieve hydraulic performance;

5.1.4 Whether looking at a 32.5m TWL reservoir or a 36m TWL reservoir, relatively little of the river itself is (or need be) actually under the overhead line and, therefore, subject to the safety clearances;

5.1.5 Where the river does pass under the line, and therefore within the safety clearance zone, National Grid's arboriculturalist has made clear that the option of coppiced woodland management would give appropriate riparian cover to achieve WFD objectives for the river;

5.1.6 Outside the safety clearance zone there is no restriction on tree heights or species;

5.1.7 Even within the safety clearance zone, the tree heights that may be accommodated are considerable for a 400kV line and are increased by the effect of the cutting itself; and

5.1.8 Safe working can be achieved under the overhead lines by observing proper construction procedures.

5.2 These points were discussed in the ISHs and in response to SEW's submissions: **REP3-017** (summary of case of ISH on 29 July 2016); **REP5-020** (summary of case of ISH on 28 September 2016), and **REP5-016** Appendix D.

## 6 Additional costs

6.1 During the examination SEW set out additional costs to its reservoir proposals which it suggests arise because of the interaction between the proposed reservoir and the RCP. National Grid strongly refutes the figures and calculations which SEW has put forward. National Grid has undertaken its own costing exercise and has calculated much lower figures than those put forward by SEW. In undertaking this exercise, again, National Grid has adopted the same design parameters provided by SEW's consultants.

6.2 National Grid has set out its workings in detail within its response to SEW's note on the cost of the river diversion (see section 4.3 (Response to South East Water's note on cost of river diversion) and Appendix C of **Doc 8.50 REP6-016**). SEW's calculations use the same

methodology that it has used within its WRMP. National Grid has instead taken a more detailed and evidenced approach.

- 6.3 National Grid believes that the total cost for SEW to mitigate for the presence of the RCP will be approximately £984,674 and the cost of diverting the 32.5mAOD channel alignment onto the 36.0mAOD channel alignment will be approximately £375,270.
- 6.4 A comparison of National Grid's and SEW's costs has highlighted differences. A significant proportion of the cost differences are as a result of SEW overestimating the costs to its proposal as a result of working under the overhead line; SEW has presented a figure over 25 times greater than National Grid believes is required. As noted throughout the examination, but particularly at the ISH on 9 and 10 November 2016 (**REP7-009**);
- 6.4.1 the clearances provided at this part of the overhead line are considerable (and National Grid has provided assurances on these within the protective provisions for the benefit of SEW at Schedule 14 to the draft Order (**REP7-003**));
- 6.4.2 the minimum clearances are at isolated parts of the line and so it would only be parts of the SEW works which would be affected by the line;
- 6.4.3 even with the minimum clearances, large structures can be constructed under the line, and very often are (for example, Tesco's depot built under an overhead line next to the M5 motorway);
- 6.4.4 after all, guidance is provided for that very purpose (as submitted by National Grid within **REP3-024**); and
- 6.4.5 it is not the case that smaller plant would always be required and varying types and sizes of plant could be employed (as set out in National Grid's response to points raised in 3<sup>rd</sup> party submissions made at deadline 7 – **Doc 8.60** Appendix C submitted at Deadline 8).
- 6.5 National Grid believes its cost estimates provide a better representation of the actual works required and hence a more accurate representation of anticipated additional costs.

## **7 Protective provisions**

- 7.1 As set out at within National Grid's note on the protective provisions included for the benefit of SEW (**REP7-008** Appendix A), in order to provide SEW with additional comfort above and beyond the standard protective provisions already included within Schedule 14 of the Order as originally submitted, National Grid extended the protections for SEW. This included not only extending the provisions for the protection of SEW's apparatus, but also provisions for the benefit of SEW's future reservoir proposal (Schedule 14 to the draft Order (**REP7-003**)).
- 7.2 As such, as set out within its note on protective provisions included for the benefit of SEW, National Grid has restricted its ability to exercise the powers in the Order over SEW's land including powers to remove and divert SEW's apparatus, powers to interfere with SEW's access, powers of entry onto SEW's land, powers to fell and lop trees, and powers to site pylons and hang conductors anywhere within the limits of deviation. National Grid has also within the protective provisions agreed that it will not unless absolutely necessary interfere

with SEW's proposals for a reservoir, that it will where required fit bird diverters to its overhead lines, and that it will inform SEW, if requested to, of upcoming outages such that it may be able to make use of them. As such, National Grid has made significant attempts to provide SEW with further comfort on the potential interaction between the two projects.

