

Applicant's Post Hearing Submissions (ISH6)

The West Midlands Rail Freight Interchange Order 201X

Four Ashes Limited

19 July 2019

Applicant's Post Hearing Submissions (ISH6 – Draft Development Consent Order and Development Consent Obligation: 11 July 2019)

The Applicant's Post Hearing submissions are set out below under the heading of the agenda item which gave rise to their discussion.

1. Draft Development Consent Order (dDCO)

- 1.1 The Applicant provided an oral summary of the changes made to the dDCO since the previous version submitted to the Examining Authority (ExA) for Deadline 3. The changes of substance were discussed during ISH 6 and are all considered below.

Article 4 (Parameters of authorised development)

- 1.2 The Applicant undertook to reconsider the drafting of article 4 to make it clear that the parameters shown and described on the parameters plans would fully constrain the development consented. The Applicant has considered the issue raised and resultant amendments are contained in the Applicant's dDCO submitted for Deadline 6 (Document 3.1D).
- 1.3 The first sentence of article 4 has been amended to make it clearer that the limits of deviation allowed for in sub paragraphs (a) to (c) are still constrained by the parameters.
- 1.4 The Applicant has given further thought to the practical need for the proviso to Article 4 and has concluded that it is not necessary. It is proposed to delete it and therefore it is not necessary to address the concerns in relation to the proviso expressed by the Examining Authority regarding its acceptance as a matter of principle or the identity of the party to adjudicate.
- 1.5 The article, as now drafted, applies the approach taken in the East Midlands Gateway approved DCO (article 4) with the exception of the additional words inserted at the beginning of the article, at the suggestion of the WMI Examining Authority, to make it clear that the limits of deviation given in (a) to (c) still have to be within the parameters.

Article 6 (Maintenance of authorised development)

- 1.6 The ExA requested that the Applicant submit the final version of Article 6 submitted to the Northampton Gateway Examination and an explanation of the drafting used. The corresponding article in the Northampton Gateway final dDCO, as submitted to the ExA is set out below:

"Maintenance of authorised development

6.—(1) The undertaker may at any time maintain the authorised development, except to the extent that this Order or an agreement made under this Order provides otherwise.

(2) Paragraph (1) does not apply to the highway works the maintenance of which is governed by article 14 (maintenance of highway works) and Parts 2 and 3 of Schedule 13 (protective provisions).

(3) Paragraph (1) does not extend to any maintenance works which would give rise to any residual significant adverse environmental effects not identified at the time this Order was made or in any updated environmental information supplied under the 2017 EIA Regulations.

- 1.7 The wording in the Northampton Gateway DCO is identical to that proposed in the WMI DCO with the sole exception that the word “residual” (underlined above) was added to subparagraph (3) of the Northampton Gateway article at the suggestion of a party participating in the Examination. The Applicant does not feel it necessary to add the word “residual” but equally has no objection to it.

Article 12 (Public rights of way – creation and stopping up)

- 1.8 The Applicant explained that it would amend the wording of article 12(3) to refer to a public right of way rather than a “byway open to all traffic” (BOAT). This is because the County Council have received a representation suggesting that the proposed BOAT should be a bridleway. The amendment ensures that, whatever amendment to the definitive map results from representations made, it will be covered by the article. That amendment has been made in the dDCO submitted for Deadline 6 (Document 3.1D). The corresponding amendment has been made to paragraph (4) of the Further Works in Schedule 1.

- 1.9 The Applicant explained that, following discussions with the County Council, all but one of the footpaths/cycleways previously listed in Part 2 of Schedule 5 as new public rights of way have been removed on the basis that most (all but three) of these are either already part of existing adopted highway or will form new adopted highway. Two of those which were previously listed will now become permissive paths and the one which remains will be a new public right of way. The ExA requested that the Applicant explain which of the rights of way that have been removed from Part 2 of Schedule 5 are to become permissive paths. These are:

- a) The length of footpath adjacent to the access to the Gailey Park Roundabout, which was shown coloured blue between C and D on the AROW Plan Doc 2.3C Rev E (APP-185) is now shown, on Rev F (REP5-015), as a dotted blue line, being the notation for a permissive path.
- b) The status of the area shown by purple cross hatching on both Rev E and F of Doc 2.3 has been changed, with the description in the key on Rev E of “EXISTING PRIVATE ROAD TO BE CLOSED AND TO BECOME PUBLIC CYCLE/FOOTPATH” being replaced by “EXISTING PRIVATE ROAD TO BE CLOSED AND BECOME PERMISSIVE ROUTE FOR PEDESTRIANS AND CYCLISTS” on Rev F.

