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Environment Agency

Mr Ian Jenkins, BSc (Hons), CEng, MICE, MCIWEM

c/o Joanna Vincent and Graham Groom, Persona Associates

By email to joannavincent@personaassociates.co.uk and grahamgroom@personaassociates.co.uk

9th February 2018

Dear Mr Jenkins

Network Rail (Suffolk Level Crossing Reduction) Order

I write to set out the Environment Agency ("EA")'s position on the draft protective provisions ("the protective provisions") being put forward by Network Rail ("NR"). We have been sent a copy of the revised Schedule 11 of the Order which NR states it is putting before you on the first day of the inquiry.

There is just one outstanding matters in dispute.

Deemed Consent or Deemed Refusal

The issue is whether if time elapses under Paragraph 2(3) of the protective provisions without a decision by the EA, the application for consent is deemed to be refused or granted. NR want deemed consent, the EA wants deemed refusal.

We would say first that we hope that there will be no need for either refusal or consent to be deemed in that the EA will endeavour wherever possible to make a decision within the timescale.

NR is correct that historically the protective provisions agreed by the EA within TWAOs have provided for deemed consent. This reflected what was, at the time, the relevant legal provision – sections 109 and 110 of the Water Resources Act 1991. In 2016, the flood defence consenting regime was transferred to the regime which permits other types of environmental permit, and flood defence consents became "flood risk activity" permits under the Environmental Permitting (England and Wales) Regulations 2016 ("EPR"). Under the EPR, if a decision on a permit application is not made within the relevant period, the application is deemed refused.

The protective provisions are for the purpose of replacing the EA's consenting/permitting regime. The EA would respectfully suggest that it is important to bear in mind that the purpose of this regime is to protect against flood risk. Consequently the EA now seeks deemed refusal to be consistent with the EPR. Part of the reason for the change in legislation was to comply with EU law.

The Inspector will be aware that the EA often agrees protective provisions as part of development consent orders ("DCO") made under the Planning Act 2008. Although made under different legislation, the principle of the EA agreeing to 'disapply' the legislation relating to its consenting/permitting regimes in return for satisfactory protective provisions within DCOs is exactly the same. In the Thames Water Utilities Limited (Thames Tideway Tunnel) Order 2014, deemed refusal was accepted as appropriate by the Secretary of State. Since flood defence consents became flood risk activity permits under the EPR, the EA has sought deemed refusal as a matter of course in draft DCOs. I would like to draw the Inspector's attention to the decision dated 1st December 2017 in relation to the application for a DCO for Junction 10A of the M20. In the hearings relating to that application, the point about deemed consent/refusal was argued and I attach for your information extracts of the examining authority's recommendations (which were adopted by the Secretary of State for Transport) on this point. NR argues that EA consent is simply the 'how' but this is no less the case than where an applicant seeks planning permission and a related flood risk activity permit.

The protective provisions are otherwise agreed by the EA.

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Environment Agency

Yours sincerely

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NETWORK RAIL INFRASTRUCTURE LIMITED

NETWORK RAIL (SUFFOLK LEVEL CROSSING REDUCTION) ORDER
Schedule 11

For the protection of Drainage Authorities and the Environment Agency

Note in response to Environment Agency letter dated 9 February 2018 on draft protective provisions relating to the Network Rail (Suffolk Level Crossing Reduction) Order

Background

1. Network Rail has applied for three "Level Crossing Reduction Orders", relating to level crossings in Suffolk, which is the subject of this inquiry, for Cambridgeshire 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 (TWAO). 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 11 to the Filled Up Network Rail (Suffolk Level Crossing Reduction) Order (the Suffolk Order) submitted on 13 February 2018.

Having seen the proposed amendments as set out in Schedule 11 to the draft Order as submitted to the Inquiry by Network Rail (NR-INQ-22), the Environment Agency wrote to the Inspector on 9 February 2018 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

The Agency, in its letter dated 9 February 2018, identified the one outstanding matter between the parties which is Deemed Consent or Deemed Refusal.

Deemed Refusal

5. 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.

6. 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.

7. 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.

8. 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 <u>consent</u> akin to the EPR which should therefore retain the same scope (i.e. deemed refusal).