- 7.3 As set out in National Grid's note on protective provisions included for the benefit of SEW, SEW is continuing to seek from National Grid additional provisions which essentially restrict National Grid's ability to deliver the proposed development. SEW has sought to do this by restricting the powers that National Grid may exercise within its land unreasonably and without justification. For example, it has sought to restrict National Grid's ability to access SEW's land (including the then in situ overhead line) without (in effect) SEW's prior consent. Unfortunately, National Grid does not have confidence in its ability to reach agreement with SEW at some future date. SEW has also sought to restrict National Grid's ability to make representations about SEW's reservoir plans once they come forward. National Grid takes issue with SEW's position which essentially requires National Grid to surrender its ability to seek reasonable protections for its own statutory undertaking in a way which SEW itself would not accept.
- 7.4 National Grid is seeking DCO powers to enable it to deliver the proposed development and accordingly it must be able to exercise those powers subject to the protections provided within the Draft DCO, including those provisions provided for the benefit of SEW already. Without such powers, National Grid could not be certain of its ability to deliver and maintain the proposed development in accordance with its statutory undertaking.
- 7.5 SEW is also seeking an indemnity for inclusion within the Order. For the detailed reasons set out within its note on protective provisions included for the benefit of SEW, National Grid does not think that the inclusion of an indemnity on the face of the Order is justified or necessary.
- 7.6 Should the Secretary of State determine, as a matter of policy, that indemnities of the type being sought by SEW should be included within DCOs, National Grid submits that the wording being proposed by SEW is unduly onerous. It contains no obligation upon SEW to mitigate its loss or to allow National Grid to adopt conduct of the defence to any third party claims for which it would be liable, all of which are standard within indemnities of this type.
- 7.7 Without prejudice to its primary position, namely that the indemnity should not be included within the draft DCO for the reasons set out within National Grid's note on protective provisions included for the benefit of SEW, if the Secretary of State concludes otherwise National Grid would request that amendments are incorporated into the form of wording SEW has proposed such that it would read as follows:

*53. (1) The undertaker must indemnify and keep indemnified SEW from and against all claims and demands arising out of or in connection with the Authorised Works or any such failure, act or omission up to a maximum amount of £1 million (one million pounds) total; and the fact that any act or thing may have been done by SEW on behalf of the undertaker or in accordance with plans approved by SEW or under its supervision will not (if it was done without negligence on the part of SEW or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this sub-paragraph.*

(2) SEW must–

- (a) *give to the undertaker written notice of any such claims or demands as soon as reasonably possible after SEW becomes aware of any such claims or demands;*
- (b) *not admit liability or make any offer to settle or settle or compromise any such claim or demand without the prior consent of the undertaker (which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand);*
- (c) *take all reasonable steps to mitigate any liabilities relating to such claims or demands; and*
- (d) *keep the undertaker informed in relation to the progress of any such actions, claims and demands and paying due regard to the undertaker's reasonable representations in relation thereto.*

*(3) In no circumstances shall the undertaker be liable to SEW under this paragraph for any indirect or consequential loss or loss of profits.*

