

4 May 2011

David Simmonds  
Network Rail  
Desk 028 Floor 1B  
George Stephenson House  
Toft Green  
York  
YO1 6HP

Our ref. TR040001

Dear Mr Simmonds,

## **NETWORK RAIL NORTH DONCASTER CHORD PROPOSAL RESPONSE TO DRAFT DOCUMENTS**

I refer to your letter dated 18 March 2011 and accompanying CD containing consultation documents (in accordance with section 42 of the Planning Act 2008 – ‘the 2008 Act’) regarding the above proposal, received on 22 March 2011. I further refer to your email dated 29 March 2011 requesting the IPC’s comments on the draft documents received above and a letter from Bircham Dyson Bell dated 05 April 2011 seeking the IPC’s comments on the draft Development Consent Order (DCO).

A meeting was held with the IPC, Ian McCulloch of Bircham Dyson Bell, Paul Irving of Winckwork Sherwood and Jenny Camp of Network Rail on 19 April 2011 to discuss the draft DCOs for the above proposal and the Ipswich Chord proposal. The points raised at the meeting are included below with some additional sections for consideration.

Please note, the following is advice and is not intended to be prescriptive, it is for applicants to determine the content of their applications. We must also stress the decision of whether or not to accept an application will be taken by a Commissioner who has had no involvement in the pre-application stage for this proposal. All advice the Commission provides at this stage does not prejudice or pre-judge the decision of the Commissioner regarding acceptance or non-acceptance of an application. As always we would recommend that you seek your own legal advice upon which you can rely however if you have any queries about the content of this letter, please do not hesitate to contact us.

### **Draft Development Consent Order**

**28 and 14 day deemed consent provisions, for example, Articles 9(5), 14(7), 15(2), 17(2), 19(8) and 20(6).**

Although we note that such provisions have previously been included in Transport and Works Act (TWA) Orders, you will wish to satisfy yourself that the relevant consenting bodies, which we understand were sent copies of the draft DCO as part of the section 42 consultation, are satisfied with this proposed approach and timescales. If you consider that these provisions and time limits are necessary for this particular project then explanation and justification for this approach should be fully set out in the Explanatory Memorandum.

We would in any event suggest that consideration is given to extending the notice period in Article 29(2) since only 14 days notice is proposed to be given although this Article as drafted allows for the construction and retention of permanent works on such land. In this regard, we are unclear as to whether those persons whose land may be used under this Article have been sent copies of the draft DCO. Further advice to this Article is given in relation to compulsory acquisition matters below.

Allowing works etc. to be carried out without obtaining the express consent of certain bodies, for example, Articles 9(1) and 14(1).

Although we note that such provisions have previously been included in TWA Orders, you will wish to satisfy yourself that the relevant consenting bodies, which we understand were sent copies of the draft DCO as part of the section 42 consultation, are satisfied with this proposed approach. If you consider that these provisions are necessary for this particular project then explanation and justification for this approach should be fully set out in the Explanatory Memorandum.

Allowing any street to be stopped up temporarily to be used as a temporary working site Article 14(2).

As mentioned by us in the meeting, it is possible that the creation of such associated working sites could constitute associated development. Indeed, Annex A of the CLG Guidance on Associated Development (under 'Other Infrastructure') gives such sites as an example of associated development. You may therefore wish to include such site(s), as specific defined work(s), in the description of the authorised development in Schedule A and more precisely describe the location and nature of these including by reference to the works plan.

The description of the authorised development including any associated development in Schedule A.

As mentioned by us in the meeting, you may wish to define the works by reference to the works plan and by giving the relevant grid references for each of these. We note that one grid reference has already been set out in relation to Work No. 1. We also note the very wide scope of what may be permitted by the further associated development at (i). We consider that this, as drafted, is too widely drawn. In order to address this, it was suggested by Paul Irving on behalf of Network Rail that the scope of what may be permitted in this regard could be limited by reference to the proposed development that has been assessed in the Environmental Impact Assessment (EIA) as set out in the Environmental Statement (ES). The IPC would welcome this approach.

The upward limit of deviation Article 7(b).

