

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

Transport and Works Act 1992

OUTLINE SUBMISSIONS ON BEHALF OF BUCKINGHAMSHIRE COUNTY COUNCIL AND AYLESBURY VALE DISTRICT COUNCIL (OBJ/232)

Introduction

1. These brief submissions should be read together with the written evidence of Dr Sarah Cox on behalf of Buckinghamshire County Council and Aylesbury Vale District Council (“**the Councils**”) and in light of the oral evidence given at the inquiry.
2. The Councils are members of the East West Rail Consortium and are strategic supporters of the project in general and the scheme promoted by the Order. However, that corporate position does not mean that the ecological consequences of the scheme fall away. The Councils therefore support the scheme, but not as is currently proposed on the information before the inquiry (Cox XX). The essential reason for that is the extent of unmitigated impacts on important habitats and species that it would give rise to and the lack of confidence that mitigation would be capable of resolving those impacts within the existing scheme design.
3. The Councils want the scheme to succeed. Among other things it will facilitate much needed housing and regeneration. For that reason also, the Councils would be affected by the situation where the scheme is consented through this process but cannot be delivered due to the impossibility of resolving matters left over to conditions or the inability for NR to obtain species licences. That is why the ecological issues need to be addressed now.
4. A curiosity of this case is that part of the problem for Network Rail (“**NR**”) is that instead of carrying out more surveys of the baseline position (in particular for bats, but also for

other species, such as barn owls) they have assumed a “worst case” position (see e.g. ES para.9.3.4). That in turn has the following negative consequences:

- Actual impacts on habitats and species are not understood because there is no knowledge (for example) of roosts and foraging/commuting habitat;
 - It is therefore impossible to understand how most effectively to design and locate mitigation; and
 - It undermines the mitigation hierarchy: to avoid, mitigate and only then compensate (on site/off site) (Cox Ex).
5. In other words, it is generic rather than targeted. It potentially misses the most important and distinctive features, such as maternity roosts.
 6. Beyond that, the Councils’ key concerns are the extent of ecological impacts and the lack of detail provided in what the ecological compensation package will comprise.
 7. It might be possible through the provision of further information to overcome some or all of the Councils’ concerns (leaving the impacts on bats and GCN largely to NE). However it is deeply frustrating to have to attend the inquiry to be asked (in XX) about what that information is, when it has been requested from NR for many weeks and not provided (Cox proof paras.48-52, PS para.1.9 and Ex).

Policy

8. The policy position is relatively clear. By NPPF para.170d decisions should minimise impacts and provide net gains for biodiversity. Para.174 reinforces the current positive approach. Para.175 provides guidance on decision-making, including that impacts on SSSIs should normally not be permitted and at (a):

“if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused”.
9. That is an expression of the mitigation hierarchy (avoid, mitigate, compensate) that applies in this case. It is supported by a wealth of guidance, including the Chartered Institute of Ecology and Environmental Management (CIEEM) guidelines on Ecology Impact Assessment (Cox Proof paras.3.17-3.18).

10. The emerging Vale of Aylesbury Local Plan (submitted to the Secretary of State for approval) reiterates the mitigation hierarchy at Policy NE2b and states at Policy NE2e that “[d]evelopment which would result in damage to or loss of a site of biodiversity or geological value of regional or local importance including habitats of principal importance or the habitats of species of principal importance will not be permitted except in exceptional circumstances where the need for, and benefits of the development significantly and demonstrably outweigh the harm it would cause to the site, and the loss can be mitigated and compensation provided to achieve a net gain in biodiversity/geodiversity” (underlining added).
11. It is a necessary corollary of this policy protection that there is a need adequately to assess the baseline position, to understand the impacts and if they cannot be avoided, mitigate or, as a last resort, compensate.

Minor issues

12. Three matters raised by the Councils should now be capable of resolution as follows. First, the Councils’ concerns about the lack of reference in the NR documents to potentially affected designated sites (the Western Turville Reservoirs SSSI and six LWSs/BNSs) is likely to be resolved by an explanation from NR of the scoping undertaken and clarification about what SSSIs certain IRZs discussed in ES Ch.9 apply to. Second, the confusion over the baseline position for Ancient Woodland is resolved by the explanation provided in NR’s email of 10 April 2019 and the Councils no longer maintain a concern about the haul road at Salden Wood as long as the commitments (as to the planting of scrub on the southern and south western boundaries) are included in the schedule of mitigation. Third, while the Councils find NR’s failure properly to assess the impact on barn owls inexplicable (a consequence in part from an “excessively precautionary” approach)¹, they accept that the issue would fall away if NR is required to submit a suitable mitigation strategy (as was promised by NR: SW proof para.4.1.93).

