

## **Re Network Rail (Essex and Others Level Crossing Reduction) Order**

### Note on Behalf of the Ramblers

#### On Outstanding Issues on the Wording of the Filled-Up Order Dated 29.01.2019

### **Limited Scope of Article 13**

1. Article 13 of the Order provides what will be referred to as a “locking mechanism”, which bites on those level crossings where closure is dependent on the provision of an alternative route that includes the provision of new highway. For these crossings, specified in column (2) of Part 1 of Schedule 2 (“Closure of Level Crossings Subject to Opening of New Highway”), Article 13 requires, at subparagraph (3):

Paragraphs (1) and (2) [of Article 13 – allowing closure of the crossings] are not to have effect until, in respect of each level crossing in that Part, the new highway specified in column (4) has been constructed and completed, to the extent specified by reference to the numbers and letters shown on the deposited plans, to the reasonable satisfaction of the highway authority in accordance with article 15 (creation and maintenance of new highway) and is open for use.

2. Essentially, Article 13 requires the provision of particular stretches of new highway to be “locked in” before the relevant crossing can be closed. Whilst this locking mechanism is to be welcomed, the Ramblers are concerned with a number of aspects to it.

#### ***(1) Crossings for which no new highway is needed***

3. Firstly, there are a number of crossings which are not covered by the “locking mechanism” at all. These are any crossings included in Part 2 of Schedule 2, for which no new highway forms part of the proposed diversion. For crossings that the Ramblers object to, this includes E10 Dixies, E54 Bures, E43 High Elm and E23 Barbara Close.
4. According to Article 14, these crossings will be immediately stopped-up and discontinued if the Order is made. Article 14 has no equivalent provision to Article

13(3) (quoted above) to require certification from the Highway Authority prior to closure.

5. There is, therefore, a real risk that these crossings could be lawfully closed without Network Rail having to deliver the promised safety improvements to the highway in E54 and E43.

**NR response:**

**NR and ECC have entered into a side agreement as set out in the joint statement numbered NR118. As set out in the penultimate paragraph in that joint statement, “To address particular concerns raised by the Council the agreement includes a requirement for the approval and construction of any works altering the existing highway to be undertaken before the related crossing can be closed”. That provides a sufficient safeguard to address the concern expressed by the Ramblers. NR confirms that the concern raised by the Ramblers – i.e. that some crossings would be able to be closed where works were required to the existing highway without those works having been certified by the highway authority – only applies to crossings within Essex. There are no proposed works to existing highways to crossings in Part 2 of Schedule 2 in the other highway authority areas.**

***(2) Locking mechanism limited to the provision of “new highway”***

6. Secondly, for those crossings covered by Article 13, the locking mechanism is unduly limited in scope. It only refers to the provision of specific new highway set out in column (4) of Part 1 of Schedule 2.
7. For a considerable number of the proposed alternative routes in this Order, Network Rail is not only providing new highway to ensure that a route is “suitable and convenient”. Network Rail is also offering to provide a number of other improvements, such as:
  - (i) Changes to existing highway, including most notably safety mitigation measures to existing roads and aligning verges (eg. E28, E29, E33, E38, E41, E43, E54, HA3, HA4), or improvements to drainage (eg. E19 on FP48)
  - (ii) Changes to existing infrastructure (eg. E35 and H05 (proposed changes to underpasses)); and,



- (iii) The provision of further furniture/infrastructure such as lighting (eg. E05 under the underpass) and/or appropriate signage.
8. The Ramblers are concerned that there is no “locking mechanism” which will ensure that the entire “package deal” offered by Network Rail for each proposed alternative route will, in fact, be delivered (whether before the crossing in question is closed or at all).
9. This is a serious concern for the Ramblers and affects not only those crossings which the Ramblers object to, but also those crossings which the Ramblers have chosen not to object to due to the proposals on offer. With regards to the latter category, it must be made clear that where the Ramblers have decided not to object to a crossing closure they have done so on the assumption that the Order will ensure the delivery of the entirety of what Network Rail is proposing to provide by way of alternative route, as opposed to only ensuring the provision of new highway.

**NR response:**

**Works to existing highways are subject to Articles 7, 9 and 10 of the Order which require any such works to be carried out to the reasonable satisfaction of the highway authority. It is not, therefore, the case that there is no highway authority oversight in respect of works to existing highways which are involved in implementing the Order proposals.**

**As to concern raised by the Ramblers, that works to the existing highway are not caught within the certification provisions of Article 15, NR would note as follows:**

- (1) In respect of those crossings within Essex, this is covered by the provisions of the side agreement referred to under para 5 above.**
- (2) The underpass at H05 is not existing highway. It is assumed this is meant to be a reference to E05.**
- (3) In respect of the works at HA03/HA04, these essentially relate to the construction of steps to bring the new PROW up to the existing roadbridge. Those works, and tie-in to the existing highway, are therefore part and parcel of**

**the “creation of the new highway” specified in Part 1 of Schedule 2 of the Order and therefore fall within the certification requirements of Article 13/15.**

***(3) Locking mechanism (Art 13) links to the “deemed certification” procedure (Article 15)***

10. Without prejudice to the Ramblers’ concern as to the limited scope of Article 13, the Ramblers are also concerned by the present drafting of Article 13 and its reliance on the certification procedure in Article 15. Article 13(3) provides that new highways must be constructed and completed to the *“reasonable satisfaction of the highway authority in accordance with article 16...”*.

