

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

Thames Water Utilities Limited's ('TWUL') response to Network Rail's ('NR') note on TWUL's objection (OBJ/226), statement of case, proof of evidence and other correspondence in relation to the Order.

Background

- 1) NR submitted a note in response to TWUL's objection on 5 February 2019 ('the Note').
- 2) NR and TWUL have been in discussion regarding TWUL's objections.
- 3) Other than TWUL's objection to Article 19 of the Order, all other objections are capable of agreement between TWUL and NR, although an agreement has not yet been finalised and as such TWUL's objections are therefore not yet withdrawn.
- 4) In relation Article 19(1), NR have confirmed that they have amended the draft Order submitted at the start of the Inquiry to remove the word 'operation' from Article 19(1). TWUL is grateful for this amendment and has no further objections relating to the reference to the words 'operation' or 'maintenance' in Article 19(1).
- 5) In relation to Article 19(3), NR has accepted that TWUL can impose conditions on volumes and composition of discharge. However, if deemed consent in Article 19(8) is not removed, the risks of uncontrolled volumes and compositions remain, as NR could discharge water without any control.
- 6) TWUL's objection to Article 19(4) relating to connections into TWUL sewers and drains is linked to its objection to Article 19(8) and therefore remains outstanding.
- 7) TWUL's objections to Article 19(8) remain outstanding, as NR is not prepared to agree to remove the sub-clause and specifically the reference to deemed consent.
- 8) In relation to TWUL's objection to the deemed consent / approval provision in Article 19(8), NR say at point 2 of the Note that Article 19 gives NR a right to use any watercourse, sewer or drain for the drainage of water into connection with the construction, (operation – see point 4 above, this word has now been removed from the Order) and maintenance of the authorised works. This is incorrect and a common misconception. TWUL has witnessed this misconception causing problems for promoters, developers and the general public more widely where they have not anticipated that their discharges may not be suitable to go into public sewer network and that requests for inappropriate discharges will be refused. Article 19 does not give NR an absolute right to use a watercourse, sewer or drain, because in accordance with Article 19(3) NR must not discharge water without the consent of the owner of the watercourse, sewer or drain, and the consent may be subject to conditions and may be reasonably refused. NR say that the form of wording in Article 19(8) has been included in previous NR orders. Having reviewed the orders that NR have applied for since 2011, it would appear as if NR have included deemed consent on the discharge of water provision in many, but not all orders. However, of the two NR orders in TWUL's area (Blackthorn to Piddington (2015) and Northumberland Park to Coppermill Lane in 2017), neither contained a discharge of water provision. The issue of deemed consent on this provision is not therefore something that TWUL has discussed previously with NR.

Response to NR's note on the objection to deemed consent / approval in Article 19(8)

- 9) As detailed in paragraph 6 of NR's note, TWUL's concern regarding Article 19(8) relates to what happens if time elapses under Article 19(8) without a decision having been made by TWUL. Although the Infrastructure Planning (Model Provisions) Order 2009 (the 'Model Provisions') do not contain a provision allowing for deemed consent in the discharge of water provision, NR has included it in the Order without consultation or consent from TWUL. TWUL is not happy to agree to the inclusion of this provision in the Order for reasons already stated in its evidence and has requested that Article 19(8) be removed in its entirety so that the article is consistent with the Model Provisions, or has suggested that

deemed consent could be replaced by deemed refusal if NR's concern is a lack of decision capable of challenge.