The IPC noted in the meeting the proposed 3 metre upward limit of deviation and queried the basis for including such a large deviation since the reasons for requiring this limit are not explained in any of the draft documentation that has been submitted. Network Rail acknowledged that this was a substantial deviation, but said that this was standard in TWA Orders for such projects and had been included here on that basis. If you consider that this limit is necessary for this particular project then explanation and justification for this should be fully set out in the Explanatory Memorandum.

Any limits of deviation provided for in the draft Order should be clearly shown on the works plan and be consistent with any limits of deviation identified and assessed in the ES. It is also unclear whether the limits of deviation have been identified in Figure 1.2 (Vol III of the ES) which shows the development boundary. You may wish to consider whether these

limits of deviation have been consulted on under section 42 and section 47 of the 2008 Act during the pre-application consultation.

#### Disapplication of legislative provisions Article 4

Paragraph 28 of Part 1 of the Schedule to the Miscellaneous Prescribed Provisions refer to schedule 25 of the Water Resources Act 1991; however Article 4(b) of the draft DCO refers to schedule 5. Please clarify whether this reference is correct.

#### Stopping up of streets Article 12

We note that Article 12 refers to the stopping up of streets specified in Schedule E to the draft Order provided that if such a street is to be stopped up wholly or partly a new street is to be constructed and substituted for if first as identified in column (4) of Schedule E. One of these proposed new streets referred to in column (4) has been identified as Work No. 8. It is unclear whether the other two new streets identified in column (4) of Schedule E have been included as associated development under Schedule A or otherwise. This should be clarified in a revised draft of the DCO.

#### Construction of bridges and tunnels Article 17

This article provides for agreement with the relevant planning authority and the highways authority on the plans for construction of a highway over or under a railway. Any such bridge or tunnel would need to be within the limits of deviation identified in the works plan and have been consulted on under section 42 and section 47 of the Act during the pre-application consultation and the impacts considered in the ES.

#### **Compulsory Acquisition**

##### Modification of compulsory acquisition provisions Article 23 and Schedule I

We note that at the meeting Network Rail explained that the reason for including these was to ensure that the creation of new rights and any necessary compensation was provided for as the Model Provisions were inadequate. You may wish to reconsider whether these modifications are strictly necessary as the definition of land for the purposes of Part 7 of the 2008 Act includes any interest in or right over land (section 159(2) and acquiring a right over land includes the creation of a new right (section 153(3)). The Model Provisions are drafted to reflect this.

##### Imposition of restrictive covenants Article 23

We note that TWA Orders have authorised these in the past. We also note the point made at the meeting that in Schedule 5 of the 2008 Act interference with rights is an ancillary matter for which provisions can be included in a DCO. The 2008 Act does not however appear to authorise expressly the imposition of restrictive covenants on third party land. It was mentioned at the meeting that Network Rail may wish to acquire rights in respect of the Order land, such as a right of support. We suggest that you may wish to clarify the wording of any references to restrictive covenants so that they are framed in such a way that indicates these are in fact positive rights to be acquired for the benefit of the Order land.

##### Acquisition by statutory undertakers Article 23(5)

As we mentioned at the meeting you will need to satisfy yourself that there are provisions in the 2008 Act that permit powers of compulsory acquisition to be conferred on statutory undertakers in this way. It seems to us that such a delegation of powers may be outside the remit of the 2008 Act. Even if there were such powers this provision should not be necessary in any event as statutory undertakers have powers in their own right to acquire

land for the purposes of their undertaking and would not need to be given them by Network Rail.

#### Protective provisions Schedule L

We note that, amongst other obligations, statutory undertakers are required to use their best endeavours to obtain facilities and rights in land. We would suggest that the 2008 Act does not permit obligations such as these to be imposed on third parties.

You will be aware of the protection offered to statutory undertakers under section 127 and section 138 which may require the Secretary of State to issue a certificate or to give consent to the inclusion of a provision affecting statutory undertakers' land, rights or apparatus. Further guidance is contained in CLG Guidance on Procedures for Compulsory Acquisition.

Any protective provisions which disapply prescribed consents or authorisations under section 150 will require the consent of the relevant body to their inclusion in the draft DCO.

