By Email Only
Ian Jenkins BSc CEng MICE MCIWEM

Joanna.vincent@gateleyhamer.com

Solicitors and
Parliamentary Agents

Minerva House
5 Montague Close
London
SE1 9BB
DX: 156810 London Bridge 6

Switchboard 020 7593 5000
Direct Line 020 7593 5133
www.wslaw.co.uk

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Our Ref: JEW/33916/00001/PFI

Dear Mr Jenkins

Transport and Works Act 1992
Proposed Rother Valley Railway (Bodiam to Robertsbridge Junction) Order

Thank you for your letter of 15 July 2020 (as re-dated) and for the two-week period allowed for the applicant's response.

1. I have reviewed the relevant provisions of the Environmental Impact Assessment (Miscellaneous Amendments Relating to Harbours, Highways and Transport) Regulations 2017 and have considered the implications of paragraph 9(1) of Schedule 6.

2. I agree that the apparent effect of paragraph 9(1) is that the transitional provisions do not apply to this application, although I do wonder whether this is the outcome that the Government intended. It was certainly anticipated at the time that where a scoping request was made for a development scheme before the legal deadline for transposition of the 2014 EIA Directive of 17 May 2017, the subsequent application would be excluded from the new EIA requirements introduced by the Directive. That this was the Government's intention is, I suggest, evidenced by the way the EIA Directive was transposed into both the Town and Country Planning regime and the law relating to Development Consent Orders under the Planning Act.

3. Paragraph 9(1) has the effect that an applicant would only benefit from the transitional provisions if a scoping request is made before the coming into force of the 2017 Regulations, but the scoping opinion is given on or after 5 December 2017. This seems both arbitrary and unreasonable; moreover, there is no provision for making a further scoping request in those circumstances in respect of the new topics introduced by the 2014 Directive (which one might reasonably expect if this outcome had been intended). In any event, and in light of doubt as to the effect of paragraph 9(1), the applicant does not intend to rely on that provision to argue in favour of limiting the potential scope of your request.

4. Your letter went on to say that, in any event, you can rely on Rule 8(8) of the Applications Rules to require the applicant to provide further information. Whilst I do not agree that Rule 8(8) could be used to require information that was not environmental information within the definition in the pre-2017 Regulations version of the Applications Rules, that question is academic in light of the applicant's position set out above. The applicant accepts that you are entitled to rely on Rule 17 or Rule 8(8). The applicant has therefore instructed its consultants to commence work on the additional information set out in your letter of 8 June.

5. As explained in my letter of 22 June, it is the work relating to the updated flood risk assessment that will drive the submission date for the Rule 17 information. For that reason, the applicant put forward two propositions for the scope of works to be carried out. It was the applicant's view that Option A would have provided the key information needed to enable reasoned conclusions to be drawn about the likely significant effects of flooding, taking into consideration the latest climate change predictions, and that such approach would be proportionate in the circumstances of this application, as well as taking the least time. However, ***only*** Option B will provide all the information stipulated in your Rule 17 direction.

6. The applicant notes your confirmation that the applicant is to provide the full extent of information set out in your letter of 8 June. Therefore neither Option A of my last letter or any hybrid of Options A or B will suffice. The applicant also notes your additional requirement that the allowances and assessment should be agreed with the relevant statutory bodies where possible.

7. The relevant statutory body is, in this case, the Environment Agency. By way of background, the Environment Agency was very closely involved in the preparation of the existing Flood Risk Assessment and agreed its conclusions. I am instructed that the process took approximately 18 months.

8. The Agency was also closely involved in drafting the relevant planning conditions and, since then, has agreed protective provisions setting out an approvals process to further control the implementation of the works, including the imposition of conditions and requirements relating to the prevention/control of flood risk.

9. The applicant has contacted the Agency to seek to confirm its requirements and timescales for the new flood risk assessment. A preliminary meeting will take place in a few weeks' time, at the earliest that can be arranged. In the meantime, instructions have been given to Capita to commence the necessary work, to be followed by a formal order once the process has been agreed with the Agency.

10. You will appreciate that it is not possible for the applicant to provide firm dates about when an external body will perform its functions. A preliminary conversation with one of the Agency's planning specialists indicated that the time estimate of 18 weeks' referred to in my last letter may be more than doubled by the requirement to agree the allowances and assessment due to constraints on its resources allowing for standard Agency response times.

11. The precise timescale for delivery of the further information is therefore uncertain, although early engagement with the Agency in the coming weeks is likely to provide a clearer picture. The applicant will seek to reduce the time involved and I am advised that the overall period will be clearer once the process has been set and the work is underway. I therefore suggest that no firm dates are set at this time and the applicant reverts to you in mid-October to more accurately identify the expected submission date and to arrange a new date for the postponed Inquiry. In any event, that Inquiry will now necessarily not take place until 2021.

12. Turning to the letter from Richard Max & Co. dated 21 July 2020 concerning our recent correspondence, whilst the applicant expects to respond directly, I would like to make a few observations:

13. Your letter of 8 June referred to a single submission date of the additional information you require, and the applicant explained that this date is driven by the flood risk assessment. I reject any criticism of the applicant for not providing a separate date for the rest of the information you require, because the applicant was not asked to do so.

14. Turning to the complaints about the delays to the Inquiry, it is very disappointing to receive a letter couched in these terms. The Inquiry was postponed due to a world-wide pandemic for which neither the applicant nor the Inspector can be held responsible. Such costs as arise from that should clearly be borne by the parties and it is wholly unreasonable to argue otherwise.

15. The Inspector is entitled to require further information but that does not mean that the applicant has been at fault. The applicant rejects the assertion that the request under Rule 17 is an indication of such fault. Further, a new date for the Inquiry has not been set. Whenever that is, any delay that there may be to the overall process is attributable to the Rule 17 Direction in June and not to any act or omission of the applicant. I stress, the applicant has, throughout the process, complied with all statutory requirements, including obtaining a Scoping Opinion from the Secretary of State specifically on the question of whether the environmental statement submitted as part of the planning application could be used for these proceedings. Frustrating though the delay must be for the landowners, the applicant has behaved entirely properly throughout.

16. In relation to the adequacy of the environmental information submitted by the applicant, my understanding is that the Department has responded to Richard Max & Co. on this point on three separate occasions.

17. It is not clear what Richard Max & Co.'s letter is intended to achieve in practical terms, but the suggestion that the applicant has behaved unreasonably in not submitting the information you have now requested at an earlier stage is completely rejected.

18. For the avoidance of doubt, it is not accepted that the delays in determining the application come anywhere close to be any interference with the landowners' Article 6 rights. Moreover, it is difficult to see how the withdrawal and re-submission of the existing application would resolve the issues of uncertainty and delay for the landowners, as such a course would cause considerable further delay to the resolution of this matter and the corresponding uncertainty would be more prolonged.

Yours sincerely

Jane Wakeham

Jane Wakeham
Partner

DT 020 7593 5133
DF 020 7593 5099
jwakeham@wslaw.co.uk