10) In response to paragraph 8 of the Note, TWUL's position is as follows:

- i) NR say at paragraph 8(i) that the consents and approvals in Article 19(3) and (4) are about the approval of detail rather than a consent equivalent to section 118 of the Water Industry Act 1991 ('WIA'). TWUL disagrees with this conclusion. Article 19 gives NR a right to discharge water into sewers and drains with the consent of TWUL. The consent can be subject to conditions and can be reasonably refused by TWUL. Similarly, section 118(1) WIA gives a person who owns trade premises a right to discharge trade effluent from their premises into TWUL sewers, but only with the consent of TWUL, which consent can be subject to conditions (section 121 WIA) and which can also be refused. NR appear to be suggesting that Article 19 gives it an approval in principle to discharge into TWUL sewers. This is incorrect. Article 19 does not give an approval in principle, but rather a right to ask for consent at first instance to discharge water into TWUL sewers and drains.
- ii) NR say at paragraph 8(ii) of the Note that *protective provisions* provide a streamlined process for the approval by regulatory authorities and statutory undertakers. However, the protective provisions provide a process for the approval of the detail of *works* authorised by an order, which in this instance is the construction of the railway. Article 19 is not a protective provision, but rather a right that NR is entitled to rely on, but which can be refused. Article 19 does not contain a process for the approval of the detail of works authorised by the Order i.e. the construction of the railway, but gives NR a right to ask for consent to discharge water. If an application for consent were not considered in a timely way the consequences would be similar to a situation where TWUL refused consent under Article 19, which is that NR would have to make alternative arrangements for storing and discharging water which does not involve the sewerage undertaker's network of sewers such as by obtaining consent from the owner of a watercourse. In relation to NR's comments regarding deemed refusal, for the avoidance of doubt, TWUL is content for Article 19 to follow the wording in the Model Provisions, which is for the article to refer neither to deemed consent nor deemed refusal. TWUL suggested deemed refusal as a means of overcoming what it expected to be the rationale for including deemed consent in this Order, which is a lack of determination either way.
- iii) In relation to paragraph 8(iii) of the Note, deemed consent may be included in provisions applicable to other bodies e.g. highway authorities, but these provisions may not hold the same risks and implications for these authorities as Article 19(8) does for TWUL. On this point it should be noted that although Article 19(8) also applies to the owners of watercourses, because Article 19(7) states that nothing in Article 19 overrides the requirement for an Environmental Permit, NR is unable to discharge anything damaging into a watercourse without an environmental permit where applicable, as it would be a criminal offence to do so. This provides an effective failsafe to the rights in the article as owners of watercourses have the protection of the Environmental Permitting Regulations. If NR discharged water into a sewer that it would not be able to discharge into a watercourse without an environmental permit, but did so by deemed consent, TWUL could face prosecution under the Environmental Permitting regime if that discharge flowed untreated to a watercourse. As detailed in TWUL's statement of case and evidence, under section 111 WIA it is a criminal offence to discharge anything into a sewer which could injure the sewer or interfere with its free flow, such as contaminated water or high volumes of water. Deemed consent in Article 19 is inconsistent with section 111 WIA and undermines the protection the WIA generally affords the sewer network and treatment works and the downstream environment.
- iv) In relation to paragraph 8(iii) of the Note, deemed consent/approval has been included in some, but not all, TWA orders authorising railways and although two recent TWA orders in TWUL's area (Bank and Barking Riverside) have included deemed consent /

approval of the discharge of water provision, this should not be taken as acceptance by TWUL of the wording of such orders. Although objections were raised in the Bank order, TWUL does not at this stage have any detail about the application on the Barking Riverside Order. In any event, the risk has been assessed and for the reasons set out in TWUL's statement of case and evidence, TWUL wishes to maintain this important objection and ensure that it does not continue to appear in TWA orders.