Article 43 (now 42) (Felling or lopping of trees and removal of hedgerows)

- 1.10 The Applicant agreed to insert wording to ensure that any works carried out under article 43 are done so pursuant to the British Standards. This revised wording is included in the dDCO submitted for Deadline 6 (Document 3.1D).

Article 45 (now 44) (governance of requirements and governance of protective provisions relating to highway works)

- 1.11 Following the ExA’s suggestion that wording similar to that contained in the East Midlands Gateway Order be added to this article to make it abundantly clear that all approvals under the DCO must be within the parameters shown and described on the parameter plans, the Applicant undertook to consider the point and has amended articles 45(1) and (2) accordingly. The revised wording is included in the dDCO submitted for Deadline 6 (Document 3.1D).

Article 49 (now 48) (Arbitration)

- 1.12 The Applicant agreed to amend article 49 so that it would not apply to any decisions made by the Secretary of State under the DCO. That amendment has been made in the dDCO submitted for Deadline 6 (Document 3.1D).

Schedule 1 (Authorised development)

- 1.13 Works No. 7 – culvert under A449. Highways England have indicated that, rather than the Applicant utilising the existing culvert under the A449 for drainage they would wish the Applicant to build a separate, entirely new, culvert for that purpose (see HE D5 submission Covering Letter (REP5–045)). It was suggested at the hearing that the Applicant might need to acquire rights from HE to utilise the existing culvert and that might impact on delivery.

- 1.14 That is not the case. The note attached at **Appendix 1** explains that:

- The culvert concerned is an “ordinary watercourse”, as confirmed by the LLFA.
- The riparian owners (of land either side of the A449) either have ownership of the culvert or right to discharge through it.
- That right is not affected by any change in status of the land i.e. development of the land.
- The noting of the culvert on an HE database does not affect the above position. It simply confirms that the culvert is used for highway drainage in addition to the riparian drainage.
- By virtue of the acquisition of the land adjacent to the A449 the Applicant will have the benefit of the riparian rights.
- The flows from the development will be controlled and will result in lower flows than currently.
- There will be no adverse physical impact on the culvert and therefore paragraph 50 of Circular 02/2013 does not apply.
- In any event the Circular cannot prevent the exercise of the existing rights.

- 1.15 In the circumstances the Applicant is confident that there are no rights which the Applicant needs to acquire from HE in order to use the culvert and, accordingly, there will be no impediment to delivery. In addition, there is even less justification for the HE suggestion that an entirely new, and unnecessary, culvert be constructed simply to separate the development flow from the highway drainage when the culvert is shared infrastructure and the impact of the development on it is only beneficial.

Schedule 13 (Protective provisions)