¹ As Dr Cox explains mitigating for such a large number of barn owls may result in higher levels of mortality than without the mitigation (as it draws otherwise unaffected owls toward the railway line) (PS 3.15)

European protected species

13. The Councils accept that Natural England is the lead expert regulator for European Protected Species, including bats and great crested newts. The Inspector should attach very significant weight to outstanding objections from that body, especially carefully considered and strongly worded as they are in this case.² That said, Dr Cox has reviewed the GCN recent draft licence submissions and that causes the Councils not to maintain a separate concern as to that species. On bats, it is a different matter. For the reasons set out in the Councils' evidence (Cox proof paras.4.12-4.14 and 4.23-4.32) the Council agrees that the evidence before the Inspector on baseline position for bats, including the rarest of species, is inadequate and (Cox proof paras.5.18-5.27) that the mitigation proposed cannot be said to maintain the favourable conservation status of the species. A licence would therefore be unlikely to be granted under the relevant legal tests.

Ecological compensation sites

14. As Dr Cox noted, the information on ECSs in Appendix 9.13 is "extremely vague" and it is difficult to understand how the ECSs will be able to deliver their objectives (Ex). The general point is the lack of detail:

- a. Lack of information or rationale as to how the ECSs were selected and/or scoped out;
- b. Lack of detail of habitat areas, including in particular the feasibility of providing a large number of objectives/habitat types in a single small site (Dr Cox gave as an example ECSs B10 and D1);
- c. Lack of information about the feasibility of the creation of habitats, a particular issue for the creation of lowland meadow (which is mentioned as a component for a number of the ECSs including B7, B9, B10, B14 and B17) and ancient woodland translocation;
- d. Lack of detail about the existing ecological quality, condition or function of the ECSs;
and

² See R (Prideaux) v Buckinghamshire CC [2013] EWHC 1054 (Admin): "Natural England is the "appropriate nature conservation body" under the regulations. Its views on issues relating to nature conservation deserve great weight. An authority may sensibly rely on those views. It is not bound to agree with them, but it would need cogent reasons for departing from them" (per Lindblom J at 116)

- e. Lack of information as to the functional connectivity of the ECSs.
15. The consequence of this is that the Councils are unable to advise the Inspector as to whether the package of ECSs presented (a) adequately address the reported impacts, (b) are feasible and (c) do not result in additional negative impact that themselves require mitigation (or at least consideration).
16. This is not the counsel of perfection. It is not to say that detailed design must be done now. It is a more basic point that essential information about how serious impacts forecast by NR to arise from the scheme should be addressed at the time that the scheme is consented. It would be unsound to simply leave this to post-Order clarification.
17. Overall, the Councils are unable to have confidence that the package of ECSs presented will be able adequately to mitigate for the important ecological features affected by the scheme (Cox Ex). On one level this is unsurprising: it is consistent with NR's *generic* calculation of an overall net loss of 432 biodiversity units. The score is of real concern, but given the lack of detail as to what compensation can actually be provided in the ECSs, the loss in real terms may be even greater.
18. Further, given the large net loss accepted by NR, the decision taken by NR to scope out 14 possible ECSs is highly questionable (Cox proof para.5.29). These sites were said to be "no longer required": a claim that is inexplicable given the reported net loss.
19. Moco Farm (ECS B28) does not enhance the ECS offer, but adds to the problems. It does not appear to be offered as *additional* compensation, but as a substitute for ECSs B9, B10 and B17 (NR 238). There is some consensus that the site is problematic: Cox PS para.3.21; Crutchley PS paras.3.2.24-3.2.25; Wray rebuttal (NR 54/1) para.1.1.11³). This tends to illustrate a wider problem: the ECS package is not robust and closer attention reveals real problems with the deliverability of what the sites are sought to provide (namely the attention given through the inquiry process to ECS B28).
20. Overall, the Councils' concern is that it is sought to do too much in too few ECSs and too little detail has been provided to give any confidence that they will be able to achieve that. While it became apparent during XX of Dr Cox that further information will now be

³ Noting that it is more than 2km from the affected GCN habitat and that disease screening would be required: "[i]t is therefore a less desirable solution than ECS B10" (see also para.1.1.23)

forthcoming, the further information necessary is too fundamental to leave to conditions.

