

## **Network Rail (Cambridgeshire Level Crossing Reduction) Order**

### **Network Rail Note No. 13**

**19 December 2017**

#### **Note on revised Schedule 16 – For the Protection of Drainage Authorities and the Environment Agency**

Prior to the end of the Inquiry, it is Network Rail's intention to submit to the Inspector a further Filled Order. It will include those amendments to the application draft that Network Rail will be asking the Secretary of State to incorporate in the event that he determines to make the Order. Those amendments will include the changes to Schedule 16 of the draft Order set out in **Appendix 1** to this note.

The principles in the protective provisions set out in the application draft Order have precedent in other made Transport and Works Orders, and the form largely follows the protective provisions as included in the High Speed Rail (London – West Midlands) Act 2017. Network Rail and the Environment Agency have been engaging in negotiations for some time with a view to agreeing a set of standard protective provisions to be included in the three- Network Rail Level Crossing Reduction Orders.

The amendments shown tracked red on the attached provisions reflect the changes agreed between the parties as at 19 December 2017.

Network Rail understands that only paragraph 2(3)(b) remains at issue, in that the Environment Agency objects to the principle of deemed consent if approval is neither given nor refused within the specified 2 month time period.

Network Rail is submitting the amended draft to this Inquiry in order that this Order can reflect the amendments that have already been agreed with the Environment Agency and to enable the Environment Agency to make representations to the Inspector on the outstanding point should it wish to do so.

A further note will be submitted before the end of the Inquiry explaining Network Rail's justification for the principle of deemed consent being retained in the protective provisions.

A copy of this note has been provided to the Environment Agency's legal team.

**Winckworth Sherwood LLP**

## SCHEDULE 16

### FOR THE PROTECTION OF DRAINAGE AUTHORITIES AND THE ENVIRONMENT AGENCY

1.—(1) The following provisions of this Schedule apply for the protection of the ~~Agency drainage authority~~ unless otherwise agreed in writing between Network Rail and the drainage authority.

(2) In this Part of this Schedule—

“the Agency” means the Environment Agency;

“a category 1 specified work” means so much of any permanent or temporary work or operation authorised by this Order (which includes, for the avoidance of doubt, any dredging and any any geotechnical investigations that may be undertaken) as ~~is likely to consist of—~~

(a) ~~erecting any structure (whether temporary or permanent) in, over or under a main river if the work is likely to affect any drainage work which is or includes a main river or the volumetric rate of flow of water in or flowing to or from any main river; affect any drainage work which is or includes a main river or the volumetric rate of flow of water in or flowing to or from any main river;~~

(b) ~~the carrying out of any work of alteration or repair of any structure (whether temporary or permanent) in, over or under a main river if the work is likely to affect the flow of water in the main river or to affect any drainage work; affect the flow, purity or quality of water in any main river or other surface waters or ground water; or~~

(c) ~~erecting or altering any structure (whether temporary or permanent) designed to contain or divert the floodwaters of any part of a main river; or~~

(b)—

(e)(d) ~~any work or operation that is in, on, under, over or within 16 metres of a drainage work which is or includes a main river or is otherwise likely to affect any such drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work, affect the conservation, distribution or use of water resources.~~

“a category 2 specified work” means any of the following—

(a) erecting any mill dam, weir or other like obstruction to the flow of any ordinary watercourse, or raising or otherwise altering any such obstruction;

(b) erecting a culvert in any ordinary watercourse;

(c) altering a culvert in a manner that would be likely to affect the flow of any ordinary watercourse; or

(d) altering, removing or replacing a structure or feature designated by a local drainage authority under Schedule 1 to the Flood and Water Management Act 2010(1);

“construction” includes execution, placing, altering, replacing, relaying and removal and “construct” and “constructed” are construed accordingly;

“the drainage authority” means—

(a) in relation to a category 1 specified work, the Agency;

(b) in relation to a category 2 specified work, the drainage board concerned within the meaning of section 23 of the Land Drainage Act 1991(2).

“drainage work” means any watercourse and includes any land which provides or is expected to provide flood storage capacity for any watercourse and any bank, wall, embankment or other structure, or any appliance, constructed or used for land drainage, flood defence or tidal monitoring;

“the fishery” means any waters containing fish and fish in such waters and the spawn, habitat or food of such fish;

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(1) 2010 c. 29

(2) 1991 c. 59

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"a main river" and "ordinary watercourse" have the meanings given by respectively the Water Resources Act 1991 and the Land Drainage Act 1991;

"plans" includes sections, drawings, specifications and method statements;

"specified work" means ~~a category 1 specified work or a category 2 specified work, so much of any work or operation authorised by this Order as is in, on, under, over or within 16 metres of a drainage work or is otherwise likely to—~~

- ~~(a) affect any drainage work or the volumetric rate of flow of water in or flowing to or from any drainage work;~~
- ~~(b) affect the flow, purity or quality of water in any watercourse or other surface waters or ground water;~~
- ~~(c) cause obstruction to the free passage of fish or damage to any fishery; or~~
- ~~(d) affect the conservation, distribution or use of water resources;~~

2.—(1) Before beginning to construct any specified work, Network Rail must submit to the drainage authority plans of the specified work and such further particulars available to it as the drainage authority may within 28 days of the ~~submission receipt~~ of the plans reasonably require.

