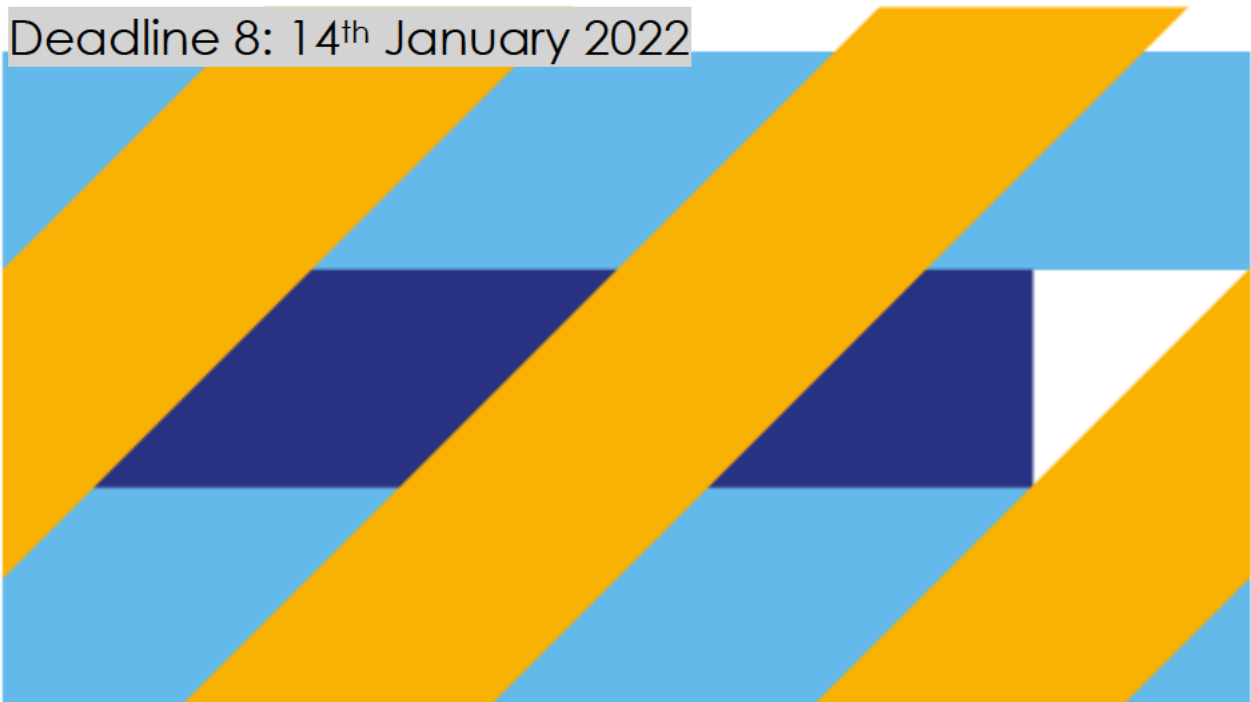


# **Response to Examining Authority's Third Written Questions (WQ3) A428 Black Cat to Caxton Gibbet Improvement Scheme**

Deadline 8: 14<sup>th</sup> January 2022



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# 1. Introduction

- 1.1. This is East West Railway Company Limited's (EWR Co) response to the Examining Authority's (ExA) Third Written Questions submitted for Deadline 8 of the A428 Black Cat to Caxton Gibbet examination.

## 2. Q3.5.2.2: Proposed draft Protective Provisions by EWR

*East West Rail Company Limited/Applicant*

***(a) "The ExA had requested to see EWR's draft Protective Provisions and the Applicant's counter proposal of a cooperation agreement since the start of the Examination [EV016] [PD-008] [PD-009], and this has only partially been made available at D6 [REP6-094] [REP6-030]. The ExA intends to highlight the delay in responding to these matters as the reason, should matters not be agreed between parties before the close of the Examination. Applicant and EWR provide reasons for the delay and proposed way of working to conclude matters."***

