

NETWORK RAIL INFRASTRUCTURE LIMITED

NETWORK RAIL (CAMBRIDGESHIRE LEVEL CROSSING REDUCTION) ORDER
Schedule 16

For the protection of Drainage Authorities and the Environment Agency

**Note in response to Environment Agency letter dated 19 December 2017
on draft protective provisions relating to the
Network Rail (Cambridge Level Crossing Reduction) Order**

Background

1. Network Rail has applied for three "Level Crossing Reduction Orders", relating to level crossings in Cambridgeshire, which is the subject of this inquiry, for Suffolk and for Essex and others.
2. The form of the protective provisions for the protection of Drainage Authorities and the Environment Agency in each of the three Orders as applied for is the same and follows the form of equivalent protective provisions in other made Network Rail Transport and Works Act Orders (TWAOs). That is, that for certain works authorised by the Order (defined as specified works), which include constructing or altering or repairing a structure in, over or under a main river which affects its flow or diverts flood waters or works which are within 16 metres of a drainage work or affect the flow of water to or from it, Network Rail must submit for approval plans and other details of those works to the Agency.
3. The Agency may impose reasonable requirements in approving the specified works and may request Network Rail, at its own expense, to construct protective works to protect drainage works from damage or to maintain its efficiency. The protective provisions allow the Agency to watch and inspect the construction of the specified works and to require Network Rail to rebuild them if they are not constructed in accordance with the plans and requirements approved. Network Rail is obliged to keep the works in good repair so as to avoid any obstruction of a drainage work. The protective provisions also provide for indemnities to be given by Network Rail and a disputes provision.
4. Following discussions with the Environment Agency (the Agency) on the form of the protective provisions for all three Orders, it has been possible to reach agreement on a number of amendments which have been included as shown in Schedule 16 to the Filled Up Network Rail (Cambridgeshire Level Crossing Reduction) Order (the Cambridgeshire Order) submitted on 15 February 2018.
5. Having seen the proposed amendments as set out in Schedule 16 to the draft Order as submitted to the Inquiry by Network Rail (NR-INQ-22), the Environment Agency wrote to the Inspector on 19 December 2017 to set out its position on the one matter not agreed between the Agency and Network Rail on the protective provisions.

The Agency's position

6. The Agency, in its letter dated 19 December 2017, identified the one outstanding matter between the parties which is whether the protective provisions should provide for deemed consent or deemed refusal.

Deemed Refusal

7. The matter in dispute is whether, if time elapses under paragraph 2(3)(b) of the draft protective provisions without a decision from the Agency, the submission by Network Rail for approval of plans and other particulars from the Agency in relation to specified works (as defined) is deemed to be refused or deemed to be granted. The Agency is seeking deemed refusal, and Network Rail, following the form of such protective provisions as made in other TWAO, deemed approval.
8. Network Rail acknowledges the Agency's comment in the second paragraph of its letter under the heading "Deemed Consent or Deemed Refusal", that it is hoped that there will be no need for either refusal or consent to be deemed in that the Agency will endeavour wherever possible to make a decision within the timescale.
9. The Agency sets out in its letter (third paragraph under the heading "Deemed Consent or Deemed Refusal") that in 2016 the flood defence consent under section 109 of the Water Resources Act became "flood risk activity" which required to be permitted under the Environmental Permitting (England and Wales) Regulations 2016 (EPR). As the Agency states in the fourth paragraph under the heading "Deemed Consent or Deemed Refusal", "The protective provisions are for the purpose of replacing the EA's consenting/permitting regime", that "the purpose of this regime is to protect against flood risk", and that "the EA now seeks deemed refusal to be consistent with the EPR". In addition the Agency cites compliance with EU law as part of the reason for the change in legislation, but it does not elaborate on this.
10. Network Rail understands the Agency's position to be that the Agency is treating the plan approvals required under the protective provisions in paragraph 2(3) as a consent akin to the EPR which should therefore retain the same scope (i.e. deemed refusal).
11. Network Rail's position is that the protective provisions should remain as drafted in the filled up Order, providing in paragraph 2(3)(b) for a deemed consent. This is for the following reasons of principle:
 - (i) The protective provisions provide not for a consent equivalent to the EPR regime, but rather for the approval of detail: the in-principle decision on whether the works in a TW Order should proceed rests firmly with the Secretary of State in deciding whether to make the Order. At the time the protective provisions are implemented that in-principle decision will already have been made. A deemed refusal in line with the Agency's powers under the EPR is therefore neither required nor appropriate in the protective provisions. Furthermore, so far as Network Rail is aware, there is nothing in any EU Directive which prohibits deemed approval in relation to flood risk activity.
 - (ii) The Agency position seems to miss the purpose of protective provisions being a streamlined process in place of any normal arrangements. It is usual in TWAO protective provisions (including those for Network Rail) to provide for deemed approval. The Agency's own Boston Barrier Order¹ provides for the Port of Boston's deemed plan approval of the Agency's authorised works. This post-dates the Environmental Permitting (England and Wales) Regulations 2016. As regards approvals by flood (land drainage) authorities, the other category of body that is covered by these protective provisions, the Land Drainage Act 1981 also includes a deemed approval provision. It is therefore entirely appropriate that the protective provisions reflect this legislative position.