#### Temporary use of land and permanent mitigation works Article 29

As we mentioned at the meeting if there are any works that you consider should remain on the land after the period of temporary possession has ended then these will require permanent rights. You need to be satisfied that you have the powers by agreement to leave any works on the land permanently and we would suggest amending the drafting of this article 29(d) to remove the reference to their being permanent. Alternatively you may wish to compulsorily acquire permanent rights under the DCO in order for the works to remain permanently on the land. You may also wish to consider how paragraph (1)(a) (ii) will operate as any land which you wish to acquire temporary rights of possession over will require to be contained within the Book of Reference and names of owners and occupiers set out.

#### Statutory undertakers Article 31(b)

We note that there is no reference to the land plan or Book of Reference. You may wish to follow the wording of the Model Provisions in order to reflect the requirement in the Infrastructure Planning (Applications Prescribed Forms and Procedures) Regulations 2009 (APFP Regulations) that if such rights are to be extinguished etc then the land affected must be shown on the land plan and the names of those entitled to enjoy the rights must be contained within the Book of Reference.

#### Application of the Land Compensation Act 1973 Railway Model Provision 33

We note the explanation for the omission of this provision but we do not see there is any disadvantage in including this in the DCO. If there is any doubt as to whether a railway authorised under a DCO is provided in the exercise of statutory powers, then this provision makes it clear that the Land Compensation Act will apply.

#### Draft Requirements

We note that draft requirements in relation to landscaping, surface water drainage, contaminated land, and the Ecological Management Plan have been identified but no proposed wording has been provided in the draft DCO. In this regard, you may wish to consider whether any mitigation strategies identified in the draft ES can be achieved through a requirement in the DCO or if any identified mitigation has been taken into consideration when determining whether there is a likely significant effect under the relevant topic in the ES.

### Highway access Requirement 5

We consider that this proposed requirement as drafted is insufficiently precise since it is not clear as to the extent/element of the authorised development which requires such road access. This should be made clear in the draft requirement either by a description and grid reference or by a suitable reference to the works plan. We note that reference is only made in the draft requirement to Rockley Lane, Holme Lane and Storr Lane. This would appear to include the works referred to as Work No.2 - 4 in Schedule A of the draft DCO. However, there is no mention of works to Bell Croft Lane (Work No. 9 - new permanent underpass) and Applehurst Level Crossing (Work No.13 - widening works for haul road traffic). We are unclear as to whether these works are proposed to be dealt with under a different requirement. This should be made clear in the draft DCO and in the Explanatory Memorandum.

### Archaeology Requirement 6

We note that sub-paragraphs (3) and (4) and the cross-reference to the ES in sub-paragraph (1) of Model Requirement 16 have not been included in draft requirement 6 and that no explanation for these omissions has been given. In the absence of any reason for their omission we think that these should be included since as worded this requirement does not provide for any archaeological works or watching brief to be carried out pursuant to the approved scheme. We also consider that consideration should be given to including a time limit by which any archaeological works should be completed. This could be included as a negatively worded Grampian type restriction in sub-paragraph (1).

### Contract requirements environment Requirement 7

We note that rather than separate requirements being included in relation to traffic management, noise and vibration, dust and air pollution, boundaries and lighting these are proposed to be dealt with in draft requirement 7. We understand that drafts of the Network Rail plans referred to in this draft requirement are to be included in the ES. Network Rail noted that these draft plans will be revised further prior to the DCO application being submitted. The IPC considers that this requirement should be negatively worded so that the development or a relevant part thereof shall not be commenced until these plans have been submitted and approved. Consideration should also be given to including a draft requirement dealing with any noise impacts arising during the operational phase of the proposed development.

### Planning application drawings

The IPC noted that a group of plans have been submitted which are entitled 'planning application drawings' and reference to these 'planning application drawings' have been made in Schedule C Part 1. This reference should be deleted (along with the title of the plans) and suitable wording substituted for this which appropriately describes these drawings. Reference should also be included either in the draft DCO or in the Explanatory Memorandum as to the relevant regulation of the APFP Regulations under which these are being submitted.

