

**NETWORK RAIL INFRASTRUCTURE LIMITED**

**NETWORK RAIL (ESSEX AND OTHERS LEVEL CROSSING REDUCTION) ORDER  
Schedule 13**

For the protection of Drainage Authorities and the Environment Agency

**Note in response to Environment Agency letter dated 18 October 2017  
on draft protective provisions relating to the  
Network Rail (Essex and Others Level Crossing Reduction) Order**

**Background**

1. Network Rail has applied for three "Level Crossing Reduction Orders", relating to level crossings in Essex, 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 (TWAOs). That is, that for certain works authorised by the Order (defined as specified works), which include constructing or altering or repairing a structure in, over or under a main river which affects its flow or diverts flood waters or works which are within 16 metres of a drainage work or affect the flow of water to or from it, Network Rail must submit for approval plans and other details of those works to the Agency.
3. The Agency may impose reasonable requirements in approving the specified works and may request Network Rail, at its own expense, to construct protective works to protect drainage works from damage or to maintain its efficiency. The protective provisions allow the Agency to watch and inspect the construction of the specified works and to require Network Rail to rebuild them if they are not constructed in accordance with the plans and requirements approved. Network Rail is obliged to keep the works in good repair so as to avoid any obstruction of a drainage work. The protective provisions also provide for indemnities to be given by Network Rail and a disputes provision.
4. Following discussions with the Environment Agency (the Agency) on the form of the protective provisions for all three Orders, it has been possible to reach agreement on a number of amendments which have been included as shown in Schedule 13 to the Filled Up Network Rail (Essex and Others Level Crossing Reduction) Order (the Essex Order) submitted to the inquiry on 18 October 2017.
5. Having seen the proposed amendments as set out in Schedule 13 to the draft Order as submitted to the Inquiry by Network Rail (NR-101), the Environment Agency wrote to the Inspector on 18 October 2017 to set out its position on the one matter not agreed between the Agency and Network Rail on the protective provisions.

**The Agency's position**

6. The Agency, in its letter dated 18 October 2017, identified the one outstanding matter between the parties which is Deemed Consent or Deemed Refusal.

## Deemed Refusal

7. The matter in dispute is whether, if time elapses under paragraph 2(3)(b) of the draft protective provisions without a decision from the Agency, the submission by Network Rail for approval of plans and other particulars from the Agency in relation to specified works (as defined) is deemed to be refused or deemed to be granted. The Agency is seeking deemed refusal, and Network Rail, following the form of such protective provisions as made in other TWAO, deemed approval.
8. Network Rail acknowledges the Agency's comment in the second paragraph of its letter under the heading "Deemed Consent or Deemed Refusal", that it is hoped that there will be no need for either refusal or consent to be deemed in that the Agency will endeavour wherever possible to make a decision within the timescale.
9. The Agency sets out in its letter (third paragraph under the heading "Deemed Consent or Deemed Refusal") that in 2016 the flood defence consent under section 109 of the Water Resources Act became "flood risk activity" which required to be permitted under the Environmental Permitting (England and Wales) Regulations 2016 (EPR). As the Agency states in the fourth paragraph under the heading "Deemed Consent or Deemed Refusal", "The protective provisions are for the purpose of replacing the EA's consenting/permitting regime", that "the purpose of this regime is to protect against flood risk", and that "the EA now seeks deemed refusal to be consistent with the EPR". In addition the Agency cites compliance with EU law as part of the reason for the change in legislation, but it does not elaborate on this.
10. Network Rail understands the Agency's position to be that the Agency is treating the plan approvals required under the protective provisions in paragraph 2(3) as a consent akin to the EPR which should therefore retain the same scope (i.e. deemed refusal).
11. Network Rail's position is that the protective provisions should remain as drafted in the filled up Order, providing in paragraph 2(3)(b) for a deemed consent. This is for the following reasons of principle:
  - (i) The protective provisions provide not for a consent equivalent to the EPR regime, but rather for the approval of detail: the in-principle decision on whether the works in a TW Order should proceed rests firmly with the Secretary of State in deciding whether to make the Order. At the time the protective provisions are implemented that in-principle decision will already have been made. A deemed refusal in line with the Agency's powers under the EPR is therefore neither required nor appropriate in the protective provisions. Furthermore, so far as Network Rail is aware, there is nothing in any 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)<sup>1</sup> 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.

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<sup>1</sup> Copy attached as Annex 1



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.