- 2.1. EWR Co has endeavoured to provide drafting in a timely manner, but to enable discussions to take place between the parties discretely and without troubling the ExA unnecessarily, it submitted the draft Protective Provisions to the Examination at Deadline 6 [REP6-094] in response to Action Point 7 of [EV-092]. Prior to submission to the Examination, EWR Co issued the draft Protective Provisions to the Applicant's legal team on 15 October 2021. In addition, EWR Co provided the Applicant with a draft Interface Agreement on 19 November 2021.
- 2.2. EWR Co had not previously submitted the draft Protective Provisions to the Examination so as to allow for discussions with the Applicant outwith the Examination process.
- 2.3. EWR Co and the Applicant continue to engage in discussions as to the draft Protective Provisions and the heads of terms for an accompanying agreement. Discussions remain ongoing as to the terms of any such agreement, although EWR Co has not received comments on its draft or a revised/alternative version, but EWR Co anticipates that agreement is still capable of being reached before the close of the Examination. In the meantime, EWR Co maintains its position that the draft Protective Provisions are proportionate and necessary for the reasons set out in this response and Appendix A of [REP6-094].

***(b) "Applicant, provide any further comments on the draft Protective Provisions proposed by EWR [REP6-094], if this version is different to what you have commented on before [REP6-030]"***

- 2.4. The draft Protective Provisions detailed at Appendix A of [REP6-094] are in the form previously shared with the Applicant, although cross references have been updated and paragraph 100(3) deleted.

- 2.5. EWR Co reserves its position pending receipt of the Applicant's response to this question.
- (c) "EWR, you have stated that your proposed Protective Provisions are adapted from those used in previous DCOs in respect of railway undertakings [REP6-094]. Can you list examples of made DCOs where Protective Provisions (that you have used as a model) were secured for a proposed railway scheme in a similar stage of development as your proposed scheme. Applicant may respond."**
- 2.6. The draft Protective Provisions are adapted from those used in previous DCOs in respect of traditional railway undertakings such as Network Rail. In light of the early stage of development of EWR and because EWR Co does not own physical assets in this area, particularly prior to announcing a preferred route alignment, the draft Protective Provisions include adaptations. These set out the mechanism for coordinating interactions without rigidly defining those interactions or seeking the protection of particular assets. Further, should the final route alignment for the EWR Project not be in the vicinity of the Scheme, the key approval mechanisms would not be triggered and, if they are triggered, this will only be to the extent necessary.
- 2.7. Provision in respect of a development to be the subject of a future DCO application was included in the Able Marine Energy Park Development Consent Order 2014 ("Able DCO"),<sup>1</sup> which included provisions to deal with rail elements.
- 2.8. While not a 'purely' railway scheme, Part 5 of Schedule 9 to the Able DCO includes provisions for the protection of C.GEN Killingholme Limited ("C.GEN"). At the time of the examination of the Able Marine Energy Park scheme, C.GEN was proposing to make an application for a DCO in relation to a thermal generating station nearby. C.GEN made representations to that effect, successfully requesting and achieving the inclusion of protective provisions. As such, the principle of including protective provisions in respect of subsequent development is already established.
- 2.9. In the case of the EWR Project, the draft Protective Provisions incorporate and adapt drafting from both the traditional Network Rail protective provisions (as included in numerous DCOs, including the recent A1 Birtley to Coal House Development Consent Order 2021 and the draft provisions included at Part 5 of the dDCO for the Scheme) and the provisions at Part 5 of Schedule 9 to the Able DCO. This approach ensures reasonable and proportionate provision for the accommodation of the EWR Project in order to ensure the proper management of key interfaces, the efficient delivery of both projects and the minimisation of environmental impacts and impacts on the public purse.
- (d) "EWR, given the early stages of development, how and when would you define the specified work supply in 95(1)?"**
- 2.10. The reference at paragraph 95(1) of the draft Protective Provisions to "specified work supply" should be read in the context of the wider provision, which requires the supply by the undertaker of plans prior to the commencement of construction of any specified work. As such, the relevant defined term is "specified work", rather than "specified work supply". Specified work is defined at paragraph 94.