11. Crucially, Article 15 (Creation and maintenance of new highway) contains what can be referred to as a “deemed certification” procedure in Article 15(11). Article 15(1) provides an initial protection for the highway authority, who must certify that any new highway has been completed to its “reasonable satisfaction”.<sup>1</sup> However, Article 15(11) then provides:

(11) The new highways are to be treated as completed to the satisfaction of the highway authority for the purpose of paragraph (1) if it fails to reply to a request for certification that it is satisfied with the work within 28 days of receiving the request.

12. Effectively, the highway authority’s approval of a stretch of new highway will therefore be “deemed” to have been granted, if a response is not given in 28 days of receiving a certification request by Network Rail.

13. The Ramblers strongly resist this “deemed certification” provision in Article 15 as there could be a risk that the highway authority receives a large number of certification requests all at the same time and is not able to respond in 28 days. If this approach were to be approved, there is an inherent risk that this might set a precedent which could be even more problematic should any similar order be sought on a

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<sup>1</sup> Article 16(1) reads in full:

*The new highways specified in column (4) of Part 1 in Schedule 2 (closure of level crossings) are to be completed to the reasonable satisfaction of the highway authority and are to be maintained by and at the expense of Network Rail for a period of 12 months from their completion and after the expiry of that period by and at the expense of the highway authority.*



greater scale (with an increased number of proposed crossing closures) in another part of the country.

14. The Ramblers appreciate that ECC has entered into a side agreement with Network Rail that – according to the joint statement (NR-118) deals with arrangements for certification of the works. However, due to the confidentiality of that agreement, it is difficult for the Ramblers to take comfort from it. What is more, similar side agreements do not appear to have been signed with the other highway authorities affected by this Order.

**NR response: NR 118 sets out that the agreement between NR and ECC includes arrangements for agreeing the design and approval of the works authorised by the Order in respect of each crossing, including submission of a Schedule of Works for each crossing by Network Rail for approval by the Council as well as to certification.**

**The other highway authorities (which, individually, do not have more than 4 crossings whose closure is subject to certification under Article 15) have not raised any concerns in respect of the proposed ‘deemed consent’ provisions. The concern about a highway authority “receiving a large number of certification requests all at the same time” and not being able to respond within the 28 days simply does not arise.**

**Further, as set out in the Explanatory Memorandum (NR03) the deeming provision has precedent in other recent TWA Orders.**

**Strictly without prejudice to the position above, this was an issue that was canvassed at the inquiry into the Suffolk Order. A form of words was provided to the Inspector which it was agreed between the legal representatives for Suffolk County Council and Network Rail would address that concern, if the Secretary of State were to consider that the Order would otherwise be defective. A copy of that text accompanies this Note.**

#### ***(4) Uncertainty for third parties***

15. Furthermore, it seems that third parties, such as the Ramblers and other interested members of the public are entirely left out of any post-Order certification process with

the highway authorities. There can be no guarantee that the highway authorities will, in fact, require the provision of all the proposed “package deal” elements before a particular crossing can be closed.

16. If, for example, Network Rail makes assurances during the Inquiry process that certain drainage issues affecting a new stretch of highway will be dealt with, but later it is decided by the Highway Authority and Network Rail that no such measures are necessary, it appears to be open to the highway authority to still certify the route, enabling the crossing to be closed. If the Ramblers disagree, they appear to have limited ability to challenge this decision – as Network Rail will be operating within the powers of the Order.

**NR response: It should be assumed that the HA will act reasonably, in the proper exercise of its functions, to certify the works to their reasonable satisfaction. Although NR 118 identifies that agreement covers payments for commuted sums, it would not be in the interests of a highway authority to certify or allow a deemed certification which does not address particular issues such as drainage, since the ongoing obligation to maintain works after the first year fall on the HA.**

### **Stage 2 RSAs**

17. There has been considerable reliance, by Network Rail during the Inquiry, on the fact that further RSA work (including Stage 2 RSAs) will need to be carried out (with the appropriate oversight of the relevant highway authorities) before crossings (that involve an interface with the road network) can be closed.
18. The Ramblers are unaware of how this requirement is guaranteed by the Order and seeks further explanation from Network Rail on this point.

**NR response: The requirement is not guaranteed by the Order. The purpose of the Order is to authorise works which interfere with, alter and extinguish as well as create, certain public rights of way and to provide powers for compulsory acquisition of interests in land including interference with private rights. The Order need only provide the powers necessary to authorise, construct and**



maintain those works and does not need to include arrangements within it to ensure that those matters which are subject to detailed design are delivered.