- (iii) The effect of the Agency's changes as they stand would also mean that either (a) the powers of the local authorities (as lead local flood authorities in respect of the Orders) would be increased, by extending a deemed refusal to them or (b) in order to preserve the position regarding flood authorities the protective provisions would have to have different arrangements for each category of body, which would be awkward as the local authorities do not have deemed refusal under their powers under section 23 of the Land Drainage Act 1991.
- (iv) The Agency is not able to cite a made TWA Order which includes deemed refusal and there is no precedent for deemed refusal within a TWAO
- (v) The Agency relies on the terms of Development Consent Orders (DCOs) under the Planning Act 2008 and provides details of the Inspector's decision in relation to the M20 Junction 10A DCO application. However, despite what the Agency says in the second sentence of the fifth paragraph under the heading "Deemed Consent or Deemed Refusal", the position regarding disapplication of legislation under DCOs is different to that for TWAOs. The Planning Act 2008, section 150, provides that an order granting development consent may include provision the effect of which is to remove a requirement for a prescribed consent or authorisation to be granted, only if the relevant body has consented to the inclusion of the provision. The Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 sets out in Regulation 5 and Schedule 2 the list of prescribed consents. It includes a consent under s109 of the Water Resources Act 1991 for works affecting main rivers (which has since been included within the Environmental Permitting regime) and environmental permit or exemption under the Environmental Permitting (England and Wales) Regulations 2010 (which would now extend to cover the 2016 EP Regulations). If Network Rail were promoting a DCO, not a TWAO, it would require the consent of the Agency to disapply these consents and would therefore be in a different position in negotiating protective provisions. That may explain the rather limited response from the Applicant to the EA's case presented for the M20 DCO application, which did not address the substantive point at issue here.
- (vi) The TWA 1992, however, allows for the disapplication of such consents without any requirement for this to be agreed by the consenting body concerned, and so with a TWA application the parties are coming at this from a different position, backed by legislation with a different policy. The form of protective provisions which include deemed plan approval are the standard that is to be found since the inception of TW Orders in 1993 and which continues to date i.e. after the EP regime. This continued the private and hybrid Bill standard for the Agency and its predecessors, which itself continues to date in hybrid Bills in Parliament promoting railway schemes, as in the Crossrail Act 2008 and the recent High Speed (London – West Midlands) Act 2017<sup>2</sup>.
- (vii) In the recent decision<sup>3</sup> on the application for the proposed Network Rail (Werrington Grade Separation) Order, where the EA raised similar points in relation to the draft protective provisions in that Order, the Secretary of State

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

<sup>3</sup> Copy attached as Annex 3.

agreed with Network Rail's position regarding draft protective provisions as set out in this note. Paragraph 33 of the decision letter dated 24 July 2018, states: *"The Secretary of State notes that a position of deemed refusal has been adopted in recent Development Consent Orders granted under the Planning Act 2008, as highlighted by the EA, but agrees with the Inspector that this is a significantly different legislative and regulatory process. For the reasons set out in IR 301, the Secretary of State agrees with the Inspector that the wording of the disputed protective provision clause should remain as proposed in the submitted draft Order (IR 303)."*

The Order as made on 3 August 2018<sup>4</sup> therefore includes deemed approval at paragraph 18(3)(b) of Part 3 of Schedule 12.

(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 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 13, paragraph 2(3)(a)) and to use reasonable endeavours to respond within two months (Schedule 13, paragraph 2(4)).

## **Conclusion**

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

**Winckworth Sherwood LLP**

**25 September 2018**

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<sup>4</sup> S.I. 2018 No. 923 The Network Rail (Werrington Grade Separation) Order 2018

## ANNEX 1

2017 No. 1329

TRANSPORT AND WORKS, ENGLAND

The Boston Barrier Order 2017

*Made* - - - - - 12th December 2017

*Coming into force* - - - - - 2nd January 2018

CONTENTS

PART 1  
PRELIMINARY

1. Citation and commencement
2. Interpretation
3. Application of 1991 Act

PART 2  
WORKS PROVISIONS

*Principal powers*

4. Power to construct and maintain works
5. Power to deviate

*Works and operations in the river*

6. Power to dredge etc.
7. Works and dredging etc. in the river
8. River not to be a reservoir

*Streets and rights of way*

9. Power to execute street works
10. Power to keep apparatus in streets
11. Power to alter layout, etc., of streets
12. Temporary stopping up and diversion of streets
13. Access to works
14. Agreements with street authorities
15. Use of private roads for construction

## 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

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

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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



## ANNEX 3



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Our Ref: TWA/16/APP/04

24 July 2018

Dear Sir/Madam

### **TRANSPORT AND WORKS ACT 1992: APPLICATION FOR THE PROPOSED NETWORK RAIL (WERRINGTON GRADE SEPARATION) ORDER AND DEEMED PLANNING PERMISSION**

1. I am directed by the Secretary of State for Transport to say that consideration has been given to the report of the Inspector, Mr Alwyn B Nixon BSc (Hons) MRTPI who held a Public Inquiry between 21-24 November 2017, into the application made on 22 December 2016 by your clients Network Rail Infrastructure Limited ("NR") for:

- (a) the Network Rail (Werrington Grade Separation) Order ("the Order") to be made under sections 1, 3 and 5 of the Transport and Works Act 1992 ("TWA"); and
- (b) direction as to deemed planning permission for the development provided for in the Order, to be given under section 90(2A) of the Town and Country Planning Act 1990 ("the Planning Direction").

