Planning Act 2008 : Application by Anglian Water Limited for an Order Granting Development Consent for the Cambridge Waste Water Treatment Plant Relocation project (CWWTPR) (ref: WW010003).

CLOSING SUBMISSIONS ON BEHALF OF
CAMBRIDGE CITY COUNCIL &
SOUTH CAMBRIDGESHIRE DISTRICT COUNCIL

INTRODUCTION

1. These are the closing submissions on behalf of Cambridge City Council ('the City Council' or 'CCC') and South Cambridgeshire District Council ('the District Council; or 'SCDC') (collectively 'the Councils') following the examination conducted by the Examining Authority ('the ExA') into the application by Anglian Water Limited ('the Applicant') pursuant to the Planning Act 2008 for an Order Granting Development Consent ('DCO') in respect of the Cambridge Waste Water Treatment Plant Relocation project ('CWWTPR' or 'the project').

2. The position of CCC and SCDC has been set out in their respective Relevant Representations and Written Representations [RR-002 , RR-004, REP1-130 and REP1-141] as well as their responses to the ExA's questions. In addition, the ExA has before them the Councils' Local Impact Reports (as corrected REP5-114 and REP5-120 respectively) which has a specific statutory role as set out below. Lastly, the ExA will also see the final Statements of Common Ground between each Council and the Applicant.

3. All of this evidence should of course be taken into account collectively and read in light of the issues that have been raised and evolved in response to the ExA's examination.

4. The purpose of these submissions is not to seek to repeat that evidence, but the Councils considered it would be of assistance to the ExA and ultimately the Secretary of State ('the SofS') to provide the Councils' understanding and position in respect of the legal framework for the consideration and decision taking of this DCO application and certain legal issues which have been raised.

THE NATURE OF THE PROJECT UNDER THE PLANNING ACT 2008 (PA 2008)

5. The construction of any waste water treatment plant within England will be a Nationally Significant Infrastructure Project ('NSIP') within the meaning of s14(1) of the PA 2008 subject to the capacity threshold as set out s29[1].

6. Section 35 "*Directions in relation to projects of national significance"* of the PA 2008 provides:

> *"(1) The Secretary of State may give a direction for development to be treated as development for which development consent is required.*
> *This is subject to the following provisions of this section and section 35ZA.*
> *(2) The Secretary of State may give a direction under subsection (1) only if—*
> *(a) the development is or forms part of—*
> *(i) a project (or proposed project) in the field of energy, transport, water, waste water or waste, or*
> *(ii) a business or commercial project (or proposed project) of a prescribed description,*
> *(b) the development will (when completed) be wholly in one or more of the areas specified in subsection (3), and*

[1] *i.e. "expected to have a capacity exceeding a population equivalent of 500,000"*

(c) the Secretary of State thinks the project (or proposed project) is of national significance, either by itself or when considered with—

(i) in a case within paragraph (a)(i), one or more other projects (or proposed projects) in the same field;

(ii) …

7. As observed by Mr Justice Dove in *EFW Group Ltd v Secretary of State for Business, Energy and Industrial Strategy [2021] EWHC 2697* (Admin))[61 –

"61 There are clear advantages of the 2008 Act incorporating a provision like section 35, both procedurally in terms of the economy of dealing with projects which are not NSIPs alongside those which are leading to more efficient decision-making, as well as enabling a project of national significance which does not fulfil the definition of an NSIP to take advantage of the DCO regime, for instance in the form of the exemptions from other consenting processes comprised within section 33 of the 2008 Act. It is pertinent to the understanding of the intention of section 35 that it appears in the same Part of the 2008 Act as section 31 and 33 which all refer to the requirement for development consent, rather than that part of the Act containing sections 104 and 105 which deals with the processes of deciding applications.

62….It is clear that the purpose of section 35 is not to make a project which is not and does not form part of an NSIP into an NSIP. Its purpose is more modest, namely to enable the defendant to bring within the scope of the 2008 decision-making framework projects which satisfy the requirements of section 35(2), and are of a particular type of infrastructure which either by themselves or when considered with other specified types of project are of national significance. They are then able to take advantage of the streamlined decision-making processes as well as the available exemptions from other consenting regimes."

8. The section 35 (s35) Direction dated 18 January 2021 (Appx 3 Planning Statement [REP1-049) in relation to the CWWTPR is clearly a key document.

