

Re The Network Rail (Essex and Others 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 (Essex and Others Crossing Reduction) Order (the "Order").

The Order

2. Network Rail is seeking to close or downgrade 59¹ level crossings, spread out across its network in the counties of Essex and Hertfordshire, the unitary authority of Thurrock, the London Borough of Havering, and the Borough of Southend-on-Sea. Through this Order, Network Rail seeks permission to carry out works for the removal of the crossings and for the diversion, or re-designation of the status of, certain public roads, footpaths, bridleways, restricted byways and byways 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 vast 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 whole counties. Normally, following the usual procedures of the Highways Act 1980 ("HA 1980"), each 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, 59 such proposals are being rushed through in one go.
4. What is more, there is a risk that this Order is a "test case" for Network Rail. It is the first of its kind and links in with two other proposed orders, affecting Cambridgeshire and Suffolk, for which public inquiries are due to follow immediately after this one. The Ramblers

¹ Originally 61 crossings were applied for in the Order, but E42 Sand Pit and E57 Wivenhoe have since been withdrawn by Network Rail.

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

5. On Tuesday 10 October, the 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. This Order 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 footpath diversions. That scheme was in fact established through the Transport and Works Act 1992 ("TWA") and is to be found, most notably, in Part VIII of the HA 1980. Use of a TWAO in this case will frustrate that statutory scheme.
6. The 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.
7. 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 the Ramblers will not unduly repeat the same points here.
8. The 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

9. The 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 not to be flawed, Network Rail has failed to appropriately implement it when preparing the Order. Furthermore, the Ramblers have (without prejudice to their concerns as to strategic matters) considered each individual crossing and the proposed alternative routes suggested by Network Rail. The 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. The Ramblers maintain objections to 32 of the crossings.²

10. In the interests of efficient use of Inquiry time, the Ramblers have not provided an overview of their objections on each individual crossing in this opening statement. The Ramblers simply highlight a number of “recurring themes” relating to the unsuitability and inconvenience of the proposed alternative routes. The Ramblers respectfully request that they may be allotted an appropriate amount of time to provide a short opening statement with regards to each individual crossing as and when each crossing is considered by the Inspector.
11. It is worth mentioning at the outset, that where the 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, the Ramblers reserves the right to reconsider their position.

Objections to Network Rail’s Strategic Case

12. In short, the Ramblers submit that the Inspector cannot be satisfied that Network Rail have justified the need for this Order and, in particular, the need to close the individual crossings included within the Order.

Lack of evidence

13. Network Rail has now clarified that it 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. There was no balancing exercise weighing up the safety risks at each crossing, against the level of usage, or purpose of usage. There was no 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) unused/little used or (ii) had a “nearby alternative route” to cross the railway. 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

² At the time of writing, the Ramblers also maintains four conditional objections to E01, E16, E21 and E22. Within the last week, the Ramblers were provided with drawings showing Network Rail’s alternative route for E08. The drawings are not of good quality and the Ramblers are unable to properly assess the alternative route on the basis of the information provided. The Ramblers, therefore, maintains a holding objection to this crossing. The five crossings referred to in this footnote are not included in the figure of 32.

decision to close a crossing. This is fatal where the initial decision-making process had not been justified.

14. Network Rail rely, predominantly, on the generic safety risks associated with level crossings as justification for this Order. The Ramblers recognise Network Rail's desire to improve safety across its networks and do not dispute that Network Rail should do all that it reasonably and practicably can to improve safety at level crossings. But the overarching 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.
15. Network Rail then argues that this 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.

Unbalanced decision-making

16. 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.
17. Furthermore, it has failed to properly consider how the proposed closures relate to national and local planning policy. For example, Network Rail has failed to even mention the Rights of Way Improvement Plans of the relevant local authorities affected by the proposed closures. Nor has Network Rail considered the recent Department for Transport's Cycling and Walking Investment Strategy 2017.
18. 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 policies.

(Im)practical Effects of the Scale of the Order

19. Due to the disproportionate scale of the Order, it has been impossible to properly scrutinise each proposed crossing closure through the consultation procedure. The 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, the Ramblers have been faced with the insurmountable task of scrutinising over 60 crossings stretching out across entire counties in one go. This is simply disproportionate.