9. 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 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 Order (2017/1329)[1] 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] 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, <u>only if the relevant body has consented to the inclusion of the provision.</u> 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 2017[2].

(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 11, paragraph 2(3)(a)) and to use reasonable endeavours to respond within two months (Schedule 11, paragraph 2(4)).

Conclusion

10. 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.

11. 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

20 February 2018

APPLICATION FOR DEVELOPMENT CONSENT ORDER FOR M20 JUNCTION 10A BY HIGHWAYS ENGLAND

EXTRACTS FROM SECTION 8 OF THE EXAMINING AUTHORITY'S REPORT – COMPULSORY PURCHASE AND RELATED MATTERS

The Case for the Environment Agency

8.6.7 The EA strongly disagrees with the Applicant's proposed wording of 20(3)(b)[120] which states "*shall be deemed to have been given*". It should read "*shall be deemed to have been refused*". This is to reflect a change in legislation. Flood defence consents were formally issued under the Water Resources Act 1991 (WRA91) and were deemed to be given, but flood risk activity permits under the Environmental Permitting (England & Wales) Regulations 2016 have superseded flood defence consents under the WRA91. Flood risk activity permits are deemed to be refused. The Protective Provisions need to align with the change in legislation to reflect deemed refusal. For the same reasons, 22(1)(a)[121] will also need to be amended to include "*or deemed to have been approved or settled*" [REP8-005 and REP8-006]. ……..

Applicant's response

8.6.10 The Applicant rejects the amendments proposed by the EA for the following reasons:
☐ Paragraph 20(3)(b) and paragraph 22(1)(a) - Consent should be deemed to be given if no response is received from the EA. The two month response period is generous, and the Applicant cannot accept the risk of the Proposed Development being delayed due to the failure of the EA to respond. The dDCO should be considered on its own merits and not by reference to other general legislation;

Examining Authority's Conclusion

8.6.11 In respect of Part 3 of Schedule 9 of the recommended dDCO (Appendix D to this report), I have considered each area of dispute between the EA and the Applicant. In consideration of paragraphs 20(3)(b) and paragraph 22(1)(a), I consider that the appeal provisions at Schedule 6 of the Environmental Permitting (England & Wales) Regulations 2016 (the EP Regs) mean that there would not be any unreasonable risk posed to the delivery of the Proposed Development. I am therefore convinced by the arguments put forward by the EA and agree that the drafting should reflect the contemporary statutory position arising from the EP Regs.

STATUTORY INSTRUMENTS

2017 No. 1329

TRANSPORT AND WORKS, ENGLAND

The Boston Barrier Order 2017

Made - - - - *12th December 2017*

Coming into force - - *2nd January 2018*

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SCHEDULE 8

Article 54

PROTECTION OF PORT OF BOSTON

1. The following provisions of this Schedule have effect unless otherwise agreed in writing between the Agency and the Harbour Authority.

2. In this Schedule—

"accumulation" means any accumulation of silt or other material which constitutes an impediment to navigation;

"construction" includes execution and placing, maintenance, extension, enlargement, alteration, replacement, relaying, and removal, and "construct" and "constructed" are to be construed accordingly;

"erosion" means any erosion of the bed or banks of the river or any jetty or other structure of whatever nature owned or occupied by the Harbour Authority;

"harbour property" means any land or works owned or administered by the Harbour Authority as part of its harbour undertaking at the Port of Boston;

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

"specified work" means so much of any permanent or temporary work authorised by this Order (which includes, for the avoidance of doubt, any removal of gravel or other material, any dredging or similar work and any geotechnical investigations that may be undertaken) as is on, in, under or over—

(a) the surface of land below the level of mean high water springs forming part of the river; or

(b) any other harbour property.

3.—(1) The Agency must not exercise the powers conferred by this Order to acquire or take temporary possession of or acquire new rights over any land held by the Harbour Authority as part of its statutory undertaking except with the consent of the Harbour Authority.

(2) The consent of the Harbour Authority under this paragraph must not be unreasonably withheld but may be given subject to such reasonable requirements as the Harbour Authority may make for the purpose of performing its statutory functions.

4.—(1) Before beginning any operations for the construction of any specified work (but this requirement does not apply to minor works of maintenance or repair), the Agency must submit to the Harbour Authority plans of the work and such further particulars available to it as the Harbour Authority may within 14 days of the submission of the plans reasonably require.

