

TRANSPORT AND WORKS ACT 1992

**TRANSPORT AND WORKS (INQUIRIES
PROCEDURE) RULES 2004**

**THE NETWORK RAIL
(ESSEX AND OTHERS
LEVEL CROSSING REDUCTION)
ORDER**

MARK BRUNNEN

**REBUTTAL OF
PROOF OF EVIDENCE**

-OF-

MR PETER KAY & MR CYRIL LIDDY

Document Reference	NR27/4/1 (Crossing: E41)
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I have reviewed the Proofs of Evidence of Wivenhoe Town Council representatives Mr. Peter Kay (OBJ/029 – W1 – 1) and Mr Cyril Liddy (E41 Paget Road OBJ59) submitted on 20 September 2017. I have the following comments on the evidence as presented.

1. Strategic Case

- 1.1. In the first 3 pages of his Proof of Evidence Mr. Kay makes general comments against Network Rail's case for closure of the crossings listed within the Essex Level Crossing Reduction Order. Similarly, Mr Liddy contests in paragraph 7 of his Proof that Network Rail has applied a generic 'one size fits all' approach to the Essex and Others Level Crossing Reduction Order.
- 1.2. Network Rail's case for closure of these crossings, and other crossings listed in the other Level Crossing Reduction Orders, is strategic. For this reason Network Rail has sought an Order against the Transport and Works Act 1992 allowing the crossings to be considered holistically, rather than individually and in isolation. The purpose of the Order is threefold:
 - a. Operational efficiency of the Network.
 - b. Safety of both rail users and those interacting with railway by reason of Public and Private rights across the operational railway.
 - c. Efficient use of public funds in accordance with "Managing Public Money".
- 1.3. The case is not formed of any one of these elements alone but, rather, the cumulative effect of all three elements acting together. As set out in Sections 4 and 5 of my Proof of Evidence, this approach is consistent with Government, ORR and Network Rail policy.

2. Network Rail's Level Crossing Safety Policy

- 2.1. On pages 3 and 4 of his Proof of Evidence, Mr Kay notes that Network Rail's policy towards level crossing safety directs concentrated effort towards those crossings that present the greatest collective risk. He contests the alignment of the Essex and Others Level Crossing Reduction Order to this policy.
- 2.2. Network Rail has a dedicated programme of level crossing safety enhancements being delivered nationally throughout Control Period 5, including on the Anglia Route, in accordance with the Level Crossing Safety Policy. This work is unrelated to the Transport and Works Act Order.
- 2.3. As emphasised above, the case for the Essex and Others Level Crossing Reduction Order is not based on the safety of individual crossings; it is concerned with managing risk on the network as a whole.
- 2.4. Similarly, it is misleading to suggest, as Mr Kay does on page 4 of his Proof of Evidence, that the costs of maintenance are being used to justify the removal of public rights of way. Maintenance costs are a component of the wider strategic case, to be viewed in the round, rather than in isolation.

3. The Law Commission's Report on Level Crossings

- 3.1. Mr Kay suggests, on pages 2-3 of his Proof of Evidence, that Network Rail has taken a 'myopic' approach to the proposals contained within the Order, focussing only on the benefit to Network Rail of removing the identified crossings from the network. He suggests that the Secretary of State is not obliged to take such an approach, and relies on recommendations contained within the Law Commission's Report on Level Crossings (September 2013) as supporting the need for a 'balanced consideration' when considering the proposed Order.
- 3.2. As should be clear from the contents of Andrew Kenning's Proof of Evidence, at no point has Network Rail adopted a 'myopic' approach to the proposed closures contained within the draft Order, nor limited its consideration to removing risk from Network Rail property. I would also note that it is important not to take the Law Commission's recommendations out of context. As set out at paragraph 1.86 of the Law Commission's report, the aims of the project were "to modernise and clarify the safety regime governing level crossings, to make it easier to close level crossings where necessary and preserve rights of way where appropriate". The Law Commission acknowledged that "from a safety perspective, every level crossing poses a risk, and the closure of level crossings reduces risk", noting that under the current system, "permanent closure can be difficult" (para 1.91), and recommended (para 1.92):

"...the creation of a new statutory procedure for closing any level crossing, whether public or private, and providing for its replacement, where appropriate"

- 3.3. The factors identified by Mr Kay in his Proof were identified by the Law Commission as a non-exhaustive and non-hierarchical list of factors which the decision-making authority should be required to take into account when considering an application for closure under the new statutory procedure (para 3.113). The Commission emphasized that the weight to be given to any particular factor in a given case would be for the decision-maker (para 3.108 – 3.112).
- 3.4. The recommendations of the Law Commission are yet to be implemented. They do not, therefore, provide the framework against which the current Order falls to be considered.