### Explanatory Memorandum

In paragraph 1.2 of the submitted draft explanatory memorandum it has been stated that where a "significant" departure from the model provisions has occurred, an explanation will be provided. To clarify, Regulation 5(2)(c) of the APFP Regulations and IPC Guidance Note 2 states that "any" divergences from the model provisions should be included within

the Explanatory Memorandum. Paragraph 24 of IPC Guidance Note 2 has been copied below for your information:

“The draft Order must be accompanied by an Explanatory Memorandum (Reg 5(2)(c)) explaining the purpose and effect of each provision in a draft Order (explaining, for example, why it is considered necessary) and any departures from the model provisions. In addition to including any comments on issues mentioned in paragraphs 21 to 23 above, the Explanatory Memorandum should identify relevant precedents for non-standard provisions.”

It is considered that this needs to be applied consistently, for example, the Explanatory Memorandum refers to the replacement of section 8 of the Compulsory Purchase Act 1965 by Article 27 but there is no explanation as to why this is considered necessary.

The Commission also considers that any divergences from the requirements described as model provisions in Schedule 4 of the Model Provisions Order should also be referred to and explained in the Explanatory Memorandum.

### **European Protected Sites**

Regulation 5(2)(g) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 (the APFP Regulations) requires applicants to submit a report identifying any European site (or Ramsar site) which may be affected by the proposed development together with sufficient information that will enable the Commission to make an appropriate assessment of the implications for the site if required.

The Commission has provided advice in Advice Note 10 “Habitat Regulations Assessment” on the suggested approach to the provision of sufficient information, which includes the submission of one of the following:

- A ‘No significant effects report’, or
- Sufficient information to enable an appropriate assessment. This may include no alternatives assessment, statement of IROPI, and compensatory measures that will inform the competent authority’s consideration.

We note that no European protected sites have been identified within the draft documents provided to the Commission. However, as the draft Application Form has not been provided, it is unclear whether you intend to provide a report in accordance with Regulation 5(2)(g) of the APFP Regulations (part 15 of the Application Form). Please can this be confirmed to the Commission in advance of submission of the DCO application.

### **Protected Species**

It may also be useful for you to give consideration to the information that you may wish to submit with the application in relation to any necessary licences in relation to ecology. If you are seeking licences in parallel the Commission will need to understand whether there is any impediment to such licences being granted. It would therefore assist the Commission if you could provide with the application confirmation from the relevant licensing authority that they intend to issue any licences in due course.

If a European Protected Species (EPS) licence is being sought from the relevant nature conservation body you should provide confirmation to the Commission that there are no impediments to the EPS licence being granted. If you conclude that an EPS licence is not

required (although EPS are present in the vicinity of the proposed development) this position should be supported by confirmation from the relevant nature conservation body.

## **ES**

IPC Guidance Note 2 paragraph 19 states "It is vital that the draft order and the ES are mutually consistent". Although the IPC is unable to comment on the content of the ES at the pre-application stage, general comments have been offered in the DCO section above which relate to the ES and a formatting comment below regarding the appendices.

Please ensure that documents referred to in the text of the ES are included in the appendices. For example, paragraph 5.2 of Volume 1 of the ES states that "An EIA Scoping Report (Appendix A) was prepared for the scheme and formally submitted to the IPC in July 2010". This has not been provided in the draft ES. Whilst paragraph 5.1 (Volume 1) states that the "consultation process has been undertaken by Network Rail for the proposed North Doncaster Chord scheme, and the key findings are presented below and in Appendix B". Is this the correct reference as Appendix B currently includes the "Report Figures" and "IPC Scoping Opinion"? The "Appendix B Report Figures" appear to be the figures included in Network Rail's EIA Scoping Opinion dated July 2010. These figures were not included in the IPC's Scoping Opinion.

## **Plans**

Please ensure all submitted plans meet the statutory standards in paragraph 10 of IPC Guidance Note 2 which states that "where the document provided comprises a plan or plans, these must also be clearly labelled in the bottom right hand corner with 'title page' information; a list of revisions should be produced so at any stage it is easy to identify the latest version of the plan."