- 1.16 **Part 2 Highways England** : Following HE’s comments at the ISH 6 in relation to the amount of the Bond Sum and Cash Surety, the Applicant undertook to liaise further with HE to seek to resolve the issue. Contrary to what was said at ISH 6 the Applicant was advised after the hearing that the review of the material relating to cost of the highway works (which is now acknowledged as having been received by HE on 24 May) is in fact ongoing with no conclusions yet reached, including any conclusion that that the information is inadequate. A response is awaited from HE. Pending that consideration the figures for the Bond Sum and Cash Surety contained in Part 2 of Schedule 3 remain as previously stated.
- 1.17 **Part 3 Local Highway Authority**: The Applicant explained that it believed the protective provisions are now agreed but awaited confirmation from the County Council. The County Council have now agreed the form of protective provisions. Specifically, the mechanism for reducing the Bond Sums in phases in paragraph 9 has been agreed subject to additional words being added in paragraph 14 (Expert Determination). These changes are contained in Part 3 of Schedule 13 to the dDCO submitted at Deadline 6 (Document 3.1D).
- 1.18 **Part 5 Gailey Roundabout Access**: The Applicant explained that it was still awaiting responses from three of the parties for whom these provisions have the benefit, but that it believes the provisions in the dDCO being discussed at ISH6 (Document 3.1C) will remain in that form. This remains the case, subject to one minor typographical amendment in paragraph 8(2) which has been made to the version submitted for Deadline 6 (Document 3.1D).
- Part 10 South Staffs Water**: The ExA was advised of the up to date position with South Staffs Water. Discussions are continuing with SSW. The protective provisions proposed for their benefit are in a standard form for this type of asset and the Applicant has no reason to believe they are not fit for purpose. The Applicant will continue to try and obtain confirmation from SSW that they are acceptable to them and will keep the ExA updated.

Schedule 2

- 1.19 **Part 1 (Requirements)**: The Applicant explained that, following extensive engagement with the County Council, the contents of Part 1 of Schedule 2 have been agreed with them. The Applicant is not aware of any concerns of the District Council with regard to Part 1 of Schedule 2. Some minor drafting amendments were discussed at ISH6 in relation to Requirements 20, 21 and 26 which the Applicant agreed to consider and the dDCO submitted for Deadline 6 incorporates the suggestions made by the ExA.
- 1.20 **Part 2 (Rail requirements)**: The Applicant explained that a further version of Part 2 had been circulated, and submitted to the ExA, prior to ISH6 which sought to address comments made by the County Council at Deadline 5. Those amendments expanded the provisions relating to the timing of the provision of the rail terminal to provide greater clarity in the process and provide for the substitution of a revised timetable if necessary. The Applicant noted that those amendments were largely considered by the local authorities, Stop WMI and HE to be helpful.
- 1.21 In response to a comment made by Stop WMI, the Applicant undertook to consider the use of the term “outside of the control of the undertaker” in order provide greater certainty. The main concern of the parties was that the Applicant might use unavailability of funds to justify a deferral. The Applicants has amended paragraph 11 of Part 2 of Schedule 2 to make it clear that such an argument could not be utilised.

- 1.22 The Applicant would also refer to the Applicant's note on Timing of the Provision of the Rail Freight Terminal contained in Appendix 2 to the Applicant's Responses to Other Parties Deadline 2 Submissions (Document 11.1 – REP3-007) and the note entitled Security for the Delivery of the Rail Terminal (Appendix 4 to Applicant's Post Hearing Submission for ISH 5 (Document 16.2).
- 1.23 Highways England commented that the local planning authority should be required to obtain HE's consent before agreeing any change to the timescales for the provision of the rail terminal, rather than simply consulting HE. The Applicant referred to paragraph 4.9 of the NPSNN, which confirms that guidance applicable to planning conditions is applicable to requirements. Such guidance is to the effect that, whilst the local planning authority can consult others, it should be the sole decision maker. Following further discussions with HE, the Applicant has concluded that there is no prospect of undertaking an assessment of the impact of a deferred terminal of the extent desired by HE during the course of the Examination. Accordingly, the Applicant has added some wording to paragraph 4 of Part 2 of Schedule 2 of the dDCO to be submitted for Deadline 6 to provide that HE's consent is required before any relaxation can be given by the local planning authority. This is following receipt from HE of a precedent in another DCO, currently undergoing Examination, whereby it had been accepted that an approval pursuant to particular requirement should be subject to HE's consent¹. The amended wording in the WMI DCO is different but follows the same principle.
- 1.24 The Examining Authority posed the question as to whether or not the ability for the local authority to relax the requirement to keep the rail freight terminal operational at some point in the future, contained in paragraph 6 of Part 2 of Schedule 2, was appropriate. The Applicant believes the wording is a prudent measure to ensure that there is an obligation at all times upon the undertaker to retain, manage and keep the rail terminal works available for use whilst at the same time allowing for a relaxation if felt logical at some point throughout the life of the development. This could apply to some short term closure of the rail connection due to construction works, such as the replacement of the terminal slab, or other eventualities that cannot all be foreseen so far into the future.
- 1.25 There is no provision in the East Midlands Gateway and DIRFT III approved DCOs requiring that the rail terminal, once provided, be maintained and retained and available for use. Nor is there any such provision proposed in the Northampton Gateway dDCO. Although the Northampton Gateway dDCO includes a requirement that rail infrastructure sufficient to handle four goods trains a day should be retained, that provision is unless otherwise agreed with the local planning authority.
- 1.26 SSC expressed concerns that the rail freight co-ordinator might be appointed at too late a stage. Accordingly paragraph 7 has been amended in order to bring forward the timing of appointment.
- 1.27 SSDC commented, in relation to the rail requirement paragraph 9, that there was reference to a GRIP process which may change. The Applicant agreed to consider whether some wording could be added to address this. The Applicant has amended the wording to ensure that the substance of the GRIP process remains applicable irrespective of any future changes (which, in any event, the Applicant understands are not imminent).