2. The Order and the Planning Direction, if made, would authorise NR to construct, maintain and operate a grade separated junction in the form of a dive under beneath the East Coast Main Line at Werrington Junction (3 miles North West from the Centre of Peterborough). The scheme would allow trains to transfer between the Stamford Lines and the Great Northern Great Eastern ("GNGE") Line without crossing the East Coast Main Line ("ECML") on the level. The scheme is required, in combination with other schemes, in order to increase capacity on the ECML to allow for up to two extra train paths per hour in each direction for long distance high speed trains ("LDHS").

3. Enclosed with this letter is a copy of the Inspector's report. The Inspector's conclusions are set out in paragraphs 236 to 304 and his overall conclusions are set out in paragraphs 305 to 308 of the report. The Inspector's recommendations are set out in paragraph 309 of the report.

4. In making this application, NR complied with the publicity requirements of the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 ("the 2006 Rules"). This included serving copies of the application and the accompanying documents on the persons specified in the 2006 Rules and making the documents available for public inspection. As also required by the 2006 Rules, NR displayed and published notices giving information about the application and how to make representations and served notice on those whose rights over land would be extinguished under the Order.

#### **Summary of Inspector's recommendations**

5. The Inspector recommended that the Order should be made, subject to modifications, and that deemed planning permission be granted subject to conditions.

#### **Summary of the Secretary of State's decision**

6. For the reason given in this letter, **the Secretary of State has decided to make the Order with modifications, and to give the planning direction, subject to the conditions set out in Annex 1 to this letter.**

#### **Secretary of State's consideration**

7. Careful consideration has been given to all the arguments put forward by, or on behalf of, the parties. The Secretary of State's consideration of the Inspector's report is set out in the following paragraphs. All "IR" references are to paragraphs in the Inspector's report.

#### **Aims and need for the proposed Network Rail (Werrington Grade Separation) Order ("the scheme")**

8. The Inspector noted that the need for the scheme arises from the significant restriction on high speed passenger train capacity on the ECML that currently exists at Werrington Junction. The existing at-grade crossing point from the Stamford Line to the GNGE currently restricts LDHS passenger train paths on the ECML to a maximum of six trains per hour (IR 237). The Inspector further noted that the ECML Connectivity Fund has been established with responsibility for interventions to increase ECML capacity. As part of the fund arrangements, NR is tasked with delivering increased capacity on the ECML for two additional LDHS trains per hour in each direction. The scheme is one of the six projects within the ECML Connectivity Fund, and one of two identified as key to delivering the additional trains per hour required (IR 240).

9. The Secretary of State agrees with the Inspector's conclusions that the aims of the scheme are plain and significant in terms of delivering enhancements to the national rail network and that there is a clear and pressing need for the scheme (IR 243).

**The main alternative options considered by Network Rail and the reasons for choosing the proposals comprised in this scheme.**

10. The Secretary of State notes the Inspector's consideration of the alternatives considered (IR 244-249) and that operational changes to signalling and timetabling cannot address the capacity constraint on the ECML at Werrington (IR 244). The Inspector noted that work undertaken in connection with the GNGE improvement project and subsequently for the ECML Connectivity Fund demonstrated that the provision of a grade separated junction at Werrington was the only realistic option in terms of operation, maintenance, cost and effectiveness (IR 247) and that following public consultation a dive under rather than a flyover was the preferred form of grade separation (IR 248). Having regard to constructability, cost, environmental factors, public feedback and operational disruption considerations, the Secretary of State agrees with the Inspector that NR has systematically and thoroughly considered possible alternatives to the Order scheme and that the Order scheme is the preferable choice (IR 249).

**Consistency with the National Policy Planning Framework ("NPPF"), National Transport Policy, and Local Transport, environmental and local planning policies**

11. The National Policy Statement for National Networks ("NPSNN") sets out policies for Nationally Significant Infrastructure Projects ("NSIP") on the national road and rail networks in England. The Secretary of State agrees with the Inspector that for the reasons set out in IR 251 that the NPSNN is of material consideration here and that it is relevant to consider the application in the context of this and the NPPF.

