

Re The Network Rail (Suffolk Level Crossing Reduction) Order

Opening Statement on Behalf of the Ramblers' Association

INTRODUCTION

1. This opening statement sets out a number of the Ramblers' Association's (the "Ramblers") key points of objection to the Network Rail (Suffolk Level Crossing Reduction) Order (the "Order").

The Order

2. Network Rail is seeking to close or downgrade 24¹ level crossings, spread out across its network in Suffolk. Through this Order, Network Rail seeks permission to carry out works for the removal of the crossings and for the diversion of certain footpaths and a bridleway, and the re-designation of a byway open to all traffic. It seeks authorisation for the creation of new public rights of way and for the acquisition of land and interests in land that would be needed to enable the closure of the crossings and the diversions to rights of way.
3. The scope of this Order is substantial and it is unprecedented. If the Order is granted, numerous local communities will be affected by the closure and the diversion of public rights of way which would take place across a whole county. Normally, following the usual procedures of the Highways Act 1980 ("HA 1980"), a proposal for a diversion or closure to a single public right of way would have its own order, its own consultation process and its own assessment by local people and the highway authority. Here, 24 such proposals are being rushed through in one go.

¹ Originally 25 crossings were included in the Order. Ramblers were, however, informed, in a letter dated 7 December 2017, that one of the proposed crossing closures (S05 Pannington Hall) has since been withdrawn and other proposals have been amended (S30, S16 and S17) by Network Rail "in the interests of fairness and natural justice in relation to the interests in the seven affected plots who were the subject of late notices". (Letter from the Department for Transport to Eugene Suggett.)

Background to the Order – Anglia CP5 Level Crossing Reduction Strategy

4. The Order must be seen in context. It is being pursued as part of the overarching Anglia CP5 Level Crossing Reduction Strategy and links in with two other proposed orders in the Anglia network. These are:
 - (i) The Network Rail (Essex and Others Level Crossing Reduction) Order (the “Essex Order”), which seeks to close or downgrade 59 level crossings across the whole county of Essex, as well as throughout areas in Hertfordshire, Havering and Thurrock.
 - (ii) The Network Rail (Cambridgeshire Level Crossing Reduction) Order (the “Cambridgeshire Order”), which proposes to close or downgrade 25 level crossings on the mainline branches across the county of Cambridge.
5. It is clear that Network Rail is relying on the same strategic case, as set out in its statement of case and the evidence of Mr Brunnen and Dr Algaard, to justify all three orders.
6. What is more, there is a real risk that this Order along with the Essex and Cambridgeshire Orders are “test cases” for Network Rail. Ramblers contend that, if it works here, Network Rail will likely roll out similar projects across the entire country. The need for there to be proper scrutiny of this Order cannot, therefore, be overstated.

The Ramblers’ Legal submissions

7. On Thursday 8 February 2018, Ramblers provided legal submissions to the Inquiry which detailed why the use of a Transport and Works Act Order (“TWAO”) is inappropriate in this case. Ramblers have previously made identical submissions in respect of both the Essex and the Cambridgeshire Orders. This Order, in common with the Essex and Cambridgeshire Orders, is solely concerned with the closure of level crossings, and works ancillary thereto. There is a particular statutory scheme designed to govern level crossing closures and public rights of way diversions. That scheme was in fact established through the Transport and Works Act 1992 (“TWA”) and is to be found in Part VIII of the HA 1980. Use of a TWAO in this case will frustrate that statutory scheme.
8. Ramblers also raised concerns as to the potential for procedural unfairness, arising from Network Rail’s use of a TWAO, particularly the risk that the case for each individual proposed crossing closure would not be properly scrutinised.

9. These legal submissions are before the Inspector and have been provided to Network Rail in advance of the opening of this Inquiry. This opening statement should be read alongside those submissions and Ramblers will not unduly repeat the same points here.
10. Ramblers do, however, reiterate that, on the basis of the points made in those legal submissions, and in addition to any other grounds for recommending refusal, the Inspector is invited to recommend refusal of the Order under section 13(2) of the TWA - that the objects of the order could be achieved by other means.