¹ SI 2017/1329. Copy attached as Annex 1

(iii) The effect of the Agency's changes as they stand would also mean that either (a) the powers of the local authorities (as lead local flood authorities in respect of the Orders) would be increased, by extending a deemed refusal to them or (b) in order to preserve the position regarding flood authorities the protective provisions would have to have different arrangements for each category of body, which would be awkward as the local authorities do not have deemed refusal under their powers under section 23 of the Land Drainage Act 1991.

(iv) The Agency is not able to cite a made TWA Order which includes deemed refusal and there is no precedent for deemed refusal within a TWAO

(v) The Agency relies on the terms of Development Consent Orders (DCOs) under the Planning Act 2008 and provides details of the Inspector's decision in relation to the M20 Junction 10A DCO application. However, despite what the Agency says in the second sentence of the fifth paragraph under the heading "Deemed Consent or Deemed Refusal", the position regarding disapplication of legislation under DCOs is different to that for TWAOs. The Planning Act 2008, section 150, provides that an order granting development consent may include provision the effect of which is to remove a requirement for a prescribed consent or authorisation to be granted, only if the relevant body has consented to the inclusion of the provision. The Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 sets out in Regulation 5 and Schedule 2 the list of prescribed consents. It includes a consent under s109 of the Water Resources Act 1991 for works affecting main rivers (which has since been included within the Environmental Permitting regime) and environmental permit or exemption under the Environmental Permitting (England and Wales) Regulations 2010 (which would now extend to cover the 2016 EP Regulations). If Network Rail were promoting a DCO, not a TWAO, it would require the consent of the Agency to disapply these consents and would therefore be in a different position in negotiating protective provisions. That may explain the rather limited response from the Applicant to the EA's case presented for the M20 DCO application, which did not address the substantive point at issue here.

(vi) The TWA 1992, however, allows for the disapplication of such consents without any requirement for this to be agreed by the consenting body concerned, and so with a TWA application the parties are coming at this from a different position, backed by legislation with a different policy. The form of protective provisions which include deemed plan approval are the standard that is to be found since the inception of TW Orders in 1993 and which continues to date i.e. after the EP regime. This continued the private and hybrid Bill standard for the Agency and its predecessors, which itself continues to date in hybrid Bills in Parliament promoting railway schemes, as in the Crossrail Act 2008 and the recent High Speed (London – West Midlands) Act 2017².

(vii) All this clearly indicates that:

- (a) deemed approval; is the form of provision the Secretary of State would expect to include for a railway scheme;
- (b) deemed approval is consistent with the policy of the TW Act; and
- (c) Parliament is content with protective provisions in the form Network Rail proposes.

(viii) The practical concern with deemed refusal is its unreasonableness. In effect, the Agency need do nothing for two months, the plans would be refused and would delay

² See Schedule 33, paragraph 52(3)(b) – copy attached as Annex 2.

the construction of Network Rail's scheme whilst the parties go to arbitration to resolve the deemed refusal. That is not consistent with the rest of the wording on plan approval and arguably robs of any practical effect the requirements not to withhold consent unreasonably as set out in Schedule 16, paragraph 2(3)(a)) and to use reasonable endeavours to respond within two months (Schedule 16, paragraph 2(4)).

Conclusion

12. If the Agency's provisions were to be accepted it would effectively create an impediment to implementation of the Order. This ignores the fact that before the Secretary of State can make an Order he must be satisfied that it is capable of being implemented without such impediment.
13. Network Rail therefore submits that the Secretary of State should resist the Agency's proposals for deemed refusal for the reasons given above.

Winckworth Sherwood LLP

15 February 2018