12. The Secretary of State agrees with the Inspector's assessment at IR 250-257 regarding the extent to which the scheme complies with the relevant policies in the NPSNN, the NPPF and the Local Transport Plan; is consistent with the Peterborough City Council Core Strategy's vision and objectives; and has paid full regard to the detailed development properties in Peterborough's Planning Policies Development Plan. The Secretary of State notes that the Ministry of Housing, Communities and Local Government recently consulted on an update to the NPPF and has had regard to this when considering this scheme.

13. The Secretary of State notes the Inspector's view that the scheme would affect part of an allocated Green Wedge and a minerals safeguarding area, but that the extent of effect would be minor and the integrity of these features/assets would not be significantly compromised (IR 63-66, 256).

14. The Secretary of State notes no objections have been raised in terms of the scheme's consistency with planning policy or principles (IR 257). Taking into account in particular the economic, social and environmental benefits of the scheme, and the provision of sustainable travel and transport choices that the scheme will deliver, the Secretary of State is satisfied that the scheme is consistent with national and local transport and planning policies.

**Impacts on Landowners and Tenants, Local Residents, General Public, Utility Providers and Statutory Undertakers**

15. The Secretary of State notes that the order would grant NR powers to acquire the land and rights in land to construct, operate and maintain the scheme (IR 258) and at the



end of the Inquiry only one objection from a land/interest owner and two representations (one from the Environment Agency ("EA") and one from Werrington Neighbourhood Council ("WNC")) remained (IR 259). The Secretary of State further notes that three dwellings will be demolished as a result of the scheme but that no objections remained in relation to those properties, or from operators of commercial premises impacted by the scheme, or from utilities providers and statutory undertakers (IR 261-263).

16. The Secretary of State notes that the scheme involves works to a number of watercourses in the vicinity and that the EA is now content on all matters concerning the scheme design principles, watercourse maintenance and access and protective provisions save for one remaining point (IR 264) – which is addressed in paragraph 33 below.

17. The Secretary of State notes the Inspector's view that the construction will inevitably have some impact on residents, occupants of commercial premises and the general public. The Secretary of State concurs with the Inspector that the Code of Construction Practice ("CoCP") framework embedded in the recommended planning conditions represents an effective means of minimising adverse construction impacts so far as reasonably practicable (IR 265).

18. The Secretary of State notes the noise and vibration impacts of the scheme are assessed in detail in the Environmental Impact Assessment ("EIA") and reported in the Environmental Statement ("ES") and that the findings of the technical assessment are not in question (IR 265). The Secretary of State further notes that no likely significant direct effects arising from construction noise are forecast for residential or non-residential receptors (IR 267). Whilst the Inspector noted that significant adverse vibration impacts are predicted at some residential properties at Whitley Park and Gascoigne during construction, he was satisfied that construction noise and vibration impacts would be minimised through the Noise and Vibration Management Plan forming part of the CoCP required as a condition of the planning permission (IR 267- 268).

### **The adequacy of the Environmental Statement**

19. The Secretary of State notes that the Lloyds Banking Group had objected to the Order on the basis that the EIA had failed to acknowledge the particular vibration and air quality sensitivities of its data processing facility but that with agreements of protective provisions between the parties the objection has been withdrawn (IR 271). The Secretary of State agrees with the Inspector that the ES submitted with the Order application is thorough and adequate with reference to the requirements of the 2006 Rules (IR 174). He is satisfied also that statutory procedural requirements have been complied with (IR 270). The Secretary of State confirms that in reaching his decision he has complied with the requirements of paragraphs (a) to (c) of section 14(3A) of the TWA relating to the consideration of the ES.

### **Measures Proposed to Mitigate Adverse Impacts**

20. The Secretary of State notes that all construction-related mitigation would be secured and regulated through the CoCP process. This would include a pollution and incident control plan, waste management plan, traffic management plan, nuisance

management plan (including light, air and dust) and a noise and vibration management plan (IR 273).

21. The Secretary of State notes the potential effect of construction noise on residential properties at Whiteley Park Homes, Hurn Road, Gascoigne, David's Close and Sunnymead and nearby commercial premises would be mitigated through the temporary acoustic hoarding incorporated in the scheme design. The Secretary of State further notes residential properties still exposed to noise exceeding defined airborne construction noise levels would qualify for noise insulation mitigation or temporary rehousing as a last resort (IR 276).