(2) Any such specified work must not be constructed except in accordance with such plans as may be approved in writing by the drainage authority, or determined under paragraph 12.

(3) Any approval of the drainage authority required under this paragraph—

- (a) must not be unreasonably withheld;
- (b) is deemed to have been given if it is neither given nor refused within 2 months of the ~~submission receipt~~ of the plans for approval and, in the case of a refusal, accompanied by a statement of the grounds of refusal; and
- (c) may be given subject to such reasonable requirements as the drainage authority may make for the protection of any drainage work, ~~or the fishery, or for the protection of~~ water resources, or for the prevention of flooding or pollution or in the discharge of its environmental duties.

(4) The drainage authority must use its reasonable endeavours to respond to the submission of any plans before the expiration of the period mentioned in sub-paragraph (3)(b).

3. Without limitation on the scope of paragraph 2, the requirements which the drainage authority may make under that paragraph include conditions requiring Network Rail at its own expense to construct such protective works, whether temporary or permanent, ~~before or~~ during the construction of the specified works (including the provision of flood banks, walls or embankments or other new works and the strengthening, repair or renewal of existing banks, walls or embankments) as are reasonably necessary—

- (a) to safeguard any drainage work against damage; or
- (b) to secure that its efficiency for flood defence purposes is not impaired and that the risk of flooding is not otherwise increased,

by reason of any specified work.

4.—(1) Subject to sub-paragraph (2), any specified work, and all protective works required by the drainage authority under paragraph 3, must be constructed—

- (a) without unnecessary delay in accordance with the plans approved ~~or deemed to have been approved~~ or settled under this Schedule; and
- (b) to the reasonable satisfaction of the drainage authority,

and an officer of the drainage authority is entitled to watch and inspect the construction of such works.

(2) Network Rail must give to the drainage authority not less than 14 days' notice in writing of its intention to commence construction of any specified work and notice in writing of its completion not later than 7 days after the date on which it is ~~brought into use~~ completed.

(3) If any part of a specified work or any protective work required by the drainage authority is constructed otherwise than in accordance with the requirements of this ~~Part of this~~ Schedule, the drainage authority may by notice in writing require Network Rail at Network Rail's own expense to

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comply with the requirements of this ~~Part of this~~ Schedule or (if Network Rail so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed) to remove, alter or pull down the work and, where removal is required, to restore the site to its former condition to such extent and within such limits as the drainage authority reasonably requires.

(4) Subject to sub-paragraph (5) and paragraph 8, if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (3) is served upon Network Rail, it has failed to begin taking steps to comply with the requirements of the notice and subsequently to make reasonably expeditious progress towards their implementation, the drainage authority may execute the works specified in the notice and any expenditure incurred by it in so doing is recoverable from Network Rail.

(5) In the event of any dispute as to whether sub-paragraph (3) is properly applicable to any work in respect of which notice has been served under that sub-paragraph, or as to the reasonableness of any requirement of such a notice, the drainage authority must not except in an emergency exercise the powers conferred by sub-paragraph (4) until the dispute has been finally determined.

(6) If by reason of construction of the specified work the Agency's access to flood defences or equipment maintained for flood defence purposes is materially obstructed, Network Rail must provide such alternative means of access to allow the Agency to maintain the flood defence or use the equipment no less effectively than before the obstruction.

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5.—(1) Subject to sub-paragraph (5) Network Rail must from the commencement of the construction of the specified works maintain in good repair and condition and free from obstruction any drainage work which is situated within the limits of deviation and on land held by Network Rail for the purposes of or in connection with the specified works, whether or not the drainage work is constructed under the powers conferred by this Order or is already in existence.

(2) If any such drainage work which Network Rail is liable to maintain is not maintained to the reasonable satisfaction of the drainage authority, the drainage authority may by notice in writing require Network Rail to repair and restore the work, or any part of such work, or (if Network Rail so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld or delayed), to remove the work and restore the site to its former condition, to such extent and within such limits as the drainage authority reasonably requires.