OVERVIEW OF THE RAMBLERS' OBJECTIONS

11. Ramblers object to the proposed Order, both on grounds that Network Rail's strategic case for the Order is flawed and on grounds that, even if its strategic case were found not to be flawed, Network Rail has failed to appropriately implement it when preparing the Order. Furthermore, Ramblers have (without prejudice to their concerns as to strategic matters) considered each individual crossing and the proposed alternative routes suggested by Network Rail. Ramblers have taken a reasonable approach to assessing each closure and have only objected to those crossings where they feel the proposed alternative is unsuitable or inconvenient. Ramblers maintain objections to 10 of the crossings,² and have withdrawn other objections subject to agreement on the details of the certification clause in the Order (see below).
12. In the interests of efficient use of Inquiry time, Ramblers have not provided an overview of their objections on each individual crossing in this opening statement. Ramblers' detailed objections will be evident from the witness evidence. Ramblers simply highlight a number of "recurring themes" relating to the unsuitability and inconvenience of the proposed alternative routes.
13. It is worth mentioning at the outset, that where Ramblers have not objected to a particular crossing closure, this is on the basis of the proposals included in the draft Order. Were those proposals to be modified, during the process of this Inquiry, Ramblers reserve the right to reconsider its position.

²S01, S02, S22, S23, S24, S25, S27, S28, S31 and S69

Objections to Network Rail's Strategic Case

14. In short, Ramblers submit that the Inspector cannot be satisfied that Network Rail has justified the need for the Order and, in particular, the need to close the individual crossings included within the Order.
15. Network Rail is relying on a threefold strategic case to justify the need to close the level crossings included in the Order. In short, Network Rail states that the Order will:³
- (i) Improve operational efficiency of the Network;
 - (ii) Increase safety of both rail users and those interacting with the railway by reason of public and private rights; and,
 - (iii) Assist in the efficient use of funds by reducing the costs associated with maintaining level crossings.
16. The first thing to note is that Ramblers do not dispute that the Order has the potential to achieve all three of these strategic aims. By closing level crossings, Network Rail will eliminate the safety risk associated with the lawful use of those crossings and no longer incur the costs of maintaining them. Removal of level crossings may also have the potential to facilitate operational efficiency improvements on Network Rail's networks, although Ramblers submit that this will depend on the specific circumstances of the stretch of railway in question, including the number of other level crossings which remain on it.
17. Yet these three strategic aims cannot, simply in themselves, justify the closure of level crossings. In short, Network Rail is not the only interested stakeholder in a level crossing. These crossings are used by a variety of different people for different purposes. Moreover, diversions to public rights of way not only affect those who use them, but also the highway authority which has duties to maintain them.
18. Overall, Ramblers submit that if Network Rail is to succeed in justifying the need for this Order, it will need to show why the proposed level crossing closures are necessary, having regard to the circumstances, and relevant stakeholder interests, surrounding each level crossing in turn.

³ See Mark Brunnen's Proof of Evidence at 2.3.