4. Network Rail's Risk Assessment Methodology

- 4.1. On page 1 of his Proof of Evidence, Mr. Kay asserts that Network Rail's standardised methodology for evaluating the risk factors at individual crossings is being abused to create a system of 'proving' any crossing to be 'unsafe'. Network Rail rejects this conclusion.
- 4.2. Similarly, Mr Liddy challenges the presentation of E41's risk profile in paragraphs 14 of his Proof of Evidence.
- 4.3. The All Level Crossing Risk Model (ALCRM) was developed by the Rail Safety & Standards Board (RSSB) in collaboration with Network Rail and Arthur D Little. It draws upon extensive research and expertise, established over many years, to model level crossing risk.

- 4.4. ALCRM is recognised by the ORR as *the* level crossing risk ranking tool for all level crossings under Network Rail's management. Its purpose is not to prove that any one crossing is so dangerous that it must close. Rather, it is to assist Network Rail in the prioritisation of risk.
- 4.5. Section 8 of my Proof of Evidence states ALCRM reports two measures of risk: collective risk and individual risk of fatality. There are thirteen grades of severity associated with each measure (1-13 for collective risk; A-M for individual risk). This allows crossings to be grouped for simplicity. A crossing's total risk is also summarised as a measure of Fatalities and Weighted Injuries (FWI). Whilst it is possible for two crossings to have identical FWI scores, in practice this is unlikely. Therefore, it is perfectly possible for a number of crossings to share the same risk grouping (e.g. "C6") and yet still to be ordered individually in a risk hierarchy. This explains Network Rail's presentation of E41 as the 25th highest risk crossing on the Anglia Route
- 4.6. As set out in my Proof of Evidence (8.18 – 8.23), ALCRM and the Narrative Risk Assessment process combine to deliver a rounded and balanced analysis of level crossing risk. Structured, expert judgement is used to compliment quantitative assessment. Such an approach is endorsed and encouraged by the ORR. In a letter to Network Rail (See Appendix A) dated 18 April 2012, Ian Prosser (Director of Railway Safety, ORR) noted that:
- "...although ALCRM can provide a good overview of risk priorities, the routes will also know where the priorities lie, based on their local knowledge, and you should consider letting their knowledge feed into the prioritisation process."*
- 4.7. I also note in my Proof of Evidence that, whilst Network Rail uses ALCRM to model level crossing risk as part of our Health and Safety and Asset Management duties, and it is a useful indicator of crossing risk, it has not been used to select or prioritise crossings for inclusion in this Order. The inclusion of a crossing is not determined by its ALCRM score in isolation or relative to other crossings in the vicinity.

5. History of Incident

- 5.1. Mr. Kay suggests, on page 1 of his Proof of Evidence, that a crossing can be considered 'safe' based principally on historical fact. Mr. Liddy suggests, in paragraph 8 of his Proof, that crossing E41 has not changed substantially in the last 150 years or so. He claims that there is no evidence that E41 is more dangerous than at any other time in the past.
- 5.2. My Proof of Evidence explains that changes to our environment, lifestyle and technology, together with changes in the cultural safety expectations of society, have changed the nature of the risks faced at level crossings. Our management approach must evolve and mature with the risk.
- 5.3. In February 2016, Network Rail proposed replacing Tidemills FP level crossings (Sussex) with a footbridge. South Downs National Park (SDNP) objected to Network Rail's proposals on grounds of aesthetics, with one SDNP representative remarking that nobody had ever died at the crossing. Tragically, less than one week later, a member of the public was accidentally struck by a train and killed at that location.

- 5.4. Indeed, of the seven footpath crossings that bore witness to an accidental fatality between April 2015 and March 2017, none had history of an accidental fatality during the 20 years previously.
- 5.5. Historical fact is an important consideration when assessing risk at level crossings, but only as one component of a multifaceted risk assessment process that balances quantitative risk modelling with structured expert judgement.

