

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 Note dated 11 October 2018
on draft protective provisions relating to the
Network Rail (Essex and Others Level Crossing Reduction) Order**

- 1 The Environment Agency responded in its Note dated 11 October 2018 (EA's Note) particularly to paragraphs 11 and 12 of Network Rail's Note dated 25 September 2018 (NR's Note). Network Rail does not wish to repeat in detail the points raised in NR's Note, but in response to the EA's Note, Network Rail has the following comments:
- 2 Despite the Agency's comment to the contrary, NR's Note correctly refers to the Environmental Permitting (England and Wales) Regulations 2016 (EPR) throughout except where it cites the historical position in the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015.
- 3 EA's Note refers to the comment in paragraph 11(i) of NR's Note as being wrong. Network Rail maintains its position that the protective provisions within the TWA regime are an approval of detail for the reasons set out in the NR Note. That difference as to the principle in part determines the differing views between the parties as to whether there should be a deemed refusal in the draft protective provisions or a deemed consent. Network Rail's view on this point of principle is supported by the comments made in the Inspector's report (Report DPI/E0535/17/5 at 301 - 304) and resulting decision made by the Secretary of State on the Network Rail (Werrington Grade Separation) Order 2018:

"301. Both sides cite various legislative provisions in support of their respective stances. However, I am convinced by the points made by Network Rail on this matter. Deemed approval is the established precedent in relation to a failure to determine details submitted pursuant to TWA Orders. In such a circumstance the protective provisions provide for approval of detail; at the time they are implemented the principle of the Scheme's acceptability will have already been determined, by the decision to make the Order. The EA is therefore being asked to approve detailed drawings for a scheme that has already been given consent by the Secretary of State, where matters such as environmental impacts and controls have already been fully considered by an independent body. This is a quite different situation to the regulatory position under the Environmental Permitting Regulations where the EA is asked to give consent to an application made to it at first instance. [198, 200, 224-6]

302. The form of protective provisions in TWA Order cases which include a deemed approval provision has been consistently adopted since the inception of TWA Orders in 1993 through to the present. There is no instance of a made TWA Order which includes deemed refusal. Although the EA relies on the terms of Development Consent Orders (DCOs) for its stance, DCOs are considered and made under a significantly different legislative and regulatory process. [202-3,227]

303. The protective provisions are a streamlined process in place of any normal arrangements. Their purpose is to provide a bespoke regime for delivery of the authorised works, not merely to replicate the regulatory provisions to be disapplied. Deemed refusal would create potential for delay in the construction of the Scheme through no fault of the applicant, with impact on costs to Network Rail and to passengers, whilst the parties go to arbitration. Avoiding unforeseen delay in the construction process is particularly important because possessions of the railway require careful planning and timing. Given the level of agreement that has already been reached between the EA and Network Rail as to the form that the drainage works should take, I consider it appropriate that the EA should be expected to determine any subsequent application to it for approval of details of the works within the prescribed period, and for potential for delay to the Scheme through a failure to do so to be avoided. [201, 204]

304. I conclude that the wording of the disputed protective provision clause should remain as proposed in the submitted draft Order.”

- 4 Given both the purpose of protective provisions in a TWAO and the difference in approach of the two regimes, NR remains of the view that the Agency's comments in the sixth paragraph of the EA Note, that it can see no reason that a different approach should be taken in relation to TWAOs than to DCOs and that the two regimes are not different in any way that matters in relation to this particular point, are unfounded. The crucial difference between the two regimes is that the DCO requires the Agency's consent to disapply the EPR and the TWA regime does not. That, rather than the merits of its approach, explains why deemed refusal is commonly included in DCOs. Indeed, the EA Note concludes its sixth paragraph that the Agency takes the stance on DCOs that it will refuse disapplication of the EPR under s150 Planning Act 2008 if an applicant will not agree to deemed refusal in a DCO.
- 5 The EA's Note's suggests that (a) there is a dispute resolution procedure if deemed refusal is invoked (third paragraph), and (b) that there could be two separate protective provisions for the respective drainage authorities (fifth paragraph), one with deemed approval, the other with deemed refusal. Network Rail maintains for the reasons in the NR Note that neither would address Network Rail's concerns as to unreasonableness and practical effects on implementation of the TWA of a deemed refusal.
- 6 Network Rail therefore maintains that the Secretary of State should resist the Agency's proposal for deemed refusal as set out in this and NR's Note.

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31 January 2019