Lack of evidence

19. It is clear that Network Rail did not base its decision as to which crossings should be included in this Order on any assessment of the individual crossing's safety risk. As a result, no balancing exercise weighing up the safety risks at each crossing, against the level of usage, or purpose of usage was undertaken. Nor was there any balancing exercise weighing up the safety risks at each crossing against the safety risks of the proposed alternative route. It appears that Network Rail simply picked the crossings either on grounds that they were (i) in Network Rail's view unused or little used or (ii) had a "nearby alternative route" to cross the railway.⁴ This initial "short-listing" decision was key. The consultation process that followed centred around the adequacy of the proposed alternative routes, with little scope for consultees to question the overarching decision to close a crossing. This is fatal where the initial decision as to which level crossings to close had not sufficiently considered other relevant interests.
20. Network Rail rely, predominantly, on the generic safety risks associated with level crossings as justification for this Order. Ramblers recognise Network Rail's desire to improve safety across its networks and does not dispute that Network Rail should do all that it reasonably and practicably can to improve safety at level crossings. But the overarching and generalised objective of reducing the safety risk at level crossings simply cannot be used as a justification for the closure of these crossings in this TWAO.
21. Ramblers recognise that Network Rail also argues that the Order is justified because it would allegedly result in significant cost savings and an enhanced potential to improve efficiency on its networks. But, again, Network Rail has not provided any cost-benefit analysis for the closure of each individual crossing. What is more, Network Rail has not provided sufficient evidence to show how the closure of these crossings will enhance operational efficiency. These justifications are, similarly, far too generalised.
22. Network Rail states that it has complied with the public sector equality duty; but provides no detailed evidence that would enable the Inspector to evaluate whether or not in making the Order applied for the Secretary of State can be satisfied that the public sector equality duty, which also applies to him, has been complied with.

⁴ NR18, p.9 and Dr Algaard's Proof of Evidence, pp. 13-14.

Unbalanced decision-making

23. Throughout its decision-making processes, Network Rail has not adequately considered the variety of interests connected to the crossings, nor how other stakeholders will be affected. This is evident both as regards Network Rail's decision as to (i) which crossings should be closed and (ii) what alternative routes will be provided.
24. As a result, the Inspector cannot be satisfied that the Order reflects a properly reasoned or balanced approach, nor that it would embody the concept of sustainable development or comply with local plan and other relevant policies. Ramblers share the concerns of the County Council⁵.

Effects of the Scale of the Order

25. Due to the disproportionate scale of the Order, it has been impossible to properly scrutinise each proposed crossing closure through the consultation procedure. Ramblers are an organisation that depends on volunteers and which is known for its particular expertise in protecting and maintaining the public rights of way network. However, Ramblers have been faced with the task of scrutinising 25 crossings stretching out across an entire county in one go. What is more, due to Network Rail progressing the three orders (Cambridgeshire, Essex and Suffolk) during the same period, Ramblers have had to consider over 100 level crossing closures over a very short space of time.⁶ This is simply disproportionate.
26. What is more, there is a real risk that the cumulative impact of the closures proposed in this Order has not been fully appreciated. Whilst Ramblers can consider the likely impacts of one crossing closure on the rest of the PROW network, it is a different task altogether to consider the cumulative impact that multiple closures on this scale will have.
27. Another example of the impracticality of the scale of this Order has been highlighted by Suffolk County Council⁷. As drafted, the Order provides for a deemed certification procedure for a number of the authorised works. For example, draft Article 16 relates to the creation and maintenance of new highways. As currently drafted, if Network Rail requests certification from the highway authority that a new highway has been created to the authority's satisfaction, and the highway authority fails to respond within 28 days of receiving the request, that new highway will be deemed to have been certified. There is nothing to stop

⁵ Evidence of Stephen Kerr paras 62-84

⁶ Network Rail applied for all three orders within the same month – March 2017.

⁷ Evidence of Stephen Kerr paras 4.1-4.5.

Network Rail from requesting certification for many new highways all at once, with the effect that Suffolk County Council could not respond in time. Ramblers supports Suffolk County Council's concerns in this regard and further submit that this problem highlights the inherent issues created by the disproportionate scale of the Order. Since this issue has already been raised in Essex and in Cambridgeshire it might have been expected that Network Rail would have actively negotiated with Suffolk County Council to agree amended terms well before the start of this inquiry. Instead Ramblers were informed as recently as 26 January 2018⁸ that Network Rail was in discussion with Suffolk County Council, with the implication that agreement had not been reached and might not be reached by the start of the inquiry.