6. Transfer of Risk

- 6.1. On page 2 of his Proof of Evidence, Mr Kay asserts that Network Rail is directed to ensure that accidents take place off Network Rail property and not on it.
- 6.2. Network Rail is responsible for the safe operation of the rail infrastructure of Great Britain. As such, it is our duty to minimise the risk of accident and incident on our infrastructure. However, it is incorrect to suggest that Network Rail wilfully transfers risk from our infrastructure onto other areas of society.
- 6.3. Each of the diversions, proposed by this Order, that divert pedestrians onto routes adjacent to the road network, has been subject to a Road Safety Audit. The purpose of an RSA assessment is to identify any areas presenting significant risks or concerns, so that adjustments can be made where possible. In some instances, where risks have been identified, we have chosen not to progress with the diversionary route, instead seeking an alternative solution; in others, we have removed the level crossing from the Order entirely.
- 6.4. By way of example: in the case of E28 (Whipps Farmers) the closest pedestrian diversion via Warley Street was not progressed after the Road Safety Audit highlighted safety concerns that we were unable to mitigate.
- 6.5. Mr Kay references E42. This crossing was removed from the Order because new information came to light showing that the number of people likely to use the alternative route had the potential to be greater than those who were using the level crossing at the time of census. Accordingly, we have elected to reappraise the solution for this crossing before proceeding further.

7. Permanent Speed Restriction

- 7.1. On page 6, Mr Kay proposes a 35mph permanent speed restriction on all trains running in the Down direction through E41. This proposal runs contrary to Network Rail's strategic case for the Order, and indeed our Operating Licence. As set out in paragraph 4.7 of my Proof of Evidence, the Licence requires us to promote improvements in railway service performance, and to protect the interests of users of railway services.
- 7.2. If we were to permanently reduce line speed at all crossings such as E41, the impact on the network would be considerable. A key aspiration of this Order is to remove constraints from the railway, not to impose more.

8. Consultation

- 8.1. In paragraphs 11 and 12 Mr Liddy asserts that Network Rail conducted the consultation exercise with a closed mind. As set out in Andrew Kenning's Proof of Evidence (paragraph 37.7) the proposals for E41 changed during the development of the project. We took on board feedback from the consultations and now offer shallow gradient access between Pagets Road and High Street, and to the planned medical clinic on Phillip Road.

DECLARATIONS

I hereby declare as follows:

This proof of evidence includes all facts which I regard as being relevant to the professional opinion which I have expressed and I have drawn the inquiry's attention to any matter which would affect the validity of that opinion.

I believe the facts which I have stated in this proof of evidence are true and that the opinions are correct.

A handwritten signature in dark ink, appearing to read 'Mark Brunnen', written in a cursive style.

Mark Brunnen
Head of Level Crossings
3rd October 2017

APPENDIX A – Letter I Prosser to Network Rail



OFFICE OF RAIL REGULATION

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18 April 2012

Gareth Llewellyn
Director, Safety and Sustainable Development
Network Rail
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90 York Way
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Dear Gareth

Formalising Network Rail's level crossing risk reduction strategy

Thank you for your letter of 7th March.

I support on behalf of the ORR your proposed 5 point strategy that aims to ensure Network Rail meets its' statutory obligations to understand properly the risks at each and every level crossing, then to produce a risk-based prioritised programme that will reduce risks to as low as reasonably practicable across the whole level crossing population.

When Network Rail is ready, ORR would be very willing to sit down with you to understand the proposed work programmes and how it has been derived in detail, before agreeing if it is 'reasonably practicable' with respect to all the constraints that might exist on Network Rail, remembering that what is reasonable practicable is not based on affordability. I have one comment, which is that although ALCRM can provide a good overview of risk priorities, the routes will also know where the priorities lie, based on their local knowledge, and you should consider letting their knowledge feed into the prioritisation process.

ORR would not take enforcement against a dutyholder if they were doing all that the law required of them to reduce risks to a tolerable level. We will however act if we find issues with risk assessments or management controls at specific locations, or with the process in



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general, or if we find by inspection or post-incident that the controls/equipment had not been adequately maintained.

I hope this gives the clarification you require from the regulator.

Yours sincerely

A handwritten signature in black ink, which appears to read 'IAN PROSSER', is positioned below the 'Yours sincerely' text.

Ian Prosser