

4 May 2011

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York  
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Our Ref: TR040002

Dear Mr Murphy,

## **NETWORK RAIL IPSWICH CHORD PROPOSAL RESPONSE TO DRAFT DOCUMENTS**

I refer to your letter dated 7 March 2011 and accompanying CD containing draft consultation documents (in accordance with section 42 of the Planning Act 2008 – ‘the 2008 Act’) regarding the above proposal and your request for the IPC’s comments on the draft documents and subsequent request from Winckworth Sherwood in their letter of 8 March 2011 seeking the IPC’s comments on the draft Development Consent Order (DCO).

A meeting was held with the IPC, Paul Irving of Winckworth Sherwood, Ian McCulloch of Bircham Dyson Bell and Jenny Camp of Network Rail on 19 April 2011 to discuss the draft DCOs for this proposal and the Doncaster 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 11(7), 15(6), and 13(8).

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 an 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 24(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, Article 11(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 11(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 the route of the surface water sewer (Work No 2) has not yet been defined and that Work No. 4 involves the construction of an access road but Railway Model Provisions 12 has been omitted. We also note the very wide scope of what may be permitted by the further associated development at (h). 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.

Ancillary works Schedule A

We understand from the meeting that in the light of recent caselaw, the description of the demolition of the former cold store building as ancillary works is to be reconsidered.

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. 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.

Although we note that a similar provision relating to the Party Wall Act 1996 was included in the Crossrail Act, you will wish to satisfy yourself that there are powers within the 2008 Act to include such a provision within the DCO. It should be noted that if it is proposed to make a DCO which makes use of “the legislation powers” to modify a statutory provision, the draft DCO must be sent to the Secretary of State who will consider whether there is any contravention of Human Rights legislation (s.121).

#### **Compulsory Acquisition**

##### Modification of compulsory acquisition provisions Article 18 and Schedule E

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 18

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 expressly authorise 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 18 (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 G

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 24

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. We note that you mentioned that the Environment Agency have agreed that flood defence works can be carried out by Network Rail but such agreement is outside of the remit of a DCO. 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 24(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 26 (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 surface water drainage and contaminated land 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.

#### Landscaping Requirement 2

We note that model requirements 7 and 8 have been combined, that there is no time limit for the submission of the written scheme, the reference to British Standards has been omitted and there is no requirement for maintenance as set out in paragraph (3) of model requirement 8. In the absence of any reason for these omissions we think that these should be included since as worded this requirement does not provide for any maintenance to be carried out pursuant to the approved scheme. We also consider that consideration should be given to including a time limit by which the scheme should be submitted for approval. This could be included as a negatively worded Grampian type restriction in sub-paragraph (1).

#### Highway access Requirement 3

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. This would appear to include the works referred to as Work No 4 in Schedule A of the draft DCO. There is also insufficient detail on how the temporary traffic lights system will be implemented and a lack of reference to the obtaining of approval from the highway authority (similarly in Article 12).

#### Archaeology Requirement 4

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 4 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 5

We note that rather than separate requirements being included in relation to waste management, traffic management, noise and vibration, dust and air pollution, boundaries and lighting these are proposed to be dealt with in draft requirement 5. 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.

#### Explanatory Memorandum

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 22 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**

We note that you have identified a European Protected Site at Stour and Orwell Estuary and included a “no likely significant effects report” within the draft documents. There does not appear to be any definitive consultation response from Natural England on the outcome of this report. In view of this, it may be helpful to consider the IPC's recently published Advice Note on the process under the Habitats Regulations.

### **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.

### **Environmental Statement (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 Environmental Statement at the pre-application stage, general comments have been offered in the DCO section above which relate to the ES.

### **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.

You may also wish to check the description and consistency of the plans against the text in the ES 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 complied with, as well as the relevant regulations, guidance and advice, when compiling this document. 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 the Preparation of Application Documents. Applicants are required to comply with these.

Having compared the draft application documents you sent us against the standards set out in the IPC's Guidance Note 2, we noticed that several do not yet fully meet the specified criteria. For example, there is no reference to the appropriate regulation in the ES Main Statement V2 and the Flood Risk Assessment does not have a summary and there is no reference to the appropriate regulation.

Please note that these are examples to illustrate the issue and do not constitute an exhaustive list. It is the applicant's duty to ensure that *all* documents submitted with the DCO application comply with the required standards.

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

Yours sincerely



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cc Paul Irving – Winckworth Sherwood

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