

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**THE NETWORK RAIL (EAST WEST RAIL BICESTER TO BEDFORD IMPROVEMENTS)  
ORDER**

**Article 19 – Discharge of water**

**Note in response to Thames Water objection (OBJ/226), statement of case, proof of evidence and subsequent correspondence in relation to the Network Rail (East West Rail Bicester to Bedford Improvements) Order**

**BACKGROUND**

1. Network Rail has applied for the abovementioned Order, which is the subject of this Inquiry.
2. The draft Order contains, at Article 19, a right for Network Rail to use any watercourse or any other public sewer or drain for the drainage of water in connection with the construction, operation or maintenance of the works authorised by the Order and may for that purpose make openings into such watercourses. Network Rail is required to seek consent of the person to whom the watercourse belongs prior to such discharge and, where relevant, is required to seek approval for its plans for making an opening into the watercourse. However, if a person having received an application for such consent or approval fails to notify Network Rail of a decision within 28 days of the receipt of the application, that person is deemed to have granted consent or approval as the case may be. This form of wording follows the form included in other Network Rail Transport and Works Act Order.
3. Thames Water, as a water and sewerage undertaker has the benefit of the protection for owners of sewers or drains in article 19 and of other protective provisions for statutory undertakers included at Schedule 16 of the draft Order. Following discussions with Thames Water, it has been possible to reach agreement on a number of concerns that it had about the protective provisions or other parts of the Order.
4. However, there is still one final point in relation to the draft Order which has not been agreed between Thames Water and Network Rail.

**Deemed consent/approval**

5. Thames Water, through correspondence with Winckworth Sherwood has identified the outstanding matter as being deemed consent/approval or deemed refusal.
6. The matter in dispute is whether, if time elapses under Article 19(8) of the draft Order without a decision from Thames Water (or any other owner of the relevant watercourse, public sewer or drain) the consent required to discharge water under Article 19(3) or the approval of plans before the making of an opening into a public sewer or drain under Article 19(4) is deemed to be refused or deemed to be granted. Thames Water is seeking deemed refusal and Network Rail, following the form of such protective provisions as made in other TWAO, deemed approval.

7. In its Statement of Case, Thames Water identifies that the purpose of Article 19 “is to add to the Applicant’s existing rights to discharge into the public sewer under sections 106 and 118 WIA”. However, it goes on to state that “deemed consent is only appropriate where is no entitlement to condition the discharge, there is a limited right to refuse consent and where the contents of the discharge are governed strictly by WIA”. It explains that the WIA allows for deemed consent for s.106 discharges but not for s.118 discharges and it considers a discharge by Network Rail under Article 19 as more akin to a s.118 discharge.
8. Network Rail’s position is that the Article should remain as drafted, providing in Article 19(8) for a deemed consent. This is for the following reasons of principle:
- i. The consents and approvals required by Article 19(3) and 19(4) like the other protective provisions in the Order are for the approval of detail, rather than a consent equivalent to s.118: the in-principle decision on whether the works in a TWAO should proceed rests firmly with the Secretary of State in deciding whether to make the Order. At the time the protective provisions are implemented that in-principle decision will already have been made.
  - ii. The purpose of protective provisions is therefore to provide a streamlined process for approval of details by regulatory authorities or statutory undertakers. The requirement for deemed approval ensures that the authority considers the application in a timely way, whereas a requirement for deemed refusal may result in failure to consider the application and lengthy delays in the construction of the scheme while the matter goes to arbitration.
  - iii. Similar requirements for deemed approval are therefore provided in relation to highway authorities (articles 14 (temporary stopping up of streets), 16 (access to works) 9 (replacement and closure of footpath level crossings) and in the protective provisions for drainage authorities (paragraph 17(3) of Schedule 16). Although the provision for deemed approval is not in the Transport and Works Act model clauses it has been included in all recent TWA Orders made authorising railways (e.g. The Network Rail (Ordsall Chord) Order 2015, the Network Rail (Hope Valley Capacity) Order 2018, the Network Rail (Werrington Grade Separation) Order 2018, the London Overground (Barking Riverside Extension) Order 2017 and the London Underground (Bank Station Capacity Upgrade) Order 2015). The last two of the orders related to the area of Thames Water and the provision appears to have been accepted by them. Thames Water cites examples of development consent orders which do not include this provision (although in other cases such as the Hornsea One Offshore Wind Farm Order 2014 it has been included), but the Planning Act 2008 has a different regime and these were not railway projects.
  - iv. The reasoning for having a deemed approval in such protective provisions was considered very recently, in the context of the Environment Agency protective provisions and approved in the decision on the Network Rail (Werrington Grade Separation) Order. The inspector’s decision letter states at paragraph 301 to 303:-  
  