20. 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 the 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.
21. Another example of the impracticality of the scale of this Order has been highlighted by Essex County Council. As drafted, the Order provides for a deemed certification procedure for a number of the authorised works. For example, draft Article 15 relates to the creation and maintenance of new highways. 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. As Essex County Council have highlighted, there is nothing to stop Network Rail from requesting certification for many new highways all at once, with the effect that Essex County Council could not respond in time. The Ramblers support Essex 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.

Objections to the Implementation of Network Rail's Strategy

22. Without prejudice to the Ramblers' objections to the underlying rationale of Network Rail's strategic case, the Ramblers object to the manner in which that strategy – even if it were to be justified (and the Ramblers do not accept that it is) – has been implemented.
23. Once Network Rail had decided on the Anglia CP5 Level Crossing Reduction Strategy,³ 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. The Ramblers dispute both that (i) a proper assessment has been done and (ii) that a number of the proposed alternatives are suitable and convenient.

³ 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). Network Rail have only provided RRDs for Essex and Hertfordshire. It has not provided relevant RRDs for Havering, Thurrock or Southend-on-Sea.

Shifting the safety risk onto roads

24. A number of the proposed alternative routes require users to walk 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.
25. 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 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.
26. The Ramblers have raised a number of concerns relating to the adequacy of the road audits which Network Rail seek to rely on. The Ramblers have highlighted that key information, such as traffic volume and speed, does not appear to have been before the auditing team, as well as other concerns relating to how the road audits were approved.⁴
27. The 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

28. 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 plan to provide commuted sums to cover this future expense but, to the knowledge of the Ramblers, no sums have been agreed. 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

⁴ On 13 October 2017, John Russell, a technical director at Motion, submitted a letter the Inquiry, on behalf of the Ramblers, detailing ongoing concerns regarding Network Rail’s road audits.

scheme which does not appear to have been accounted for in the Estimate of Costs.⁵ The Ramblers submit that, in light of these outstanding issues, the Order proposal is premature.

Issues of future-proofing

29. Network Rail is relying, to a significant degree, on the verge spaces alongside existing highways to provide alternative routes. Network Rail has still not clarified whether the land it intends to use, for these routes, is recognised as highway land. 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 scheme. Whilst the highway authority may not have any present plans to change the roads 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, these routes would not have the same protected status under the law. For this reason alone, these alternatives cannot be seen as suitable.⁶

Reliance on existing routes are not “diversions”

30. It is worth noting that the 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.⁷

Unsuitability and Inconvenience of Proposed Alternative Routes

31. The Ramblers’ objections to specific crossing closures are generally based on grounds that the proposed alternative routes are not suitable and convenient.⁸ Each proposed crossing closure affects a unique public right of way, for which different considerations will need to 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

⁵ NR07.

⁶ *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.”

⁷ Sauvain QC, *Highway Law*, 5th ed at 9-73.

⁸ The 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 Network Rail’s letter to Nicky Philpott, dated 4 September 2017). See also paras 35-39 of the Ramblers’ Legal Submissions, dated 10 October 2017, for further tests and considerations that the Ramblers submit should apply to a proper assessment of the proposed alternative routes.

of “recurring themes” in relation to the 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 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 have, on many occasions, replaced a tranquil country walk with a path (or verge) alongside a busy, noisy road. The qualitative difference between the existing and proposed routes do not appear to have been appreciated by Network Rail but they will often be enough, in themselves, to stop people from walking them.

(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.

(iv) Inaccessible

A number of proposed alternative routes will require walkers to walk up or down steep gradients – including up over bridges, or down under underpasses. Network Rail has not made adequate provision to address these accessibility constraints.

(v) 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.

(vi) Increased flood risks

Some proposed alternatives will take walkers into areas of increased flood risk but in circumstances where Network Rail has not provided any flood mitigation. It is likely that, in some cases, the proposed alternative will become waterlogged for parts of the year and this will dissuade or prevent walkers from using the route.

CONCLUSION

32. The Ramblers reiterates 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, to access their farm, or to get to the local shops – each crossing has a different purpose and its own particular connection to the rights of way network.
33. 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. The 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.

34. Overall, the 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;
 - (d) Less accessible;
 - (e) Less enjoyable to walk; and,
 - (f) Have an increased flood risk.

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

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17 OCTOBER 2017

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