(3) Subject to sub-paragraph 5 and paragraph 8, if, within a reasonable period being not less than 28 days beginning with the date on which a notice in respect of any drainage work is served under sub-paragraph (2) on Network Rail, Network Rail has failed to begin taking steps to comply with the reasonable requirements of the notice and has not subsequently made reasonably expeditious progress towards their implementation, the drainage authority may do what is necessary for such compliance and may recover any expenditure reasonably incurred by it in so doing from Network Rail.

(4) In the event of any dispute as to the reasonableness of any requirement of a notice served under sub-paragraph (2), the drainage authority must not except in a case of an emergency exercise the powers conferred by sub-paragraph (3) until the dispute has been finally determined.

(5) This paragraph does not apply to—

(a) drainage works which are vested in the drainage authority, or which the drainage authority or another person is liable to maintain and is not ~~prescribed~~precluded by the powers of the Order from doing so; and

(b) any obstruction of a drainage work for the purpose of a work or operation authorised by this Order and carried out in accordance with the provisions of this ~~Part of this~~ Schedule.

6. Subject to paragraph 8, if by reason of the construction of any specified work or of the failure of any such work the efficiency of any drainage work for flood defence purposes is impaired, or that drainage work is otherwise damaged, such impairment or damage must be made good by Network Rail to the reasonable satisfaction of the drainage authority and if Network Rail fails to do so, the drainage authority may make good the same and recover from Network Rail the expense reasonably incurred by it in so doing.

7.—(1) Network Rail must take all such measures as may be reasonably practicable to prevent any interruption of the free passage of fish in the fishery during the construction of any specified work.

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(2) If by reason of—

- (a) the construction of any specified work; or
- (b) the failure of any such work,

damage to ~~the~~ fishery is caused, or the Agency has reason to expect that such damage may be caused, the drainage authority may serve notice on Network Rail requiring it to take such steps as may be reasonably practicable to make good the damage, or, as the case may be, to protect the fishery against such damage.

(3) Subject to paragraph 8, if within such time as may be reasonably practicable for that purpose after the receipt of written notice from the Agency of any damage or expected damage to a fishery, Network Rail fails to take such steps as are described in sub-paragraph (2), the drainage authority may take those steps and may recover from Network Rail the expense reasonably incurred by it in doing so.

(4) Subject to paragraph 8, in any case where immediate action by the Agency is reasonably required in order to secure that the risk of damage to the fishery is avoided or reduced, the drainage authority may take such steps as are reasonable for the purpose, and may recover from Network Rail the reasonable cost of so doing provided that notice specifying those steps is served on Network Rail as soon as reasonably practicable after the Agency has taken, or commenced to take, the steps specified in the notice.

8. Nothing in paragraphs 4(4), 5(3), 6, 7(3) and (4) authorises the drainage authority to execute works on or affecting an operational railway forming part of Network Rail's network without the prior consent in writing of Network Rail such consent not to be unreasonably withheld or delayed.

9. Network Rail must indemnify the drainage authority in respect of all costs, charges and expenses which the drainage authority may reasonably incur or have to pay or which it may sustain—

- (a) in the examination or approval of plans under this Schedule; ~~and~~
- (b) in the inspection of the construction of the specified works or any protective works required by the drainage authority under this Schedule.

10.—(1) Without affecting the other provisions of this ~~Part of this~~ Schedule, Network Rail must indemnify the drainage authority from all claims, demands, proceedings, costs, ~~charges, penalties, damages, expenses or and losses~~, which may be made or taken against, recovered from, or incurred by, the drainage authority by reason of—

- (a) any damage to any drainage work so as to impair its efficiency for the purposes of flood defence;
- (b) any damage to the fishery;
- (c) any raising or lowering of the water table in land adjoining the authorised development or any sewers, drains and watercourses;
- (d) any flooding or increased flooding of any such lands, or
- (e) inadequate water quality in any watercourse or other surface waters or in any groundwater,

which is caused by the construction of any of the specified works or any act or omission of Network Rail, its contractors, agents or employees whilst engaged upon the work.

(2) The drainage authority must give to Network Rail reasonable notice of any such claim or demand and no settlement or compromise may be made without the agreement of Network Rail which agreement must not be unreasonably withheld or delayed.

11. The fact that any work or thing has been executed or done by Network Rail in accordance with ~~a plan approved or deemed to be approved~~ by the drainage authority, or to ~~its the drainage authority's~~ satisfaction, or in accordance with any directions or award of an arbitrator, does not relieve Network Rail from any liability under the provisions of this Schedule.

12. Any dispute arising between Network Rail and the drainage authority under this Schedule, if the parties agree, is to be determined by arbitration under article 40 (arbitration), but otherwise is to be determined by the Secretary of State for Environment, Food and Rural Affairs and the Secretary of State for Transport acting jointly on a reference to them by Network Rail or the drainage authority, after notice in writing by one to the other.

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