22. Regarding noise and vibration levels during the operation of the scheme, the Secretary of State notes it is not predicted to give rise to any significant adverse noise or vibration effects for sensitive receptors and that planned mitigation initiatives will address minor increases expected in some locations. The scheme would also be governed by the Noise Insulation (Railways and Other Guided Transport Systems) Regulations 1996 (IR 277).

23. The Secretary of State notes the various measures set out in IR 279 to help mitigate the landscape, visual and biodiversity impacts of the scheme. Various mitigation measures have been incorporated into the scheme including reinstatement, replacement and enhancement of features lost as a result of the scheme construction. In terms of flood risk, mitigation embedded within the design of the modifications to the local drainage system arising from the scheme will ensure that flood risk within the surrounding area will not be increased (IR 280). The Secretary of State is satisfied that there are sufficient measures proposed to help mitigate adverse impacts of the scheme.

24. The Secretary of State considers that the planning conditions attached at Annex 1 to this letter and the measures in the draft Order would allow the effects identified in the ES to be satisfactorily mitigated and would avoid any significant adverse environmental impacts. Under section 14(3AA) of the TWA, the Secretary of State is required to describe the main measures to avoid, reduce and if possible, remedy the major adverse environmental impacts of a scheme. In this case, he considers that the main measures to mitigate the effects of the scheme are those in the planning conditions set out in Annex 1 to this letter, including the Code of Construction Practice that would be secured by condition 6 (see IR 273 – 276).

### **Compulsory Purchase Matters (including funding)**

25. The Ministry of Housing, Communities and Local Government's Guidance on the Compulsory Purchase Process and the Crichel Down Rules 2015 indicates that the acquiring authority will need to be able to show that: all necessary funding is likely to be available within a reasonable timescale; and the scheme is unlikely to be blocked by any physical or legal impediments to implementation, including any need for consent. The Guidance also indicates that an acquiring authority should be sure that the purposes for which it is making a compulsory purchase order sufficiently justifies interfering with the human rights of those with an interest in the land affected.

26. The Secretary of State is satisfied that the need for the scheme has been demonstrated as set out above and agrees with the Inspector that the public benefits of

providing the additional rail capacity through the scheme are plainly evident and very substantial (IR 282). The Secretary of State notes there are no maintained objections to the effect that the Order would involve land that is not needed for the construction, operation and maintenance of the proposed scheme and that NR has reached agreement with almost all the landowners concerned (IR 284). Paragraph 31 below sets out the position on the remaining objection raised by a landowner. The Secretary of State concurs with the Inspector that to the extent that there would be interference with human rights as a result of the compulsory acquisition of land or rights in land, such interference would be necessary and proportionate in view of the overriding public interest in carrying out the scheme.

27. The Secretary of State notes that details of funding for the scheme are set out in IR 290. The Secretary of State notes the Inspector's conclusions that there is currently funding available for the scheme and that there is a reasonable prospect that funding will continue to be available for the scheme's implementation (IR 292). The Secretary of State has no reason to disagree with this conclusion. The Secretary of State is further satisfied that the scheme is unlikely to be blocked by any legal or financial impediment to implementation and that there is a compelling case in the public interest for the Order (IR 285).

#### **Conditions to be attached to the Deemed Planning Permission**

28. The Secretary of State notes that the finalised planning conditions appended to the Inspectors Report have been agreed with Peterborough City Council as local planning authority (IR 286).

29. The Secretary of State notes concerns by WNC and its request for provisions in the conditions to protect local residents from excessive noise and vibration impacts (IR 184-196, 212-219). The Secretary State notes condition 7 of the planning conditions set out in Annex 1 of this letter requiring a CoCP includes a noise and vibration management plan and requires an external communications programme which establishes a process for enquiries or complaints (IR 287). The Secretary of State agrees with the Inspector that this condition provides a robust and appropriate safeguarding mechanism in respect of construction noise and vibration (IR 287). Further consideration of WNC's concerns on operational noise are set out in paragraph 32 below.

30. The Secretary of State agrees with the Inspector that the recommended planning conditions meet the test prescribed for planning conditions and are necessary and appropriate (IR 289).

#### **Remaining Objections and Representations**

31. The Secretary of State notes that there is a single remaining registered objection to the scheme. Milton (Peterborough) Estates Company & Sir Philip Naylor-Leyland Bt (OBJ/4), which relates to concern about disruption to the Estate's farming practices and sporting interest, arising from the temporary use of the land in connection with the scheme's construction (IR 211). The Secretary of State further notes NR's response to this (IR 181-3, 210-1) and the Inspector's consideration of this matter (IR 293-294). The Secretary of State agrees with the Inspector that the land in question is needed to enable the scheme to be constructed and notes pursuant to the Order any land temporarily taken has to be fully restored before being returned to its owner. In addition, the Secretary of State is

satisfied that the compensation provisions within the Order will ensure that the objector is fairly recompensed for loss of utility as a result of the scheme (IR 294).