9. It confirms the SofS's determination and views as follows:

(i) That having considered the Applicant's request and the details of the proposed project, the SofS is satisfied that the Applicant's request

constitutes a "*qualifying request*" in accordance with section 35ZA(1 of the PA 2008*).*

(ii) That the proposed project relates to the construction of a new waste water treatment plant and thus sits within one of qualifying infrastructure fields listed in section 35(2)(a)(i) (i.e. waste water)

(iii) That he directs "*that the proposed development, namely, the Cambridge Waste Water Treatment Plant Relocation Project, is to be treated as development for which development consent is required".*

(iv) That he also directs that any DCO application "*for the proposed development may also include any matters that may properly be included in a development consent order (within the meaning of section 120 of the Planning Act) including ancillary matters (section 120(3)) and associated development (within the meaning of section 115(2) of the Planning Act*).

(v) That he further directs in accordance with s35ZA(3)(b) and (5)(b) of the PA 2008 that "*any proposed application for a consent or authorisation mentioned in section 33(1) or (2) of the Planning Act in relation to the NSIP development is to be treated as a proposed application for which development consent is required*".

10. The s35 Direction also confirms that it is given "*without prejudice to the Secretary of State's consideration of any application for a development consent order which is made in relation to all or part of the proposed project."*

11. The Annex to the s35 Direction sets out the SofS's reasons for issuing the direction and are based upon his *"opinion that the proposed development, known as the Cambridge Waste Water Treatment Plant Relocation Project, is of national significance".*

12. These reasons are again, in the Councils' submission, key to the ExA's consideration and the SofS's final determination. They notably refer not only to the nature and form of the project but also to the SofS's conclusions about what the project will contribute to and enable as follows:.

"…having in particular taken into account that the project will:

- *be for a complex and substantial relocation scheme, involving extensive infrastructure works and requiring multiple consents involving various statutory undertakers;*
- *provide a key contribution to the development of Cambridge, particularly to the North East of the city, and to the investment in waste water infrastructure;*
- *enable the relocation of the existing Cambridge Waste Water Treatment Plant, the development of that brownfield site, and the development of provision of waste water services to a proposed development at Waterbeach New Town;*
- *benefit from the application being determined in a timely and consistent manner by the Secretary of State and through removing the uncertainty of applying for numerous separate approvals across multiple local authority areas.*

Furthermore, the Secretary of State notes that the proposed project:

- *is likely to support growth in the economy through its contribution to the development of North East Cambridge;*
- *will have an impact across several local authority areas;*
- *has been granted Housing Infrastructure Funding to ensure its delivery by 31 March 2028;*
- *will be important to meet government housing objectives; and*
- *will be of a substantial physical size."*

13. Such a decision by the SofS and its legality is to be treated on the same basis as any "*evaluative planning judgement*" (see judgment of Dove J in *Ross v Secretary of State for Transport [2020*] EWHC 226 (Admin)[66-67]). The Direction and the basis for its issue has not been the subject of any legal challenge.

14. Whilst the conclusions drawn within the Direction are without prejudice to the SofS's determination of the DCO application, effect and due weight clearly must be given not only to the legal consequence of the Direction (i.e. that legal consent for the project can now only be sought for the project through the PA 2008 not the Town and Country Planning Act 1990 ('the 1990 Act')) but also to the reasons why the Direction has been made.

15. As set out above, the judgment of Dove J in EFW confirms that whilst a s35 Direction cannot turn a project which is not an NSIP into an NSIP nor can it act to override or amend a National Policy Statement (NPS) (see EFW[58]) (although the SofS may include which NPS is considered to apply[2]), a s35 Direction does act to confirm that a given project from the start is recognised as being "*of national significance*" even if it "*does not fulfil the definition of an NSIP*" EFW [61].

16. The reasons why the project is considered by the SofS to be of national significance provide the principal identification of the circumstances for this particular type of infrastructure.

NPS – SECTION 104 AND 105

17. The decision making framework for this DCO application as with any such application is provided exclusively by the PA 2008 and specifically by sections 104 and/or 105.

18. As described again by Dove J in EFW at [16] "*in essence section 104 applies to applications for a DCO where an NPS has effect, and section 105 applies to decisions where no NPS has effect. Where section 104 is in play, then by virtue of section 104(3) the application must be determined "in accordance with any relevant national policy statement", subject to a number of limited exceptions. By contrast, section 105 prescribes matters to which the defendant is to have regard to when making a decision without the statutory presumption set out in section 104(3*)."