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<sup>1</sup> [REDACTED]

- 2.11. The definition of “specified work” is drafted such that the provision under paragraph 95(1) will only be triggered where the authorised development is situated:
- upon, across, under, over or within 15 metres of, or that may in any way adversely affect, the EWR alignment; or
  - within the order limits presented during the statutory consultation for the EWR project or within the development consent order application for the EWR project, whichever is most recent.
- 2.12. In turn, “EWR alignment” is defined as being the EWR project route which is the latest of that:
- confirmed by a preferred route alignment announcement;
  - presented within any statutory consultation;
  - specified within an application made pursuant to section 37 of the 2008 Act; or
  - specified within a development consent order.
- 2.13. As a result, should insufficient progress be made in relation to the design of the EWR Project ahead of commencement of construction of the relevant Scheme work, the provision under paragraph 95(1) of the draft Protective Provisions would not be triggered. This position acknowledges the differing stages of development of the EWR Project and the Scheme, and represents a proportionate level of protection for the EWR Project.
- (e) “Applicant and EWR, can 95(3) be delivered within the provisions of the current draft of the dDCO [REP6-003]?”***
- 2.14. Paragraph 95(3) provides for the construction of specified works by EWR Co. As noted in Appendix A of [REP6-094], the protective provision is accompanied by an addition to article 11(5) of the dDCO. The proposed addition to article 11(5) would mean that the Secretary of State’s consent would not be required in order for the undertaker to transfer or grant the benefit of the provisions of the dDCO to EWR Co. This reflects the position in respect of the statutory undertakers listed at article 11(5) and would circumvent the administrative burden associated with seeking the Secretary of State’s consent where specified works were to be constructed by EWR Co, which is already a fit and proper person for the exercise of such powers (it is owned by the Secretary of State and is a named party for purposes of the equivalent transfer provision in the Network Rail (East West Rail) (Bicester to Bedford Improvements) Order 2020<sup>2</sup>).
- 2.15. Avoiding the requirement for the Secretary of State’s consent would be advantageous to both EWR Co and the Applicant. However, if the amendment to article 11(5) were not included, meaning the Secretary of State’s consent would be required for the undertaker to transfer or grant the benefit of the provisions of the dDCO to EWR Co, this would not preclude the operation of paragraph 95(3) of the draft Protective Provisions.

***(f) “EWR, notwithstanding the provision in 95(5), how can the ExA secure in the dDCO adaptation and integration of approved work without any details before it, or understanding the associated environmental effects?”***

- 2.16. By virtue of the differing stages of development of the EWR Project and the Scheme, the precise nature of the protective works, interfaces and construction programme requirements cannot be defined at this stage. For that reason, the draft Protective Provisions secure the mechanism for the inclusion of protective works, implementation of an interface scheme and refinement of construction programming matters at the appropriate stage.
- 2.17. This reflects the position in the provisions for the protection of Network Rail in numerous DCOs, including the recent A1 Birtley to Coal House Development Consent Order 2021 and the draft provisions included at Part 5 of the dDCO for the Scheme. In addition to reflecting the established position adopted in respect of Network Rail, the proposed provisions are subject to the parameters at paragraph 95(5) of the draft Protective Provisions, which carve out protective works, interface schemes and construction programming matters that would give rise to any materially new or materially different environmental effects from those reported in the environmental statement.
- 2.18. As a result, the draft Protective Provisions follow an established mechanism to provide for protective works, an interface scheme and construction programming matters while being subject to suitable parameters to ensure any such amendments do not give rise to materially new or materially different environmental effects. This acknowledges the differing stages of development of the EWR Project and the Scheme while ensuring a mechanism is in place to provide for the accommodation of the EWR Project.