32. The Secretary of State notes the outstanding representation from WNC (IR 212 - 219). The position with regard to construction noise is set out in paragraph 29 above. The Secretary of State notes that WNC supports the scheme proposals but raised concerns about the impact of noise resulting from an increase in the number of trains using the GNGE following line improvements completed in 2014. The Secretary of State agrees with the Inspector that WNC's concerns about the noise arising from more trains using the GNGE following the GNGE line improvements is not a consideration here as the GNGE line improvements do not form part of this scheme and were completed in 2014. Further, the Secretary of State agrees with the Inspector that the appropriate baseline against which to measure the predicted change in operational railway noise from the scheme is the situation after the GNGE line improvement, not before it (IR 297). The Secretary of State concurs with the Inspector that the resulting predicted increases in operational noise as a result of the scheme are minor and not significant and that the scheme is predicted to result in a negligible rise in night time train noise on the GNGE as there are no planned increases in night time use of the line as a result of the scheme (IR 298). For the reasons set out in IR 288, the Secretary of State agrees with the Inspector that a planning condition to address operational railway noise arising from the scheme is therefore not appropriate in this case (IR 299).

33. The Secretary of State notes that the EA does not object in principle to the Order but has a single remaining point of contention relating to the protective provisions proposed in the Order. The protective provisions as drafted by NR state that, in the event that the EA fails to determine an application for approval of details within the prescribed period, the EA's permission is deemed to be given, whilst the EA contend that permission should be deemed to be refused (IR 300). The Secretary of State notes the arguments set out by NR and EA in IR 197-206 and 223-228 respectively. The Secretary of State further notes the Inspector's position set out in IR 301-303. The Secretary of State notes that a position of deemed refusal has been adopted in recent Development Consent Orders granted under the Planning Act 2008, as highlighted by the EA, but agrees with the Inspector that this is a significantly different legislative and regulatory process. For the reasons set out in IR 301, the Secretary of State agrees with the Inspector that the wording of the disputed protective provision clause should remain as proposed in the submitted draft Order (IR 303).

### **Secretary of State's overall conclusion and decision**

34. The Secretary of State agrees that for all the reasons given above, the Order is justified on its merits and there is a compelling case in the public interest for making it. The Secretary of State, has, accordingly, decided to make the Order, subject to the modifications set out in IR 309(a) and a number of minor drafting amendments (including amendments necessary due to updates to the general law<sup>1</sup>) which do not make a substantial change in the proposals such as would require notification to affected persons

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<sup>1</sup> In particular amendments to article 5 (out-of-date reference to Environmental Permitting Regulations), article 17 (new general power of entry for survey proposes contained in the Housing and Planning Act 2016), articles 19-22 and Schedule 9 (modification of compulsory acquisition legislation by the Housing and Planning Act 2016) and Part 2 of Schedule 12 (introduction of new electronic communications code



under section 13(4) of the TWA, and to give the planning direction subject to the conditions at Annex 1 of the letter.

35. This letter constitutes the Secretary of State's notice of his determination to make the Order with modifications, for the purposes of section 14(1)(a) and section 14(2) of the TWA. Your clients are required to publish newspaper notices of the determination in accordance with section 14(4) of the TWA.

### **Challenge to Decisions**

36. The circumstances in which the Secretary of State's decisions may be challenged are set out in the note attached at Annex 2 to this letter.

### **Distribution**

37. Copies of this letter are being sent to those who appeared at the Inquiry and to all statutory objectors whose objections were referred to the Inquiry under section 11(3) of the TWA but who did not appear.

Yours sincerely,

**Natasha Kopala**

**TOWN AND COUNTRY PLANNING ACT 1990**

**NETWORK RAIL (WERRINGTON GRADE SEPARATION) ORDER 2018**

**CONDITIONS WHICH THE SECRETARY OF STATE INTENDS TO ATTACH TO THE  
DIRECTION AS TO DEEMED PLANNING PERMISSION.**

**Interpretation**

In the following conditions—

“the Applications Rules” means the Transport and Works (Applications and Objections Procedure) (England and Wales) Rules 2006 (S.I. 2006 No. 1466);

“the development” means the development authorised by the Order, but does not include preliminary works;

“the ES” means the Environmental Statement submitted with the application for the Order on 22 December 2016.