- v) In relation to the point in paragraph 8(iii) of the Note regarding the inclusion of deemed consent in all recent TWA railway orders, TWUL does not consider that the type of works e.g. railway works or otherwise, or whether they were being carried out under a TWA order or development consent order ('DCO') is relevant to the issue as the wording of the discharge of water provision in both TWA orders and DCO's are the same and are based on the Model Provisions and the risks and implications for TWUL are the same in all cases, which is that the outcome of having deemed consent in the discharge of water provision is the discharge of unknown quantities and composition of water into TWUL sewers without control. Although numerous orders which contain the discharge of water provision (many do not contain the provision at all) contain a deemed consent provision, many do not contain deemed consent, but follow the wording of the Model Provisions, namely: The Blackpool Tramway (Blackpool North Extension) 2017, The Transport for Greater Manchester (Light Rapid Transport System) 2016, The Midland Metro (Wolverhampton City Centre Extension) Order 2016, The Midland Metro (Birmingham City Centre Extension) Order 2016, The Network Rail (Tinsley Chord) Order 2015, The Ashton Vale to Temple Meads and Bristol City Centre Rapid Transit Order 2013, The Transport for Greater Manchester (Light Rapid Transit System Second City Crossing) Order 2013, The Crossrail (Kensal Green) Order 2013, The Network Rail (Hitchin Cambridge Junction) Order 2011, The Nottingham Tramway (Nottingham Express Transit System) Order 2011. There is no indication in the decision letters on the NR Tinsley Chord or NR Hitchin to Cambridge Junction Orders why the discharge of water provisions in these orders did not include deemed consent. Furthermore, TWUL raised the issue on the Silvertown Tunnel DCO and the order was amended by agreement to remove deemed consent as far as the discharge of water provision was concerned. In relation to the discharge of water provision, the Thames Tideway Tunnel DCO contained a deemed refusal provision rather than deemed consent and the Crossrail Act 2008 did not include deemed consent but followed the wording in the Model Provisions (schedule 2, paragraph 8). The absence of deemed consent in these significant infrastructure projects did not appear to cause a significant issue to the promoters in those cases. NR have not explained why the inclusion of deemed consent / approval on the discharge of water provision is important in this case, nor has it given any examples of situations where it has been forced to rely on a deemed consent provision in relation to the discharge of water provision as far as TWUL is concerned.
- vi) In paragraph 8(iv) of the Note NR refer to the decision in the Werrington Order 2018, which they say includes the reasoning for having deemed approval in *protective provisions*. As detailed above, Article 19 is not a protective provision, but rather contains a right for NR to discharge water to TWUL's sewers with consent and subject to conditions, which consent can be refused. The relevant paragraphs of the Inspector's decision on the Werrington Order (paragraphs 301-303) have been included in NR's note at paragraph 8 (iv). By way of background, the decision in paragraphs 301-303 of the Inspector's decision related to an objection by the Environment Agency ('EA') to the deemed consent provision in paragraph 18(3) of Schedule 12 of their protective provisions. As such the decision did not relate to the discharge of water provision. The protective provisions in question required approval from the EA before NR could begin to construct 'specified works', which were defined in paragraph 17(2) of Schedule 12 as 'so much of any work or operation authorised by the order which was in, on, under, over or within 16m of drainage works or which could affect drainage works'. The protective provision therefore related to gaining consent before starting the works

authorised by the order. Article 19 consent does not relate to works or discharges that have already been approved in principle by the Order; the Order does not grant approval in principle for any such discharges, but simply gives NR a right to apply to discharge water with consent and subject to conditions, which consent can be refused.