19. The statutory presumption referred to in the above passage relates to the application of s104(3) i.e. *"The Secretary of State must decide the application in accordance with any relevant national policy statement"* . EFW recognises that an NPS may be 'relevant' even if it does not 'have effect'.

[2] See s35 Direction Aquind Interconnector dated 30 July 2018

20. Also, to be clear the statutory presumption referred to obviously only arises in favour of a DCO if, first the NPS has effect and secondly, on consideration of the policies contained within the NPS, it is concluded that the DCO application accords with those policies.

21. The question of whether there is an NPS which has effect in respect of the CWWTPR application was raised in the ExA's first series of questions ('ExQ1') and the Councils provided their response at Deadline 1 ('DL1') (and amended at DL2) (see in particular the answers to ExQ1 2.3) [ref REP2-046 and REP2-054] as well as within their Local Impact Reports (as amended/superseded) [ref REP 5-114 and REP5-120].

22. As indicated in their responses the Councils consider the National Policy Statement for Waste Water (NPSWW) published in March 2012 will clearly be relevant to the consideration of this project whether or not it 'has effect' i.e. whether or not s104 or 105 applies. It is relevant because the project to be determined is waste water infrastructure that is of national significance and the NPS would equate in any event to a matter that is *"both important and relevant to the Secretary of State's decision"* (see s104 (2)(d) and s105 (2)(c).

23. To that end the extent to which the DCO accords with the NPS will still be relevant under s105 as under s104 even if the NPS does not have effect and hence the statutory presumption will not apply. In the absence of the availability of a statutory presumption however the decision maker will instead accord weight to the extent to which the DCO accords with the NPS. That weight clearly is a matter within the SofS's discretion subject to the test of 'Wednesbury' unreasonableness.

ROLE OF THE COUNCILS and LOCAL IMPACT REPORTS

24. The Councils are relevant authorities under the PA 2008 because the land the subject of the DCO lies within their respective areas (see s43(1) and 56A) and as such they clearly fall within the definition of authorities to which the SofS "*must give notice in writing…inviting them to submit a local impact report"* (see s60 PA 2008).

25. The Councils have, as is appropriate, been guided by their statutory role within this process under the PA 2008 and not sought to overstep and place themselves in the position of the decision makers or to confuse their specific role before the examination with their parallel role as local planning authorities for the area responsible for bring forward the development plan under the Planning and Compulsory Planning Act 2004 and 1990 Act. As pointed out, that development plan role is limited in any event as the Councils are not the relevant planning authorities responsible for matter of waste. That legal capacity falls to Cambridgeshire County Council which would also be the relevant authority for determining an equivalent waste water project under the same Acts.

26. Local Impact Reports (if submitted) are referred to both under s104 and 105 as matters to which the SofS *"must have regard"* when *" deciding the [DCO]application"* (see s104(2) (b) and s105(2) (a) *the Secretary of State to* …..s60(3) defines them as *"(3)… a report in writing giving details of the likely impact of the proposed development on the authority's area (or any part of that area).".*

27. The principal guidance with regard to LIRs and how relevant authorities should approach them is set out the Planning Inspectorate's Advice Note 1.

28. It states in particular as follows:

"The sole definition of an LIR is given in s60(3) of the Act as 'a report in writing giving details of the likely impact of the proposed development on the authority's area (or any part of that area)'. The content of the LIR is a matter for the local authority concerned as long as it falls within this statutory definition….

….Local authorities should cover any topics they consider relevant to the impact of the proposed development on their area.

Local authorities should set out clearly their terms of reference for the LIR. The LIR should be used by local authorities as the means by which their existing body of local knowledge and evidence on local issues can be fully and robustly reported to the Examining Authority.