It is not appropriate to include in the Order details of arrangements concerning the exercise of the powers. Those matters can properly be left for agreement (to the extent necessary) with the relevant highway authority, including through a legally binding agreement enforceable through the courts. Such agreement has already been entered into with ECC which, as set out in NR 118, includes arrangements for agreeing the design and approval of the works authorised by the Order in respect of each crossing, including submission of a Schedule of Works for each crossing by Network Rail for approval by the Council.

#### **Commutated sums for ongoing maintenance of alternative routes**

19. Similarly, Network Rail has often made reference to the fact that commuted sums will be paid to the highway authorities for the continued maintenance of the routes, including any need for vegetation cut-back to ensure routes are safe to walk.
20. The Ramblers have a keen interest that the diversions are properly maintained into the future and are conscious that, when such maintenance obligations are not adhered to by public bodies it can often fall to organisations such as the Ramblers to step in and push for this to be done.
21. The Ramblers seek clarification on how the requirement for appropriate commuted sums to be paid is guaranteed by the Order – and asks for clarification as to whether any such sums will be ringfenced to maintain these new routes.

**NR response:** See comment to previous question - it is not for the Order to make provision for the payment of commuted sums or 'ring fencing' of the same. As set out in NR118 NR and ECC have agreed that commuted sums are to be paid, including the scope of such payments and how they are to be calculated. There is no basis for considering that it would not enter into similar arrangements with the other highway authorities, if those authorities request the payment of commuted sums. There is also no basis for suggesting that provisions in the Order are necessary to secure the safeguarding, and future use of those sums.

**The appropriate use of public funds to secure the maintenance of the PROW and**

highway networks is a matter for the highway authority, and there is simply no basis for the Order to intervene in that respect.

#### **Rights of Way to be Shown on the Definitive Map and Statement**

22. The Order does not appear to require new rights of way to be shown on the Definitive Map and Statement. Nor are specific widths and OS grid references provided for new stretches of ROW to allow interested parties to check any later Legal Event Modification Orders that might be made by the surveying authorities to add the new ROWs to the DMS.

**NR response: This is not a matter for the TWAO. These are matters for a Legal Event Modification Order. As a matter of law, the TW Order cannot itself be a LEMO. Again, that is a matter to be dealt with between NR and the relevant HA.**

#### **Arbitration Clause**

23. The Ramblers also take this opportunity to query whether the wording of the arbitration clause, in Article 37 of the Order, is appropriate in the specific context of the Order proposals. The Ramblers note that this clause mirrors that taken from the Transport and Works (Model Clauses for Railways and Tramways) Order 2006 but suggest that it should be modified to reflect the particular focus of this Order (in closing and diverting rights of way). The Ramblers request that Article 37 should be re-worded to specify that, if agreement on a single arbitrator cannot be reached, any arbitrator should be an independent member of the Institute of Public Rights of Way and Access Management (IPROW) appointed by the President of IPROW.

**NR response: Article 37 follows the wording in the Model Clause. NR does not agree that the clause needs to be amended. It does not require the President of ICE to appoint a civil engineer as arbitrator: merely provides that it is for the President to appoint an appropriate arbitrator. The Order does not specify that this is to be an engineer, and NR would resist a suggestion that the clause should**



**specify a professional membership body from which the arbitrator would be drawn.**

**Network Rail Infrastructure Limited****Network Rail (Essex and Others Level Crossing Reduction) Order**

Text of potential modification of article 13 reflecting text suggested if modification required to article 14 of the draft Suffolk Order at inquiry into that Order

**Article 13:****Closure of level crossings subject to opening of new rights of way**

13.—(1) Subject to paragraphs (3) and (5), the level crossings specified in column (2) of Part 1 of Schedule 2 (Closure of level crossings) are stopped-up and discontinued.

(2) Subject to paragraphs (3) and (5), upon the stopping up and discontinuance of the level crossings referred to in paragraph (1)—

- (a) any rights of way over those crossings are extinguished to the extent specified in column (2) of Part 1 in Schedule 2; and
- (b) any public rights of way specified in column (3) of Part 1 of Schedule 2 are extinguished to the extent specified, by reference to the numbers and letters shown on the deposited plans.

(3) Paragraphs (1) and (2) are not to have effect until, in respect of each level crossing in that Part, the new highway specified in column (4) and such other alterations to existing highway authorised by this Order as agreed with the highway authority has been constructed and completed, to the extent specified by reference to the numbers and letters shown on the deposited plans, to the reasonable satisfaction of the highway authority in accordance with article 15 (creation and maintenance of new highway) and is open for use.

(4) Any person who suffers loss by the suspension or extinguishment of any private right of way under this article is entitled to compensation to be determined, in case of dispute, under Part 1 of the 1961 Act.

(5) This article does not apply so as to extinguish the rights of statutory undertakers.