- vii) The Inspector's comments at paragraph 301 of the decision letter say *'the protective provisions provide for approval of detail...the EA is therefore being asked to approve details of 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 quite different 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'*. Unlike the protective provisions where TWUL and other authorities are asked to give approval of the detail of works being carried out as part of the scheme already approved by the Order, in this instance of the construction/improvement of the railway, applications under Article 19 are applications at first instance. No information about the proposed use of TWUL's sewer network has been provided with the application documents, proofs of evidence or otherwise, so up until the point of the request to discharge under Article 19 neither TWUL nor the Inspector / Secretary of State will have seen any details of the proposed discharges into sewers, they do not form part of the works authorised by the order, and such proposals will not have been subject to the review of environmental impacts and controls by an independent body or by TWUL. Article 19 applications are applications at first instance, which is why TWUL says that the decision in the Werrington Order inquiry does not support the case for deemed consent in Article 19.
- viii) In relation to paragraph 302 of the Inspector's decision, although deemed consent may have been consistently applied to *protective provisions* relating to the approval of detail, deemed consent has not been adopted in relation to the discharge of water provision on all TWA orders since 1993. Although we are only able to easily identify decisions made since 2011, since that time, of all 23 orders made which include a discharge of water provision (many orders do not contain the provision at all), deemed consent has only been applied to 13 orders. 10 orders have followed the Model Provisions and refer neither to deemed consent nor deemed refusal. We are unable to identify an instance where deemed refusal has been adopted in a TWA order, but it was adopted in the Thames Water Utilities Limited (Thames Tideway Tunnel) DCO in 2014. Although the regimes governing TWA orders and DCO's may differ, as the wording of the discharge of water provision in both types of order derive from the Model Provisions and because the risks and implications of the provision in both TWA order and DCO cases are the same, we believe it is valid to refer to DCO decisions here. In that regard, up until 2016 of all DCO's made only 16 out of 38 contained deemed consent. The others followed the Model Provisions other than the Thames Tideway Tunnel Order. As detailed above, deemed refusal has only been suggested by TWUL as a way to give NR a decision on applications where time has lapsed. TWUL would prefer for the provision to follow the form in the Model Provisions, which many TWA orders, DCO's and the Crossrail Act 2008 follow, which is to remove Article 19(8) in its entirety.
- ix) In relation to paragraph 303 of the Inspector's decision, this refers to protective provisions and says that they *'provide a bespoke regime for delivery of the authorised works...deemed refusal would create potential for delay...of the Scheme...the EA should be expected to determine any subsequent application to it for approval of the details of the works'*. For the reasons set out above, Article 19 is not a protective provision, does not relate to applications for the approval of detail but rather to applications at first instance which can be refused by TWUL, and refusal or lack of determination should not cause delay to the scheme, as NR is entitled to apply to discharge water to watercourses or to make other arrangements to store and discharge of water other than through the public sewerage network, which should primarily be used to remove and treat domestic and trade effluent from homes and businesses.

Conclusion

- 11) TWUL has offered NR a process for considering applications under the discharge of water provisions so that this can be included in an agreement outside of the Order. If followed, a process should ensure that all NR applications are received by the appropriate TWUL department and processed in accordance with a programme that TWUL is able to administer. This should give NR comfort that applications will be considered in a timely manner. NR appears willing to agree to a process subject to the fall back in the process being the deemed consent provision in Article 19(8). This fall back provides no failsafe to the process and does not resolve the issue regarding the risks and implications of having a deemed consent provision in the Order.
- 12) Regardless of any process included in an agreement outside the Order, if deemed consent is contained within the discharge of water provision of the Order, it sets an continuing unhelpful precedent which TWUL will, for the reasons highlighted in TWUL's statement of case and evidence result in significant potential risk to the public sewerage network, the environment and the service which TWUL provides to customers which it has a statutory duty to serve. If decisions are not given within a specified period of time, this may be because a stage in the process has failed, but the solution is not to carry on without consent, as this could cause damage and pollution. It is incumbent on everyone, including NR to make sure that what goes in a sewer is safe and relying on deemed consent is not the responsible way of ensuring this.
- 13) Although deemed refusal may not be the ordinary form of wording for TWA orders, TWUL suggested this amendment to give NR a decision in cases where time had elapsed under Article 19(8). However, TWUL would prefer for Article 19(8) to be removed entirely and for the Order to refer neither to deemed consent nor deemed refusal.
- 14) For the reasons set out above and in TWUL's statement of case and proof of evidence of Jane Battle, TWUL respectfully requests the Inspector and Secretary of State remove Article 19(8) of the Order or replace deemed consent with deemed refusal.