“the local planning authority” means Peterborough City Council;

“Network Rail” means Network Rail Infrastructure Limited;

“the Order” means the Network Rail (Werrington Grade Separation) Order 201[x];

“the Order limits” has the same meaning as in article 2 (interpretation) of the Order;

“the planning direction drawings” means the drawings listed in Schedule 2 to the request for planning permission submitted under rule 10(6) of the Applications Rules;

“preliminary works” means—

- (i) environmental (including archaeological) investigations, site or soil surveys and the erection of fencing to site boundaries or the marking out of site boundaries;
- (ii) site clearance and de-vegetation, except for the purposes of condition 8 (ecology); and
- (iii) the erection of contractors’ work compounds and site offices where such works do not require excavations and/or the construction of foundations and/or piling works;

“the site” means the land within the Order limits; and

“stage” means a defined section or part of the development (excluding preliminary works) the extent of which is shown in a scheme submitted to and approved by the local planning authority pursuant to condition 3 (stages of development), and reference to a numbered stage is to the stage of that number in the approved scheme.

### **Time limit for commencement of development**

1. The development shall commence before the expiration of five years from the date that the Order comes into force.

*Reason: To ensure that development is commenced within a reasonable period of time.*

### **Development in accordance with the planning direction drawings**

2. The development shall be carried out in accordance with the planning direction drawings.

*Reason: To ensure that the development is carried out in accordance with the consented design.*

### **Stages of development**

3. No development shall commence until a written scheme setting out all the stages of the development, including timescales, has been submitted to and approved in writing by the local planning authority. The development shall thereafter proceed in accordance with the approved written scheme unless variations are agreed in writing by the local planning authority.

*Reason: To control the timescale for the approval of details.*

### **Tree Removal**

4. No tree removal or de-vegetation shall take place until a scheme has been submitted to and approved in writing by the local planning authority which identifies the trees to be removed and trees to be retained. Best practicable means shall be demonstrated in the plan to minimise tree loss. No tree removal shall take place except in accordance with the approved scheme, unless variations are agreed in writing by the local planning authority.

*Reason: In the interests of the visual appearance and biodiversity of the area in accordance with the Peterborough Core Strategy policies CS16 and CS20 and policy PP16 of the Peterborough Planning Policies DPD. This is a pre-commencement condition because it relates to tree removal which shall take place during preliminary works or at the start of the development.*

### **Tree Protection**

5. No preliminary works or development shall commence until details of tree protection measures have been submitted to and approved in writing by the local planning authority. The details shall include root protection and other arrangements to be made in accordance with BS 5837:2005 to protect the trees to be retained (in accordance with condition 4 (tree removal)). The approved details shall be adhered to throughout the period of de-vegetation

and tree removal and throughout the construction period in the area to which the works relate.

**Reason:** *In the interests of the visual appearance and biodiversity of the area in accordance with the Peterborough Core Strategy policies CS16 and CS20 and policy PP16 of the Peterborough Planning Policies DPD. This is a pre-commencement condition because it relates to tree protection which shall take place during preliminary works and throughout development.*

## **Landscaping**

- 6.(a) No stage of the development shall commence until a written landscaping scheme for that stage has been submitted to, and approved in writing by, the local planning authority.
- (b) The landscaping scheme shall include details of mitigation as proposed in chapter 17.2 and shown cross-hatched brown and as a dark green line on figure 17.1 (sheets 1 to 3) in the Environmental Statement and must contain details of hard and soft landscaping including—
- (i) the number, species, size and planting density of any proposed planting;
  - (ii) details of cultivation, importing of materials and other operations to ensure plant establishment;
  - (iii) details of hard surfacing materials of any new footpath, bridleway or road;
  - (iv) details of the landscape management and maintenance regime; and
  - (v) an implementation timetable.
- (c) The approved scheme shall be implemented in accordance with the approved details and as set down in the implementation timetables or any subsequent revisions that have been approved in writing by the local planning authority.
- (d) Should any trees or plants die, become seriously diseased or seriously damaged, or be destroyed or removed, within a period of five years from planting, they shall be replaced with species of a similar size and type in the next available planting season.

**Reason:** *In the interests of the visual appearance and biodiversity of the area in accordance with the Peterborough Core Strategy policies CS16 and CS20 and policy PP16 of the Peterborough Planning Policies DPD. This is to secure the correct implementation of the measures identified in the Environmental Statement.*

## **Code of Construction Practice**

7.(a) The development shall not commence until a Code of Construction Practice (CoCP), including the relevant plans and programmes referred to in (b) below (which incorporates the means to mitigate the construction impacts identified by the Environmental Statement), has been submitted to and approved in writing by the local planning authority. The CoCP shall be in two parts. Part A shall provide a general overview and framework of



environmental principles and management practice to be applied to the scheme along with all construction-led mitigation identified in the ES.