¹ *Reinforcement to North Shropshire Electricity Distribution Network DCO, Requirement 11*

1.28 The Applicant explained, in response to SSDC's new issue raised at ISH 6, in relation to fees for discharge of requirements, that it did not propose to amend the dDCO to deal with this, on the basis that it was established from the outset with SSDC, that a planning performance agreement (PPA) would be entered into. SSDC had previously advised that it did not wish to progress that agreement unless and until the DCO was approved.

2. Development Consent Obligation (DCOb)

2.1 The Applicant explained that the DCOb for the main site and also the DCOb for the Farmland Bird Mitigation are both agreed with all parties and that it will submit signed and completed Agreements to the ExA as soon as possible.

2.2 The principal changes to the main site DCOb were the addition of a sum of money to be used for degraded local wildlife sites and improvements to the drafting of the noise insulation scheme to provide greater clarity and to ensure that there is sufficient opportunity for occupants benefitting from noise insulation to install it prior to the noise to which it relates.

2.3 Stop WMI requested that the A5 to the west of Gailey roundabout be identified as a Barred Route however for the reasons given in the Applicant's Responses to Other Parties Deadline 4 Submissions (page 47 Document 15.2 (REP5-006) the Applicant does not believe this appropriate, nor, it is understood, do SCC.

Applicant's A449 Culvert Note

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Appendix 1

Applicant's position in respect of drainage into the existing culvert beneath the A449

1. Introduction & Background

- 1.1 This note sets out the Applicant's position in response to the points raised by Highways England (HE) relating to the use of the existing culvert beneath the A449 (REP2-034 and REP4-106).
- 1.2 The culvert forms a part of an ordinary watercourse and exists primarily to convey land drainage from east to west below the A449. Lead Local Flood Authority have agreed the strategy to outfall into the ditch and via the culvert and are responsible for such consents under the Flood and Water Act Management 2010.
- 1.3 The Lead Local Flood Authority has confirmed that the culvert is an ordinary watercourse. The culvert has been in situ since circa 1936, well in advance of the dualling of the A449.
- 1.4 As the ExA will be aware from the Book of Reference (Document 4.3, APP-007), the land in which the culvert is located is unregistered¹ and HE have not been able to provide evidence to support their asserted ownership of the culvert. The simple noting of a culvert on a database does not invest ownership in HE.
- 1.5 There are no records of any consents of the adjacent owners for HE (or its predecessor as highway authority) to construct the culvert and therefore, based on the available evidence and confirmation from the LLFA that the culvert is a watercourse, the clear conclusion is that the culvert falls within the principles of riparian ownership of the adjacent landowners and that the Applicant will benefit from that riparian ownership when it acquires the land. Indeed, even if HE were able to provide evidence of ownership of the culvert (i.e. the physical asset), as a matter of law, the adjacent landowner (in due course, the Applicant) still maintains the ability to discharge into the culvert pursuant to those riparian rights.
- 1.6 At no time has HE contested that drainage strategy is unacceptable on the basis of impact on the culvert. The HE objection to continuing use of the culvert is entirely based on a principle (not a legal principle) of seeking to separate highway drainage from land drainage.

