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5 April 2019

Ref: OBJ/242

Dear Mr Thompson,

The Network Rail (East West Rail Bicester to Bedford Improvements) Order – Ecology

I write in relation to the Network Rail (East West Rail Bicester to Bedford Improvements) Order (the Order), Natural England's representation (ref: OBJ/242) dated 5 September 2018, and the subsequent engagement between Network Rail and Natural England so far as it relates to ecology matters.

Letter of no impediment

One of the functions of Natural England in relation to an application for planning permission is to indicate to the planning authority – in this case the Secretary of State for Transport in his consideration of the application for the Order and Network Rail's Request for Deemed Planning Permission (NR08) – whether, in a case in which a derogation licence will be required under the Habitat Regulations in order lawfully to carry out the proposed development, there is any good reason to anticipate that the requisite licence or licences will not be granted at the appropriate time. In the present case, it is not in issue that construction of the works for which the Order, if made, grants deemed planning permission will require the grant of licences under the Habitat Regulations. The relevant question, therefore, for the Inspector to consider in his report to the Secretary of State is whether the works to be authorised by the Order would be "*unlikely to be licensed pursuant to the derogation powers*": see *R (Morge) v Hampshire County Council* [2011] UKSC 2 at [29] per Lord Brown of Eaton-under-Heywood. See also *R (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin) at [96] per Lindblom J.

It is for this reason that Network Rail is seeking a letter from Natural England confirming that it sees no good reason to anticipate that the requisite licences will not be granted at the appropriate time, enabling the works authorised by the Order lawfully to be carried out. This will enable the Inspector to compile his report to the Secretary of State and notify him that there is no impediment on that account to the Order being made.

It is Network Rail's position that, in the light of the clear statement of the correct approach to inquiry into this question by Lord Brown in paragraph 29 of the *Morge* decision, it is for Natural England to bring forward positive reasons and evidence demonstrating why (if that is Natural England's view) the requisite licences are unlikely to be granted in the event that the Order is made and Network Rail proposes to proceed with the authorised works.

Licence applications

Network Rail has submitted 8 draft licence applications to Natural England in respect of ecological mitigation which is proposed in connection with the EWR2 Scheme to be authorised under the Order. Network Rail has also submitted 7 additional draft licence applications which are linked with planning applications for the wider EWR2 Scheme and one that relates to permitted development; these are separate to applications for licences which relate to the proposed Order. It has also submitted various other documents related to the proposed mitigation, and further information as requested by Natural England.

The majority of these draft licences were submitted to Natural England between February and mid-March of this year, with the latest being submitted on 18 March 2019. These have been discussed with Natural England on numerous occasions and, although we believe that several matters have been resolved, there remain matters outstanding or where we have yet to receive an indication from Natural England as to its position. Natural England has had several weeks and, in some cases months, to consider these applications.

A full list of the documents submitted and the dates on which they were provided by Network Rail is at Annex 1 to this letter. A summary of the current status of negotiations is as follows.

Bats – Route wide

The route wide draft licence application in relation to low or moderate significance roosts was submitted to Natural England on 18 March 2019. Network Rail has not yet received any comments on this draft application and believes that it has provided information that Natural England requires in relation to this draft licence application.

Bats – Swanbourne Station

The Swanbourne Station roost destruction draft licence application was submitted to Natural England on 22 February 2019. Network Rail is yet to receive full comments on this draft application. However, Natural England has indicated that any comments it has are minor and can be resolved in due course. Natural England has not indicated any substantial or in principle concerns with this draft licence.

Bat mitigation strategy

This strategy document was submitted by Network Rail on 28 February 2019. On 20 March 2019, Natural England raised some queries in relation to radio tracking and trapping data in relation to colony size to which Network Rail responded on 4 April 2019. Network Rail also sent a requested Collision Risk Analysis on this date. Network Rail understands that it has now provided Natural England with all requested information in relation to the bat mitigation strategy.