There is no need for the LIR to replicate the EIA. Nor is it necessary to replicate any assessment already produced in respect of the site such as those included in National Policy Statements. Rather, it should draw on existing local knowledge and experience. Examples might be local evidence of flooding, local social or economic issues or local knowledge of travel patterns to community facilities.
In producing a LIR, the local authority is not required to carry out its own consultation with the community…

The report should consist of a statement of positive, neutral and negative local impacts, but it does not need to contain a balancing exercise between positives and negatives; nor does it need to take the form of a formal committee report.
The Examining Authority will carry out a balancing exercise of relevant impacts, and these will include those local impacts specifically reported in the LIR.
By setting out clearly evaluated impacts in a structured document, local authorities will assist the Examining Authority by identifying local issues which might not otherwise come to its attention in the examination process. It will also be very helpful to have the local authority's appraisal of the proposed development's compliance with local policy and guidance.
….
There is, however, no need for the local authority to undertake an assessment of compliance with an NPS; this would duplicate the Examining Authority's role.."
*(*emphasis added)

29. The Councils in producing their respective LIRs have accorded with this guidance. They have in particular provided in the LIRs (and any further clarifications) appraisals of the proposed development's compliance with local policy and guidance without carrying out any *"balancing exercise between positives and negatives"* to form an overall view (however artificial that would be in any event in light of the fact that under the 2004 Act and 1990 Act neither authority would be the determining authority). This has necessarily meant however in those instances where a policy itself requires such a balancing exercise in order to establish compliance or not that the Councils have stopped short of reaching that final determination. The Councils have been pressed upon this stance during the examination at times and it is hoped that the

ExA and the SofS understands why the Councils position in the circumstances the appropriate one.

30. The principal example of where the Councils, in particular SCDC has found it necessary to take this approach is with regard to the application of Green Belt policy and the recognition that the project amounts to inappropriate development which requires the demonstration of very special circumstances sufficient to outweigh the harm by reason of inappropriateness and any other harm.

31. Each of the LIRs has confirmed the in principle support for the development by reference in particular to a series of benefits including the unlocking of the NEC area for development for housing in future. SCDC specifically concludes as [7.1.3] of its LIR that "*there are substantial benefits arising from the proposal that collectively can amount to very special circumstances. However, it is for the ExA and ultimately the Secretary of State to determine the weight of those benefits against Green Belt harm"*.

32. Those benefits and the Councils' position were further expanded upon following questions by the ExA at Issue Specific Hearing (ISH) 3 as set out by Mrs Hunt. Her answer is also reflected in the Written Summaries of Oral submissions made at Issue Specific Hearing 3 (ISH 3) at point 9 (see REP4-090 (City Council) and REP4-094 (SCDC)).

33. To paraphrase that answer the Councils consider it is important for the ExA and the SofS when approaching this DCO application to recognise that the preferred strategy for the emerging Greater Cambridge Local Plan (GCLP) in identifying the North East Cambridge (NEC) area for future development (including meeting considerable housing needs) reflects and is consistent with existing policy in the 2018 Local Plans . These existing plans build upon 20 years' worth of consistent recognition of this area (as set out in section 6 of both Councils' LIRs) as a highly sustainable (and now in the emerging GCLP and its evidence as the most sustainable) area for such development. Equally the history has shown that by necessity, the bringing forward of this area is predicated on the existing WWTP relocating and the site becoming available for redevelopment. It is a matter of fact that the emerging GCLP is predicated on whether this DCO is approved and thence it can be concluded that the emerging NEC policy is

deliverable. This is the central test any Inspector examining the GCLP or NECAAP must apply, and the Councils must meet in taking forward their plans for examination.

34. This policy context and this history are all important and relevant matters in the Councils' submission under s104 or s105. It is also not considered correct to approach a decision under s105 on the basis that neither the NPS nor the wider planning history and emerging policies are somehow irrelevant or if relevant can carry no weight – the sole question is whether they are important and relevant, not whether the NPS has effect or whether policy has been adopted.

35. As explained it would simply not have been possible for the existing or emerging local plan to include any proposals relating to the relocation of the WWTP because neither CCC or SCDC are the LPA for waste and minerals. Waste matters are outside the responsibilities of both Councils as district local planning authorities and indeed it would be unlawful for the district council to seek to make any proposals for waste within their Local Plan. It would have been a matter for the County Council as the Waste Planning Authority to address such a proposal within the Minerals and Waste Local Plan. As such, the GCLP and NECAAP can only progress so far until there is evidence that the NEC site is deliverable, and that will only be in place if and when the DCO is approved .

36. If the SofS should decide not to approve the DCO the consequence of this would be significant. The Councils would have to look to identify a replacement site for the majority of the 8,350 homes identified in the emerging GCLP First Proposals that are dependent on the CWWTP being relocated, and in particular that 3,900 homes for the plan period to 2041 (see LIR paragraphs 6.34 to 6.35, Map 1 and paragraphs 6.98 to 6.101 [REP2 -043]). The Councils would have to go through a further process of reviewing the development strategy to identify an alternative site(s) to meet the evidenced need for jobs and homes. This would inevitably include reviewing whether the earlier conclusion that exceptional circumstances do not exist in principle to justify revisions to the Green Belt can remain the case. What is more, again as explained, the area or areas of land that would need to be identified would not simply equate to the size of the existing WWTP but a wider area reflecting the odour constraint on sensitive uses, in particular residential development.