21. A last point on the ECSs is the mechanism for monitoring and maintenance. Some level of management must be achieved. Draft condition 11(a) (NR 256) goes some way towards this, but presents potential issues for enforcement. A more conventional and effective approach would be to ensure that agreements (whether under the NERC Act or otherwise) were entered into.

Biodiversity loss

22. As above, the scheme as presented will have very significant impacts on habitats and species of principal importance, including the full range of protected bat species.
23. This is shown in the substantial adverse score presented from NR's biodiversity metric (FEI Appx 9.16 Table 4.2). There are four important provisos to this figure.
24. First, the use of a biodiversity metric is no substitute for the need to avoid, mitigate and only as a last resort compensate for impacts on important ecological features.⁴
25. Second, the NR metric is notably "generous" compared to other metrics that are referred to in the evidence (Wray proof Appx B Table 2.2 gives the WCS BIA metric a showing a negative value of 984 units and the Defra 2012 metric 681 units: the difference is largely accounted for by the more optimistic calculation of biodiversity offsetting from the ECSs in the NR metric).
26. Third, as above, there are serious questions about ability of ECSs to deliver what it is said they can deliver.
27. Finally, it is not clear that NR still relies upon the NR metric or the calculations done under it. EWR's response to the Biodiversity Instruction (NR 208) explains that NR will update the calculations assuming the "Defra 2.0 metric" (and providing net gain). That response indicates that "[t]here is still ... likely to be a net loss". No recalculation however is before the Inspector.
28. It is impossible without this substantial further work having been undertaken to understand the full ecological implications of scheme. It is unclear whether the further work might have implications for the design of scheme, including the need for additional

⁴ Those affected are listed, for example, at ES section 9.8

avoidance, mitigation or compensation measures. In any event, the position before the Inspector is a very substantial net loss.

Net gain

29. Given the Biodiversity Instruction (NR 207) it is now common ground that net gain is a proper policy aim for the scheme.⁵
30. Draft condition 11 (NR 256) will be the subject of further discussion. 10% is laudable aim. However, it would not be reasonable simply to rubber stamp that intention without some sense that it can be achieved for the scheme as designed. That is particularly important given the emphasis in the Defra metric 2.0 on connectivity (Cox proof para.6.12).
31. The Councils consider that there are opportunities for providing a level of net gain that need to be explored – including in particular enhancements to local LWSs and BNSs (Cox proof para.6.11). There appears, as yet, to have been little movement in this regard (Cox Ex).
32. Therefore, while the Councils support the aim, they consider that further work is needed from NR to show that it can be achieved by the project in a reasonable timescale.
33. A difficulty for the scheme is that while the delivery of net gain was part of the original intention (in the 2017 proposals), it was dropped for the application, and then added back in later. The task of retrofitting the scheme so that it can now deliver 10% net gain is laudable but ambitious.

Conclusion

34. As Dr Cox stated in her conclusion, the Councils' position is that on the information currently before the Inspector, the scheme should not be consented as proposed. It may be that the provision of further information, including if necessary further commitments to ecological mitigation, may be able to resolve some or all of the Councils' concerns in this regard. If so, the Councils will notify the Inspector.
35. A point that looks likely however to remain is that the scheme will give rise to a very substantial impact on biodiversity and that it has not taken appropriate opportunities to

⁵ That is supported by policy (see above), the positions of the Councils (Cox proof section 6), NE (Crutchley proof paras.5.4.2-5.4.6) as well as the EA, Bedford BC, Oxfordshire CC and Cherwell DC

avoid or mitigate those impacts. It is therefore contrary to policy (above). The reason for that comes down in part to the inadequacies of the initial surveying effort. That might be resolvable, but not without potentially revisiting areas of the scheme proposals and ensuring that adequate mitigation (etc) is included.

36. The Councils invite the Inspector (and the Secretary of State) to have regard to its concerns when deciding whether or not to make the Order and if so in what form.

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