(b) Part B of the CoCP shall include the following plans and programmes—

- (i) An external communications programme, including a protocol for dealing with any complaints;
- (ii) A pollution prevention and incident control plan;
- (iii) A waste management plan;
- (iv) A materials management plan including a separate soils mitigation plan;
- (v) A nuisance management plan concerning dust, wheel wash measures, air pollution and temporary lighting;
- (vi) A noise and vibration management plan including a construction methodology assessment;
- (vii) A road condition survey for all construction routes into and out of the project area, including a road condition survey of agreed sections of the following streets: Lincoln Road, Hurn Road, Gasworks Road, Stirling Way and Coningsby Road; and
- (viii) A traffic management plan.

(c) The CoCP shall be implemented in full throughout the period of the works.

**Reason:** To mitigate construction impacts arising from the development in accordance with Peterborough Core Strategy policies CS14 & 16 and Policies PP3 & 12 of the approved Planning Policies DPD. This is a pre-commencement condition because the CoCP, due to its nature, must be implemented from the outset of the development.

## Ecology

8. No preliminary works or development shall commence until an Ecological Management Plan has been submitted to and approved in writing by the local planning authority. The development and preliminary works shall only take place in complete accordance with the approved Ecological Management Plan and/or any subsequent revisions as may be approved in writing by the local planning authority. The Ecological Management Plan shall reflect the survey results and ecological mitigation and enhancement measures set out in the Environmental Statement, including the measures illustrated in figure 17.1 (sheets 1 to 3) of the ES, and must also include an implementation timetable and a five year post-completion monitoring schedule and measures to be taken if mitigation is found to be failing during this period.

**Reason:** To mitigate against the effects the development will have on species and habitats and to enhance local bio-diversity in accordance with policy CS21 of the Peterborough Core Strategy and policy PP16 of the Peterborough Planning Policies DPD. This is a pre-commencement condition because the ecological management plan must be deployed from the preliminary works onwards.

## Archaeology

9. No preliminary works or development shall commence until a programme of archaeological work including a written scheme of investigation has been submitted to, and approved in writing, by the local planning authority. Preliminary works and development shall take place in accordance with the approved scheme. The approved scheme shall be implemented in full including any post development requirements, e.g. archiving and submission of final reports.

**Reason:** *To secure the obligation on the planning applicant or developer to mitigate the impact of the scheme on the historic environment when preservation in situ is not possible, in accordance with paragraphs 128 and 141 of the National Planning Policy Framework (2012), policy CS17 and the Peterborough Core Strategy DPD (2011) and policy PP17 of the Peterborough Planning Policies DPD (2012). This is a pre-commencement condition because the archaeological work programme must be deployed from the preliminary works onwards.*

### **Means of Enclosure**

10. Within 6 months of the commencement of stage one of the development (as defined by condition 3), details of all permanent means of enclosure shall be submitted to and approved in writing by the local planning authority. The details shall include a timetable for the erection of the means of enclosure. The approved means of enclosure shall be erected in full in accordance with the approved timetable and retained as such thereafter.

**Reason:** *In the interest of public safety and visual amenity in accordance with policy CS16 of the Peterborough Core Strategy and policy PP2 of the Peterborough Planning Policies DPD.*

### **Details of footpath at Cock Lane Footbridge**

11. Details, including specification and detail of surfacing, of the footpath link from point P1A to point P5 at the east end of the new Cock Lane Footbridge, and from the end of the new ramp on the western side of the new Cock Lane Footbridge to the existing footpath (as shown on planning drawing 140365-JAC-WER-0-DR-MD-000085 Revision A03) shall be submitted to and approved in writing by the local planning authority prior to the commencement of the demolition of the old Cock Lane Footbridge. The development shall be carried out in accordance with these approved details.

**Reason:** *In the interests of the safety and integrity of the rights of way network and to be consistent with Policy PP12 of the Peterborough Planning Policies DPD.*

## **RIGHT TO CHALLENGE ORDERS MADE UNDER THE TWA**

Any person who is aggrieved by the making of the Order may challenge its validity, or the validity of any provision in it, on the grounds that—

- it is not within the powers of the TWA; or
- any requirement imposed by or under the TWA or the Tribunals and Inquiries Act 1992 has not been complied with.

Any such challenge must be made, by application to the High Court, within the period of 42 days beginning with the day on which notice of this determination is published in the London Gazette as required by section 14(1)(b) of the TWA. This notice is expected to be published within three working days of the date of this decision letter.

**A person who thinks they have grounds for challenging the decision to make the Order is advised to seek legal advice before taking action.**