(2) Any specified work must not be constructed except in accordance with such plans as may be approved in writing by the Harbour Authority or determined to be in accordance with article 67 (arbitration) of this Order.

(3) Any approval of the Harbour Authority required under this paragraph must not be unreasonably withheld and—

(a) shall be deemed to be given if it is neither given or refused (with an indication of the grounds for refusal) within 28 days of the submission of the plans or where further particulars are submitted under sub-paragraph (1), within 28 days of the submission of those particulars; and

(b) may be given subject to such reasonable requirements as the Harbour Authority may make for the protection of—

(i) navigation in, or the flow or regime of, the river; or

(ii) the use of its land other than such parts as are required for the specified works for the purposes of performing its statutory functions.

5. The Agency must give to the Harbour Authority not less than 14 days' written notice of its intention to commence the construction of a specified work (but this requirement does not apply to minor works of maintenance or repair) and, not more than 14 days after completion of such construction, must give to the Harbour Authority written notice of such completion.

6. The Agency must carry out all operations for the construction of any specified works with all reasonable dispatch to the reasonable satisfaction of the Harbour Authority so that navigation in, or the flow or regime of, the river and the exercise of the Harbour Authority's statutory functions do not suffer more interference than is reasonably practicable and the Harbour Authority shall be entitled by its officer at all reasonable times, on giving such notice as may be reasonable in the circumstances, to inspect and survey such operations.

7. After the purpose of any temporary works has been accomplished the Agency must with all reasonable dispatch, or after a reasonable period of notice in writing from the Harbour Authority requiring the Agency so to do, remove any such temporary works or any materials relating thereto which may have been placed below the level of high water by or on behalf of the Agency; and, on failing to so do within a reasonable period after receiving such notice, the Harbour Authority may remove the same and may recover the reasonable costs of so doing from the Agency.

8.—(1) If—

(a) during the construction of a tidal work or within 10 years after the completion of that work and wholly or partly in consequence of its construction; or

(b) during the exercise of the powers conferred by article 6 (power to dredge etc.) of this Order or within 10 years after and wholly or partly in consequence of the exercise of those powers,

there is caused or created an accumulation or erosion which results or is likely to result in interference with navigation or damage to harbour property, the Agency must, if so requested by the Harbour Authority acting reasonably and having regard in particular to its and the Agency's statutory functions, remedy such accumulation or erosion to the extent attributable to such construction or exercise of powers in the manner specified in sub-paragraph (3) and, if it refuses or fails to do so, the Harbour Authority may itself cause the work to be done and may recover the reasonable cost of doing so from the Agency.

(2) If any such accumulation or erosion in consequence of such construction or exercise of the powers conferred under article 6 (power to dredge etc.) arises within the said period of 10 years and is remedied in accordance with sub-paragraph (1), any recurrence of such accumulation or erosion must, from time to time, if reasonably so required to do by the Harbour Authority after notice in writing to it from the Agency and having regard in particular to its and the Agency's statutory functions, be so remedied by the Agency during the said period of 10 years and at any time thereafter, save that the Agency's obligation under this paragraph shall cease if, following the remedying of any accumulation or erosion, a period of 10 years elapses without any further accumulation or erosion being caused or created in consequence of such construction or exercise.

(3) For the purposes of sub-paragraph (1) and (2) above—

(a) in the case of an accumulation, the remedy must be its removal; and

(b) in the case of erosion, the remedy must be the carrying out of such reconstruction works and other protective works or measures as may be necessary.

(4) In the event that any surveys, inspection, tests or sampling establish that such accumulation or erosion may have been caused in any event by factors other than the construction of a tidal work or the exercise of the powers conferred by article 6 (power to dredge etc), the Agency is liable to remedy such accumulation or erosion only to the extent that the same is attributable to such construction or exercise.

(5) For the purposes of sub-paragraph (1) the date of completion of a work is the date on which it is brought into use.

9. The Agency must pay to the Harbour Authority the reasonable costs of such alterations to the marking and lighting of the navigational channel of the river as may be necessary during or within five years of the completion of and in consequence of the construction of a tidal work and afford

to the Harbour Authority such facilities as it may reasonably require for the placing and maintenance on any tidal work of signals, tide-boards, tide-gauges or other apparatus for the safety or benefit of navigation.