Badger

The draft badger licence application was submitted to Natural England on 20 February 2019. Natural England has made two further requests for information in relation to further baseline data and sett locations. Network Rail provided responses to these requests on 20 March and 22 March and considers that it has provided Natural England with all the information necessary to enable Natural England and Defra to carry out disease screening. Although baseline survey data and detailed design information will need to be updated prior to submission of the final licence application, Network Rail considers that it has shown that it is feasible to mitigate the loss, damage and disturbance of badger setts as a result of the EWR2 Scheme.

Great crested newts – Section wide licences

The draft licence applications for Route Sections 2A and 2B of the EWR2 Scheme were submitted on 1 March 2019 with those for Sections 2D and 2E submitted on 16 March 2019. Network Rail understands that Natural England is reviewing these and will not be sending full comments on them before the end of the public inquiry.

Natural England has provided some initial comments verbally relating to the impacts to great crested newts described in the licences and the assessment of the vulnerability of meta-populations. However, no written comments have been provided and there has been no clarification of what information Natural England would expect to see in addition to that already provided.

Network Rail considers that the comments are in relation to specific mitigation methods used, rather than consideration of whether the EWR2 Scheme overall is capable of providing adequate compensation to ensure that the favourable conservation status of great crested newts is preserved. Network Rail considers that issues of this nature should be addressed and agreed for the final licence application submission and should not affect whether the EWR2 Scheme is licensable in principle.

Great crested newts – Compound and enabling works licences

All draft licence applications relating to early works compounds and enabling works were submitted on 27 February 2019. These compound works are the subject of separate Town and Country Planning Act planning applications, and do not form part of the works for which permission is sought under the Transport and Works Act Order application. The Section 2C enabling works will be carried out under Network Rail's permitted development rights. Natural England has provided comments on some of these draft licence applications. Network Rail considers that it has adequately responded to these comments and, given the low magnitude of impact of these works, has demonstrated that it is feasible to mitigate the impacts of the works and maintain the favourable conservation status of the great crested newts.

Otter

The draft licence application in relation to otters was submitted on 22 February 2019, with further information including all watercourse crossing along the EWR2 Scheme, even where licensable effects on otters are not predicted, being submitted on 14 March 2019. Natural England has not provided written comments on these documents. Some verbal queries have been raised with Network Rail about baseline survey information. Network Rail considers

that, while it is important that areas where they have not had access so far receive adequate survey effort prior to the construction of the EWR2 Scheme, it has demonstrated that where licensable impacts have been identified or anticipated, suitable mitigation and compensation has been incorporated.

Statement of Common Ground

Natural England has indicated that it is content to agree a Statement of Common Ground in relation to dormouse, Sites of Special Scientific Interest (SSSIs), net gain in biodiversity and barn owl. In relation to barn owl, we understand that Natural England requires the provision of further information and we will contact you shortly to determine exactly what is requested and whether Network Rail is able to provide this information at this stage. For SSSIs and net gain, Natural England has stated that these would be subject to suitable conditions; Network Rail does not know what these conditions are or to what extent it can provide appropriate reassurance to Natural England that it has not already offered.

Planning conditions and opportunity for further comment

As set out above, Natural England has requested further detail which it would like to see before it is willing to progress matters further. Natural England is, we understand, concerned that Network Rail has not provided full details of the proposed mitigation.

Network Rail has submitted further information to Natural England, as requested, and has also presented existing information in alternative formats to facilitate Natural England's consideration of the draft applications. Given the level of detail that is required for a Transport and Works Act Order, Network Rail has not yet reached the detailed stage of design that would enable it to provide the remaining information requested by Natural England at this point in the process. It is for that reason that applications for Transport and Works Act Orders will often include a mechanism for further oversight by Natural England in the form of a condition attached to the request for deemed planning permission. That is the case with this Order.