***(g) “Applicant does your position stated at CAH2 [REP6-032] that you would not be providing a revised wording to the Protective Provisions for the negotiations, still stand? If not, provide your proposed amendments.”***

- 2.19. *EWR Co will provide a further response on receipt of the Applicant’s response to this question.*

***(h) “Applicant, the ExA can see some merit in the arguments you have presented in response to the EWR’s proposed draft Protective Provisions; however, the ExA considers that your counter proposal, [REP6-094], would not provide adequate protection for the EWR scheme in the dDCO. Consider the protections sought in the Protective Provisions and provide a suitably worded draft Cooperation Agreement that may provide similar protections, for EWR to consider. This may be shared between parties in advance of D8, and the ExA would welcome EWR’s response to proposed draft, alongside at D8.”***

- 2.20. *EWR Co received the draft cooperation agreement from the Applicant on 12 January 2022, so is unable to provide a full response to the proposed draft at Deadline 8 but will*

*provide comments at Deadline 9. In addition, EWR Co will review the draft agreement in the meantime and continue to engage with the Applicant.*

- 2.21. *On an initial review, EWR Co does not consider that the draft cooperation agreement accords with the ExA's request for the draft cooperation agreement to consider the provision of similar protections to those offered by the draft Protective Provisions. As such, EWR Co's position remains that the required protections should be secured by way of the draft Protective Provisions."*

### **3. Q3.6.3.1: Environmental Management Plan**

#### **First Iteration EMP**

***(b) All relevant Parties comment, if you have concerns, to the changes proposed in the First Iteration EMP [REP6-008].***

- 3.1. As detailed in its response to Q2.10.1.1(b) [REP4-067], EWR Co considers that it is necessary and appropriate to include a design principle to require the consideration at detailed design of the opportunities to integrate the Scheme and the EWR Project, both in terms of design changes to allow for engineering efficiencies and the coordination of construction programmes. In [REP4-067], EWR Co proposed an additional design principle for inclusion in the First Iteration Environmental Management Plan:

*"In preparing the detailed design and the construction programme, the potential interfaces with the East West Rail Project shall be taken into account. So far as reasonably practicable, the detailed design and construction programme shall provide for and demonstrate the realisation of design and programming efficiencies between the Scheme and the East West Rail Project."*

- 3.2. At Item 1, Table 2 of [REP6-095], EWR Co further justified the inclusion of the above design principle in its response to the Applicant's Deadline 5 submission, highlighting that:

*"the logic behind the inclusion of a design principle relating to the EWR Project is to establish the mechanism to ensure appropriate engagement between the parties at the appropriate stage. At that stage, further information in respect of the EWR Project is likely to be available and can then be taken into account. Nevertheless, the difference in the design development of the two projects is acknowledged in the wording of the draft design principle, which refers to the "potential interfaces" and "so far as reasonably practicable". Clearly, if the EWR Project is not sufficiently progressed at the point when the design principle is triggered, the weight to be attached to it will be reduced."*

- 3.3. At paragraph 1.2.1 of [REP3-014] the Applicant identifies that the design principles set out in that document will be secured in the First Iteration Environmental Management Plan. While [REP6-008] includes a number of design principles in the annexed Landscape and Ecology Management Plan, it does not include the design principle proposed by EWR Co.

- 3.4. As a result, EWR Co's concerns as to the exclusion of the above design principle remain.

## 4. Q3.17.4.1: East West Rail

*East West Rail Company Limited/Applicant*

***“At ISH5 [EV-070] EWR explained that potential design changes to the Proposed Development would largely be limited to LHA side roads linking to the Proposed Development. However, EWR state in the post hearing note [REP6-094] that the exception to this would likely be at Black Cat Roundabout. Explain how the EWR Route Alignments 1, 2 and 6 would likely affect the intended layout or function of the proposed Black Cat junction.***

***(See related questions in Protective Provisions.)”***

- 4.1. EWR Co and the Applicant have agreed the below response to Q3.17.4.1:

“For EWR Route Alignments 1, 2 and 6, the EWR alignment would cross the Black Cat junction on a viaduct just to the north of the Black Cat Junction, over the slip roads and the A1. Therefore, the present design for EWR Route Alignments 1, 2 and 6 would not alter the main layout or function of the A428 Black Cat Roundabout and its slip roads in the permanent case. However, temporary changes to the layout or function of the junction may be necessary to facilitate access to and construction of the EWR viaduct. These could include lane closures, diversions and the construction of temporary and permanent structures alongside the highway. In addition, there may be a requirement for the slight realignment of local road infrastructure, such as the Roxton Road access road.”