Where appropriate, the plans must also meet the requirements of the APFP Regulations, including for example, the level of detail required for the land and works plans, the inclusion of a North arrow and the relevant sections and detail required under regulation 6.

There is confusion regarding the submitted draft plans. The plan documents submitted by CD were saved as "Land Plans", "Land Plans and Sections" and "Planning Application Drawings". Upon opening the "Land Plans and Sections" document, the front page is titled "Works Plans and Sections". As some of these plans may be referenced within the DCO it is vital to understand which plans are the correct and final versions.

The "Land Plans" document (ref. 61156683) contains a key plan and 14 other plans. There are numbers labelled on each of the 14 plans, to which there is no key to explain their significance. Furthermore, these plans do not meet all of the standards and requirements listed above.

A further three land plans appear to have been included within the "Land Plans and Sections" document ref. 61143423. These land plans are not referred to in the document key plan and on each of the plans it states there are 6 land plans, although only three are included. The plans and key only refer to blue shading for temporary land take (right to use land) and the pink shading (compulsory acquisition). Three further plans titled "Land Affected" do not make any reference to being part of a land plan and they reference Regulation 5(2)(j) works plan (however land affected by the development is required within the land plan).

You may also wish to check the description and consistency of the plans against the text in the ES. For example, Figure 4.2 (Volume 1 - Access Option 1) is described in the text of the ES at paragraph 4.3.2 as showing the preferred option, which is the route described in Chapter 3 of the ES and is the route which has been selected for the purposes of the IPC application. However, this appears to reflect Figure B.3 of the EIA Scoping Report (dated July 2010) and does not reflect the route shown in Figure 1.4 which is described as "the preferred access route to the west, as shown in Figure 1.4 in Volume III of the ES". The colour used in Figures 4.2 (orange) to identify the route does not appear to match the colour of the same route shown on the 10 Route Options in Figure 4.1 where it is shown as green.

The above comments are not exhaustive and you are therefore encouraged to ensure all plans are consistent with the description of the proposed development in the text of the ES.

### **Consultation Report**

As we have not received a draft consultation report for comment, we would remind you to ensure that all of the requirements within the 2008 Act are met as well as the relevant Regulations, Guidance and Advice when compiling this document. At the acceptance stage this document will be heavily reviewed and will carry substantial weight. The Commission, in deciding whether or not to accept the application must have regard to this document under section 55(4)(a) of the 2008 Act.

### **Additional Comments**

The IPC has set statutory standards under section 37(5) of the 2008 Act for the production of all documents. Please refer to the acceptance checklist which contains this information, and paragraphs 8, 9 and 10 of IPC Guidance Note 2 on Preparation of Application Documents, applicants are required to comply with these standards.

Please ensure the documents consistently refer to the relevant proposal, for example the Assessment of Need document paragraph 1.7 refers to Ipswich Chord.

Please note, the information contained on the submitted CD for this proposal is greater than which is displayed on your community consultation webpage. For example the Flood Risk Assessment and Non-Technical Summary are not available on the webpage.

Should you have any queries in relation to the above or any other matter, please do not hesitate to contact me.

Yours sincerely



Kathryn Powell  
Case Leader

Tel. 0303 444 5065

Email. [kathryn.powell@infrastructure.gsi.gov.uk](mailto:kathryn.powell@infrastructure.gsi.gov.uk)

cc Ian McCulloch - Bircham Dyson Bell



The IPC gives advice about applying for an order granting development consent or making representations about an application (or a proposed application). The IPC takes care to ensure that the advice we provide is accurate. This correspondence does not however constitute legal advice upon which you can rely and you should note that IPC lawyers are not covered by the compulsory professional indemnity insurance scheme. You should obtain your own legal advice and professional advice as required.

We are required by law to publish on our website a record of the advice we provide and to record on our website the name of the person or organisation who asked for the advice. We will however protect the privacy of any other personal information which you choose to share with us and we will not hold the information any longer than is necessary.

You should note that we have a Policy Commitment to Openness and Transparency and you should not provide us with confidential or commercial information which you do not wish to be put in the public domain.

[www.independent.gov.uk/infrastructure](http://www.independent.gov.uk/infrastructure)