Objections to the Implementation of Network Rail's Strategy

28. Without prejudice to Ramblers' objections to the underlying rationale of Network Rail's strategic case, Ramblers object to the manner in which that strategy – even if it were to be justified (and Ramblers do not accept that it is) – has been implemented.
29. Once Network Rail had decided on the Anglia CP5 Level Crossing Reduction Strategy,⁹ and the crossings that would be closed, it then needed to properly assess each proposed alternative route and determine if it would be suitable and convenient. Ramblers dispute both that (i) a proper assessment has been done and (ii) that a number of the proposed alternatives are suitable and convenient.

Lack of access to proposed alternative routes

30. It is important to note at the outset that, in relation to their evidence on the suitability and convenience of the proposed alternative routes, Ramblers' local volunteers have been restricted by their inability to access a number of proposed alternative routes that are located on private land.

⁸ Letter from Winckworth Sherwood to Eugene Suggett.

⁹ NR18. It appears that this "Client Requirement Document" sets out the overview strategy for the Anglia route and is intended to be implemented through "Route Requirement Documents" for each county (see Andrew Kenning's Appendix 1).

Shifting the safety risk onto roads

31. A number of the proposed alternative routes require users to walk in, alongside, or cross over, roads, yet Network Rail has failed, in a number of regards, to properly assess the impacts these schemes will have on use of the road network and safety on the roads.
32. It is important to note that these shortcomings form part of a bigger picture. Through this Order, Network Rail is seeking to reduce the safety risks associated with its networks. It has done so, however, without due regard to the knock-on consequences that the Order will have on increasing safety risks elsewhere. The result is that in some cases Network Rail has simply shifted the issue away from the railways and onto the roads – for Network Rail, it appears to be a question of “out of sight, out of mind”. This approach, however, fails to recognise that the Secretary of State, who will determine whether or not to grant the Order, will need to consider the whole picture and not just the level of safety risks on the railway network. Overall, Network Rail’s approach to impacts on road safety is not reasonable or responsible and it does not align with the planning system’s notion of sustainable development.
33. Ramblers have a number of concerns relating to the adequacy of the road safety audits which Network Rail seek to rely on. Key information, such as traffic volume and speed, does not appear to have been before the auditing team, and the Ramblers have previously raised other concerns relating to how the road safety audits were approved.¹⁰
34. Ramblers will, in relation to a number of the crossing closures, be raising objections on safety grounds, highlighting how the proposed alternative routes are not suitable because they are too unsafe.

Unknown costs of highway maintenance

35. As presently drafted, the Order requires Network Rail to fund the ongoing maintenance of the new alternative routes for the first 12 months only. After which time, the responsibility will shift to the highway authority. This maintenance obligation represents an unquantifiable future expense for the highway authority. Network Rail plans to provide commuted sums to cover this future expense; and in this regard Ramblers share the County Council’s concerns

¹⁰ On 13 October 2017, John Russell, a technical director at Motion, submitted a letter to the Essex Inquiry, on behalf of the Ramblers, detailing ongoing concerns regarding Network Rail’s road safety audits. Mr Russell has submitted a letter, detailing similar concerns, to this Inquiry and will be giving evidence about those concerns. (Ramblers submitted these two letters to the Cambridgeshire Inquiry on 20 November 2017, highlighting that the same issues apply to the Cambridgeshire RSAs.)

about the mechanism for ensuring commuted sums are paid to the Council and how and when they should be calculated¹¹. Again, this is evidence of Network Rail shifting responsibility onto the highway authority. What is more, until these sums are agreed, they represent an “unknown” cost for the proposed scheme which does not appear to have been accounted for in the Estimate of Costs.¹²

36. Where no new route is proposed and it is intended that the public make use of what is assumed to be highway verge¹³ increased use of the verge may lead to an increased maintenance liability. The duty to maintain a highway and its verges, where these are part of the highway maintainable at public expense, is not absolute; it changes depending on the ordinary traffic of the area¹⁴ which will change if users are displaced from the rights of way network onto the highway verge. Again increased obligation on the Council is to be accounted for by a commuted sum for maintenance; again this will be difficult to quantify.