As mentioned above, Network Rail has made an application to the Secretary of State for Deemed Planning Permission (NR08) under Rule 10(6) of the Transport and Works (Applications and Objections Procedures) (England and Wales) Rules 2006. The planning permission, if granted, would be subject to the planning conditions set out in the application, as revised following discussions with the local planning authorities, Natural England and the Environment Agency. Condition 11 of the proposed planning conditions concerns ecology. It states that no stage of the development may commence until there is an ecological management plan which has been approved by the local planning authority in consultation with Natural England and the Environment Agency. Network Rail has proposed an update to this condition following discussions with Natural England, which clarifies that the ecological management plan will, among other things, include a programme of monitoring to ensure adaptive management.

It should therefore be clear that Natural England will have further opportunity to consider the ecological mitigation measures proposed by Network Rail once the project is at a more detailed stage of design. However, for the more immediate purposes of the Inquiry and the Secretary of State's decision on the Order, Network Rail is of the view that it has submitted all the draft licences, other documents and information which would allow Natural England to

form a view on the mitigation proposed and determine whether it is able to issue a letter of no impediment, acting in accordance with the correct legal approach as set out in the opening paragraphs of this letter.

We would be grateful if you are able now to confirm whether or not Natural England is able to issue such a letter, based on the information currently available to you. If you are not, we would welcome a meeting to discuss Natural England's reasons why that is the case, and what additional information Network Rail can provide; we have suggested to you by way of email a meeting at your earliest convenience next week for this purpose. In any event, could you please let us know as soon as possible and in precise terms what further information you require, in order to be able to make a decision to issue a letter of no impediment (rather than a determination of the licence applications) prior to the scheduled closure of the Inquiry on Thursday 2 May 2019.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'S Moeng', written in a cursive style.

Sophie Moeng

Consultation Manager

For and on behalf of Network Rail

ANNEX 1

DRAFT LICENCE APPLICATIONS AND OTHER DOCUMENTS SUBMITTED

	Document	Submission date
1.	Bat – Swanbourne Station Roost Destruction Licence	22/02/2019
2.	Bat – Mitigation Strategy / Scheme Wide	28/02/2019
3.	Bat – Scheme Wide Low Feature Bat Roost Licence	18/03/2019
4.	Bat – Collision Risk Analysis	08/4/19
5.	GCN – Section 2A Phase 3 – 2A2 Compound Licence	07/12/2018; Reasoned Statement submitted 19/02/2019
6.	GCN – Section 2A Phase 3 – 2A3 Compound Licence	Outline of proposal submitted 08/02/2019 Natural England has agreed that a full draft licence does not need to be submitted at this stage.
7.	GCN – Section 2B/C Phase 1 - 2B/C Enabling Works Licence	15/02/2019
8.	GCN – Section 2B/C Phase 2 - Compounds (B1) Licence	15/02/2019
9.	GCN – Section 2B/C Phase 2 - Compounds (B3) Licence	15/02/2019
10.	GCN – Section 2B/C Phase 2 - Compounds (B4) Licence	15/02/2019
11.	GCN – Section 2B/C Phase 2 - Compounds (B6) Licence	18/02/2019
12.	GCN – Section 2A Phase 3 – 2A4 Compound Licence	27/02/2019
13.	GCN – Section 2A Scheme Wide Masterplan / Licence	28/02/19
14.	GCN – Section 2B/C Phase 3 - 2B/C Scheme-wide Masterplan / Licence	01/03/2019
15.	GCN – Moco Farm addendum	12/03/2019
16.	GCN – Section 2D Scheme-wide Master Plan / Licence	16/03/2019
17.	GCN – Section 2E Scheme-wide masterplan/Licence	16/03/2019

	Document	Submission date
18.	Badger – Licence	20/02/2019
19.	Otter – Licence	22/02/2019
20.	Otter – additional information	14/03/2019
21.	Barn Owl – additional information	19/03/2019
22.	Dormouse – additional information	20/02/2019
23.	Water vole – additional information	20/02/2019