“ 301. Both sides cite various legislative provisions in support of their respective stances. However, I am convinced by the points made by Network Rail on this matter. Deemed approval is the established precedent in relation to a failure to determine details submitted pursuant to TWA Orders. In such a

*circumstance the protective provisions provide for approval of detail; at the time they are implemented the principle of the Scheme's acceptability will have already been determined, by the decision to make the Order. The EA is therefore being asked to approve detailed drawings for a scheme that has already been given consent by the Secretary of State, where matters such as environmental impacts and controls have already been fully considered by an independent body. This is a quite different situation to the regulatory position under the Environmental Permitting Regulations where the EA is asked to give consent to an application made to it at first instance. [198, 200, 224-6].*

*302. The form of protective provisions in TWA Order cases which include a deemed approval provision has been consistently adopted since the inception of TWA Orders in 1993 through to the present. There is no instance of a made TWA Order which includes deemed refusal. Although the EA relies on the terms of Development Consent Orders (DCOs) for its stance, DCOs are considered and made under a significantly different legislative and regulatory process. [202-3,227].*

*303. The protective provisions are a streamlined process in place of any normal arrangements. Their purpose is to provide a bespoke regime for delivery of the authorised works, not merely to replicate the regulatory provisions to be disapplied. Deemed refusal would create potential for delay in the construction of the Scheme through no fault of the applicant, with impact on costs to Network Rail and to passengers, whilst the parties go to arbitration. Avoiding unforeseen delay in the construction process is particularly important because possessions of the railway require careful planning and timing. Given the level of agreement that has already been reached between the EA and Network Rail as to the form that the drainage works should take, I consider it appropriate that the EA should be expected to determine any subsequent application to it for approval of details of the works within the prescribed period, and for potential for delay to the Scheme through a failure to do so to be avoided. [201, 204]."*

- v. Paragraph 33 of the decision letter dated 24 July 2018, states: "*The Secretary of State notes that a position of deemed refusal has been adopted in recent Development Consent Orders granted under the Planning Act 2008, as highlighted by the EA, but agrees with the Inspector that this is a significantly different legislative and regulatory process. For the reasons set out in IR 301, the Secretary of State agrees with the Inspector that the wording of the disputed protective provision clause should remain as proposed in the submitted draft Order (IR303).*"

The Order as made on 3 August 2018<sup>1</sup> therefore includes deemed approval throughout.

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<sup>1</sup> S.I. 2018 No.923 The Network Rail (Werrington Grade Separation) Order 2018

## **Conclusion**

9. In view of Thames Waters' concerns Network Rail has offered in an agreement outside the Order to extend, in this case, the period for consideration of the application to 56 rather than 28 days and also to commit to provide Thames Water, prior to making any application for any approval consent under article 19, with a programme for approvals and to engage in early discussions of the proposals. This will ensure that Thames Water should not receive any applications without being prepared for them.
10. If Thames Water's provisions were to be accepted it would create a risk of delay to implementation of the Order. The relevant provision in the Order follows the standard approach in all recent TWA Orders authorising railways.
11. Network Rail therefore submits that the Secretary of State should resist Thames Water's proposals for deemed refusal for the reasons given above.

**Winckworth Sherwood LLP**