## **8 PC/8 and PC/10**

- 8.1 In Appendix A to National Grid's hearing note on actions following the hearing on 19 and 20 October (**REP6-009** Appendix A) National Grid set out a table and plans showing options that moved pylons PC/8 and PC/10. All options remained within the projects limits of deviation. These options were discussed at the DCO ISH on 9 and 10 November 2016 along with some draft sections provided by SEW. At Deadline 7 National Grid provided an ES Addendum (**REP7-027**) confirming that these various options do not result in any materially different or new environmental effect.
- 8.2 These options were produced to show how relocating the pylon positions for PC/8 and PC/10 could reduce any interaction between these pylon locations and the swathe of land identified by SEW for the Sarre Penn diversion and fish pass. They were produced to further demonstrate National Grid's willingness to work with SEW to ensure that the two projects can easily co-exist with minimum interaction. National Grid offered to make the location of the pylons in any of these options the subject-matter of a Protective Provision limiting National Grid to identified pylon locations. SEW refused to identify any of the alternative pylon locations in preference to those shown on the 'Design Drawings'. Clearly this refusal should be considered in the context of SEW's claim of 'serious detriment' under section 127.
- 8.3 These points were discussed in the ISHs and in further submissions: see **REP5-020** (summary of case of ISH on 28 September); **REP6-010** (summary of case of hearing on 19 and 20 October); **REP6-009** Appendix A (table and plans showing options); and **REP7-027** (ES Addendum).

## **9 Sections 127 / 138**

- 9.1 National Grid accepts that s127 of the Planning Act (the "Act") is engaged in relation to SEW's land at Broad Oak because, although there is currently no 'undertaking' being carried out on the land by SEW, the land is being held for that purpose (as per s127(1) of the Act). National

Grid is aware that SEW acquired the Broad Oak site for the purpose of constructing a reservoir over 40 years ago. However, as Counsel for National Grid noted at the ISH on 28 September 2016 (**REP5-020**), the Act deals differently with the acquisition of rights and land. Rights in land can only be acquired if the matters in s127(6) of the Act have been met, that is, that the right can be acquired without 'serious detriment' to the carrying on of the undertaking, or that any detriment to the undertaking can be made good by the undertakers by the use of other land belonging to them or that they can acquire. Counsel considered that these were the questions the ExA had to answer.

- 9.2 With regard to the meaning of 'serious detriment', Counsel noted at that hearing that this was a matter for the Secretary of State or ultimately the courts. However, the addition of the word 'serious' means that the detriment has to be something which goes well beyond just 'detriment'.
- 9.3 It should be clear from the above that there is no 'serious detriment' in this case because;
- 9.3.1 There is currently no undertaking being 'carried on' by SEW on the land;
  - 9.3.2 The only detriment claimed is, therefore, to a future proposal for development that would become part of SEW's undertaking;
  - 9.3.3 That proposed development has very limited planning status, in the case of a 32.5m TWL reservoir, and no planning status, in terms of a 36m TWL reservoir;
  - 9.3.4 The proposed reservoir, whether 32.5m or 36m TWL, has no funding and, in any event, only has a target date of 2033;
  - 9.3.5 The proposed reservoir, whether 32.5m or 36m TWL, could be developed with the RCP in place, as proposed;
  - 9.3.6 Indeed, there is no physical interaction between either the 32.5m or 36m TWL reservoir itself (i.e. the 'operational' development) and the RCP; only between the RCP and the ecological mitigation for the diversion of the Sarre Penn river;
  - 9.3.7 The proposed mitigation for the Sarre Penn river, whether for a 32.5m or 36m TWL reservoir, could be developed and implemented with the RCP in place;
  - 9.3.8 Other land is available to SEW that would allow it to provide adequate ecological mitigation for the diversion of the Sarre Penn river;
  - 9.3.9 National Grid has offered to move pylons PC/8 and PC/10 within the limits of deviation to reduce any interaction between those pylons and the proposed mitigation for the Sarre Penn diversion and that offer was refused; and
  - 9.3.10 It is accepted that the RCP would (a) require some design changes to SEW's proposed mitigation for the Sarre Penn diversion, and that (b) that would have some cost, but in the context of the uncertainty about whether the reservoir will ever be developed, that does not amount to 'serious' detriment.
- 9.4 In short, there is no 'serious detriment' in this case within the meaning of section 127.

9.5 SEW did not pursue an objection under section 138.

## **10 Conclusions**

It is apparent from this summary of National Grid's submissions made throughout the examination that National Grid has consistently sought to give SEW comfort and has devoted significant resource to developing solutions that could be adopted to reduce any interaction between the two projects. None of the work undertaken to date has raised any concerns for National Grid and it is confident that the two projects could co-exist should the reservoir project come forward.