10. Without affecting the other provisions of this Schedule, the Agency must be responsible for, and make good to the Harbour Authority, all costs which may reasonably be incurred by or occasioned to the Harbour Authority by reason of or arising from or in connection with—

(a) the carrying out of surveys, inspections, tests and sampling within and of the river (including the bed and banks of the river) where the Harbour Authority has reasonable cause to believe that the construction of any of the tidal works or the exercise of the powers conferred by article 6 (power to dredge etc.) of this Order is causing or has caused any such accumulation or erosion;

(b) the surveillance, co-ordination and regulation of traffic within the Port of Boston which becomes reasonably necessary by reason of the exercise or the prospective exercise by the Agency of its powers to close the river or any part of the river to navigation under article 17 (temporary closing of the river in connection with works) of this Order.

11.—(1) The Agency must indemnify the Harbour Authority from all claims, demands, proceedings or damages, which may be made or given against, or recovered from the Harbour Authority and any costs or expense reasonably incurred by the Harbour Authority by reason of any damage to the bed or banks of the river or other harbour property which is caused by the construction, maintenance or failure of any specified work or any act or omission of the Agency, its contractors, agents or employees whilst engaged upon the work.

(2) The Harbour Authority must give to the Agency reasonable notice of any such claim or demand and no settlement or compromise of any such claim or demand must be made without the consent of the Agency, which, if it notifies the Harbour Authority that it desires to do so, shall have the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

12. Nothing in paragraph 11 imposes any liability on the Agency with respect to any damage to the extent that it is attributable to any prior defect, want of maintenance or want of repair to the beds or banks of the river or other harbour property or to the act, neglect or default of the Harbour Authority, its officers, servants, contractors or agents but the fact that any work or thing has been executed or done in accordance with a plan approved or deemed to be approved by the Harbour Authority, or to its satisfaction, or in accordance with a determination under article 67 (arbitration) of the Order, does not (in the absence of negligence on the part of the Harbour Authority, its officers, servants, contractors or agents) relieve the Agency from any liability under the provisions of this Schedule.

13. Save to the extent expressly provided for nothing in this Order affects prejudicially any statutory or other rights, powers or privileges vested in, or enjoyed by, the Harbour Authority at the commencement of this Order.

ANNEX (2)

High Speed Rail (London - West Midlands) Act 2017

CHAPTER 7

Explanatory Notes have been produced to assist in the understanding of this Act and are available separately

£46.25

High Speed Rail (London - West Midlands) Act 2017

CHAPTER 7

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52 (1) Before beginning to construct any specified work, the nominated undertaker must submit to the drainage authority plans of the work and such further particulars available to it as the drainage authority may within 28 days of the submission 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 61.

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

(a) must not be unreasonably withheld,

(b) is to be deemed to have been given if it is neither given nor refused within 56 days of the submission of the plans for approval or where further particulars are submitted under sub-paragraph (1), within 56 days of the submission of those particulars, and

(c) may be given subject to such reasonable requirements or conditions as the drainage authority may make for the protection of any drainage work or fishery or for the protection of water resources, or for the prevention of flooding or pollution or in the discharge of its statutory environmental duties.

53 The requirements which the drainage authority may make under paragraph 52 include conditions requiring the nominated undertaker at its own expense to construct such protective works (including any new works as well as alterations to existing works) 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 the specified work.

54 (1) Any specified work, and all protective works required by the drainage authority under paragraph 52, must be constructed to the reasonable satisfaction of the drainage authority and an officer of the drainage authority is entitled on giving such notice as may be reasonable in the circumstances, to inspect and watch the construction of such works.

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

(3) If any part of the works comprising a structure in, over or under a watercourse is constructed otherwise than in accordance with the requirements of this Part, the drainage authority may by notice require the nominated undertaker at the nominated undertaker's own expense to comply with the requirements of this Part or (if the nominated undertaker so elects and the drainage authority in writing consents, such consent not to be unreasonably withheld) 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), if within a reasonable period, being not less than 28 days from the date when a notice under sub-paragraph (3) is served upon the nominated undertaker, 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