2. Riparian Rights

- 2.1 The principle of riparian ownership and riparian rights are established at common law. This means that the adjoining owners benefit from various rights including:
- 2.1.1 the presumption that a landowner owns the land up to the centre of the watercourse, unless there is evidence to the contrary; and
- 2.1.2 the right to receive flow of water in its natural quantity and quality, without undue interference.
- 2.2 A riparian owner also has a number of responsibilities including:

¹ Located within the land shown as Plot 2, Land Plans Document 2.1B, APP-161

- 2.2.1 to pass on the flow of water (i.e. discharge) without obstruction, pollution or diversion which could affect the rights of others;
 - 2.2.2 to accept flood flow through their land, even if these are caused by inadequate capacity downstream (there being no duty to improve the drainage capacity of a watercourse); and
 - 2.2.3 to maintain the banks of the watercourse (if applicable).
- 2.3 The Applicant is clear, therefore, that it will benefit from the right to discharge water into the culvert pursuant to these established common law principles.

3. Department for Transport Circular 02/2013

- 3.1 In its Deadline 4 submissions, REP4-016, HE rely on Department for Transport Circular 02/2013 and contend that such guidance militates against a connection between the highway and site drainage. The relevant paragraph of the Circular is set out below.

“PHYSICAL IMPACT OF DEVELOPMENT ON THE STRATEGIC ROAD NETWORK

49. ...

50. In order to ensure the integrity of the highway drainage systems, no water run off that may arise due to any change of use will be accepted into the highway drainage systems, and there shall be no new connections into those systems from third party development and drainage systems. Where there is already an existing third party connection the right for connection may be allowed to continue provided that the input of the contributing catchment to the connection remains unaltered.”

- 3.2 The Applicant contends that, in so far as it is relevant at all where existing drainage rights apply (as here), the circular supports the Applicant’s position.
- 3.3 The heading, under which the paragraph sits, is clear that the mischief the guidance is aimed at is preventing physical impact of development on the SRN. There is no additional physical impact proposed. The water from the catchment already passes through the existing culvert and, as noted at paragraph 3.4 below.
- 3.4 The Applicant’s surface water drainage strategy (see Document 6.2 Appendix 16.3, APP-152) does not result in an increase in the quantity of water into the culvert. Tables 7.2 and 7.3 in section 7.5.4 of the document show the calculated flow rates which contribute upstream of the culvert (Outfall A) before and after the implementation of the proposed drainage strategy. The results show that the flows will be controlled and will be less.
- 3.5 The flow rate for the existing catchment which drains through the culvert has been calculated in accordance with DMRB and planning policy guidance methodology for greenfield 1 in 1 year, 1 in 30 year and 1 in 100 year events and the proposed rate for all of these events is at the Q_{bar} greenfield rate, ensuring that the pre-development rate is not exceeded. This has been reviewed and confirmed as correct by the Lead Local Flood Authority who are responsible for ordinary watercourses.
- 3.6 The input of the contributing catchment to the connection therefore remains unaltered. There is no new connection to the existing culvert proposed. It is proposed to connect the Development surface water network to the existing land drainage network which is to be

diverted upstream of the culvert. The principles (and rights) of riparian ownership are not affected by the change of use of adjoining land.

4. Conclusion

- 4.1 The adjoining landowner (and, following the exercise of its agreement to acquire the land, the Applicant) has the benefit of the necessary and appropriate rights for the discharge of surface water into the existing culvert. There is no need for the Applicant to acquire such rights from HE nor any basis for them to have to do so.
- 4.2 In so far as it is relevant having regard to the above, the Applicant also considers, for the reasons set out in this note, that the proposals do not conflict with the guidance contained in the DfT Circular 02/2013.
- 4.3 For those reasons, HE's "requirement" that a further culvert be constructed is clearly unnecessary and inappropriate.