37. The Councils in their LIRs have confirmed that there would be significant planning benefits arising from proposals for a new city district at NEC proposed in the emerging NECAAP and GCLP, both locally and nationally, as also recognised by Government through its Case for Cambridge, and that the delivery of the assessed development needs of those emerging plans and other related benefits are substantial.

38. These benefits carry considerable weight as important and relevant considerations to the DCO weighing in its favour.

Implications of R(oao Aschurch) v Tewkesbury Borough Council [2023] EWCA Civ 101 ('Aschurch')

39. In this context it is noted that the question has been raised whether the ExA's assessment and the SofS's decision can lawfully take these wider benefits into account when the NEC proposals do not form part of the same project based principally on the recent Court of Appeal judgment Aschurch.

40. It is understood that the point has been raised in the context of this DCO by drawing an analogy with the finding in Ashchurch case that it had been wrong for decision maker in that case to *"to take into account the public benefits of the development facilitated by the bridge"* which was the project the subject of the application in Aschurch " *but… to leave out of account the concomitant harms"* of that facilitated development.

41. The Councils consider that such an analogy to this DCO would be incorrect and respectfully agrees with the submissions by the Applicant made on their behalf by Ms Ellis in ISH/1 and reflected in Appendix D to the Applicant's "*Comments on Deadline 4 Submissions*" [REP5-112].

42. This is because, setting aside the focus of the CA's judgment in Ashcurch which was whether the proposed development and development it would facilitate should be treated as a 'single project' under the EIA Regulations 2017 [3] (it is clear that:

    (i) the allocation and future development of the NEC has been the subject of appraisal as part of the assessment of previous and existing adopted development plans.

    (ii) the impact of the future development of the NEC has also been the subject of appraisal as part of the emerging GCLP and NECAAP

    (iii) the impact of the future development of the NEC has been taken into account as part of the Applicant's cumulative impact assessment as part of the Environmental Statement see Chapter 22 [REP6-043.] ref section 3

43. There is also no suggestion on the Councils part that the SofS should approach his decision in this case on the basis that only the positive impacts of the future development which would be enabled by the grant of this DCO should be recognised.

Definition of Associated Development

44. Again in the context of what development should as a matter of law properly qualify as part of this DCO project the Councils also note the issue raised in the examination with regard to that which has been included as 'associated development' in particular the Gateway Building, parking to the front and the workshop building proposed as part of the new WWTP .

45. The Councils have never raised this as a matter and can confirm they do not consider that any such issue arises in this respect. They would respectfully agree with the Applicant's submissions in this respect recorded at Applicant's Response to ISH4 Actions (pages 9-10) [REP6 -116:].

46. On a simple basis , applying the wording of s115 of the PA 2008 which provides the statutory definition, it does appear that the above proposed elements are clearly *"associated with"* the "*development for which development consent is required"* see

[3] For DCOs *Infrastructure Planning (Environmental Impact Assessment) Regulations 2017*

s115(1) and (2) and also meet the other parts of s115. In addition looking at the SofS's *"Guidance on associated development applications for major infrastructure projects"* ('the AD Guidance') it does also appear to the Councils that there is a *"a direct relationship between [the] associated development and the principal development"* and that the elements *"support the…operation of the principal development"*(see [5](i) AD Guidance). Further these elements do not appear to be *" an aim in [themselves] "* and are "*subordinate to the principal development"* nor do they appear *"only necessary as a source of additional revenue for the applicant"* (see [5](ii) and (iii) of the AD Guidance[4].

47. Matters which relate to the necessity or justification for specific elements of a development are in the Councils submission largely relevant to the justification for compulsory acquisition of land required for those elements (see application of s122 of PA 2008 and SofS "*Guidance related to procedures for the compulsory acquisition of land")*

CONCLUDING SUBMISSIONS

48. The Councils respectfully ask that the ExA in reporting upon this DCO application and the SofS in determining take full account of the above position.

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39 ESSEX CHAMBERS

12 APRIL 2024