37. Ramblers submit that, in light of these outstanding issues, the Order proposal is premature.

Issues of future-proofing

38. Network Rail is relying, to a significant degree, on the verge spaces alongside existing public vehicular highways to provide alternative routes. As noted above, Network Rail has still not clarified whether the land it intends to use, for these routes, is recognised as highway. And it appears that Network Rail does not intend that these new alternative routes will be designated as public rights of way. This raises a serious question as to the future-proofing of this

¹¹ Evidence of Stephen Kerr paras 35-39

¹² NR07.

¹³ Assumed, because there is no evidence before the inquiry of the lateral extent of the public vehicular highways concerned and Network Rail appears to be relying on the rebuttable presumption that the highway extends from boundary to boundary and on an advice note which fails to mention *Hale v Norfolk County Council* (2001) Ch. 717. The importance of making a preliminary factual evaluation as to boundaries is made by Hale LJ: “Third, the presumption of dedication of all the land running between hedges or fences can only arise if there is reason to suppose that the hedge or fence was erected by reference to the highway: that is, to separate the land over which there was to be no public right of way from the land over which there was to be such a right. Where matters are lost in the mists of time, it must often be possible to draw such an inference from the layout on the ground. In a conventional road running between hedges or fences, even if the verges are of varying widths and shapes, this may well be the obvious conclusion. It is not surprising, therefore, that the cases regarded this as the prima facie position. But that is not the same as elevating this preliminary factual question into a presumption of law.”

¹⁴ *Burnside v Emerson* (1968) 1 WLR per Diplock LJ. “The duty of maintenance of a highway....is not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition”

scheme. Whilst the highway authority may not have any present plans to change the public vehicular highways in question, this does not prevent future plans, for example road widening schemes, from being pursued in years to come. Unlike a public right of way, routes utilising verges would not have the same protected status under the law. For this reason alone, these alternatives cannot be seen as suitable.¹⁵

Reliance on existing routes are not “diversions”

39. Ramblers do not accept that an alternative route that solely relies upon the existing highway network is a “diversion”. Where no new path or way is to be created, the change to the existing right of way is in the manner of an extinguishment and would, therefore, need to be justified on grounds that an alternative route is not necessary.¹⁶

Unsuitability and Inconvenience of Proposed Alternative Routes

40. Ramblers’ objections to specific crossing closures are generally based on grounds that the proposed alternative routes are not suitable and convenient.¹⁷ Each proposed crossing closure affects a unique public right of way, for which different considerations will apply to any assessment of suitability and convenience. Indeed, one of the major flaws of Network Rail’s proposals arises from an apparent failure, on the part of Network Rail, to properly consider the individual circumstances of each crossing. That being said, there are a number of “recurring themes” in relation to Ramblers’ objections to the proposed alternative routes. These include:

(i) Increase in length of route

A number of the proposed alternative routes greatly increase the walking time to connect back up to the PROW network. What is more, many of the existing routes

¹⁵ *Ramblers Association v Kent* (1990) 60 P & CR 464 per Woolf LJ, “In deciding whether an alternative way is reasonable, it must be a way which is protected, so far as duration is concerned, in the same way as the existing way is protected. It must also be suitable, or reasonably suitable, for the purpose for which the public were using the existing way.”

¹⁶ Sauvain QC, *Highway Law*, 5th ed at 9-73.

¹⁷ Ramblers note, and welcome, that Network Rail has agreed that the reference to an “alternative right of way” in s5(6) of the TWA means “a convenient and suitable replacement for existing users”, as stated in Annex 2 of the *Guide to TWA Procedures* (see, for example, Susan Tilbrook’s Proof of Evidence at 1.3.2). However, Ramblers and NR disagree as to the meaning, in practice, of convenient and suitable. See also paras 35-39 of Ramblers’ Legal Submissions for further tests and considerations that the Ramblers submit should apply to a proper assessment of the proposed alternative routes.

will be used as part of a circular walk (during which walkers will use the PROW to get from A to B and then back from B to A). As a result, any increase in time will, in practice, be doubled. The impact of added time to a walk will vary greatly depending on the purpose of the walker. An extra 15 minutes there and 15 minutes back can easily put a walker off popping down to the shops. They will just drive instead. Furthermore, if the added length is so much as to put people off using the route, then the PROW network will, in practice, be disconnected.

(ii) Change in quality

A number of the proposed alternatives are a world away from the existing route in terms of scenic value and atmosphere. Network Rail has, on many occasions, replaced a tranquil country walk with a route alongside a busy, noisy road and in other cases proposes to divert a route alongside a railway line. The qualitative difference between the existing and proposed routes does not appear to have been appreciated by Network Rail but they will often be enough, in themselves, to stop people from walking them. Ramblers consider that Network Rail has entirely failed to consider that routes, especially rural routes, are in the main used by walkers to walk for walking's sake.

(iii) Safety

As has already been noted, a number of the alternative routes carry walkers alongside roads. Apart from the resultant change in quality this also represents an increased safety risk, particularly as many of the roads used are rural roads along which drivers drive relatively fast and are not expecting to see many walkers. Clearly an unsafe route is not suitable or convenient. It is stated in evidence that there is no accepted methodology for comparing the relative risk to the public of using a railway crossing as compared to having to make use of the carriageway¹⁸; there is therefore the risk that walkers will be displaced by this Order to a less safe environment.

¹⁸ Rebuttal proof of Ms Tilbrook at para 3.1.3

(iv) Less enjoyable to walk

A number of Network Rail's proposed alternative routes will upset the natural flow of walking and do not follow obvious desire lines. For example, some of the routes involve backtracking, or zig-zag directions, which will require the walker to at some point walk away from the direction in which they are going. Whilst difficult to describe, these changes are likely, in reality, to dissuade people from walking the route altogether. This has adverse impact on the enjoyment that the public derive from the rights of way network and also adversely affects the success of policies to encourage people to walk for health benefits.

CONCLUSION

41. Ramblers reiterate that each crossing included in the Order is unique. There are many different reasons why people use level crossings. Crossings may, for example, be used by people to access the countryside, to access their home, or to get to the local shops or to schools – each crossing has a different purpose and its own particular connection to the rights of way network.
42. It is clear from the way Network Rail has (i) chosen which crossings to close and (ii) chosen what alternative routes to provide, that it has failed to properly consider each crossing in its context. It has failed to properly consider how each crossing is being used, by how many people and on what basis. Yet it proposes to close the crossings permanently. Ramblers highlight that once these rights of way are lost, they are lost for ever - leaving a lasting impact on the rights of way network for generations to come.
43. Overall, Ramblers object to the Order on grounds *inter alia* that:
- (i) The use of a TWAO is inappropriate and, or in the alternative, that the purposes of this Order can be achieved through other means (s13(2) TWA);
 - (ii) Network Rail has not sufficiently justified the need for the Order as a whole, nor the need for closure of each individual crossing;

- (iii) Deemed planning permission should not be granted for the development proposed to be authorised by the Order, because the development conflicts with a number of national and local planning policies;
- (iv) The proposed alternative routes on a number of the crossings are not suitable or convenient, most notably a number of the proposed routes are *inter alia*:
 - (a) Of significantly increased length;
 - (b) Much less scenic, often requiring walkers to walk besides busy, noisy and polluted roads;
 - (c) Unsafe; and,
 - (d) Less enjoyable to walk.

44. For all of these reasons, Ramblers invite the Inspector to recommend the refusal of this Order.

12 February 2018

Sue Rumfitt

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