

A1 Birtley to Coal House

Scheme Number TR010031

7.5G Statement of Common Ground with Network Rail Infrastructure Limited

APFP Regulation 5(2)(q)

Planning Act 2008

Infrastructure Planning (Applications: Prescribed
Forms and Procedure) Regulations 2009

[only use if submitted with application]

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Infrastructure Planning

Planning Act 2008

**The Infrastructure Planning
(Applications: Prescribed Forms and
Procedure) Regulations 2009**

The A1 Birtley to Coal House
Development Consent Order 202[X]

STATEMENT OF COMMON GROUND

Regulation Number:	Regulation 5(2)(q)
Planning Inspectorate Scheme Reference	TR010031
Application Document Reference	7.5G
Author:	A1 Birtley to Coal House Project Team, Highways England

Version	Date	Status of Version
Rev 0	25 February 2020	Draft

STATEMENT OF COMMON GROUND

This Statement of Common Ground has been prepared and agreed by (1) Highways England Company Limited and (2) Network Rail Infrastructure Limited.

Signed.....
[NAME]
Project Manager
on behalf of Highways England
Date: [DATE]

Signed.....
[NAME]
[POSITION]
on behalf of Network Rail Infrastructure
Limited
Date: [DATE]

Without Prejudice

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1 INTRODUCTION

1.1 Purpose of this document

- 1.1.1 This Statement of Common Ground ("SoCG") relates to an application made by Highways England (the "Applicant") to the Planning Inspectorate (the "Inspectorate") under the Planning Act 2008 (the "2008 Act") for a Development Consent Order (DCO). If made, the DCO would grant consent for the A1 Birtley to Coal House (the "Scheme"). A detailed description of the Scheme can be found in Chapter 2 of the Environmental Statement (ES) (**Application Document Reference: TR010031/APP/6.1**)
- 1.1.2 This SoCG does not seek to replicate information which is available elsewhere within the Application documents. All documents are available in the deposit locations and/or the Planning Inspectorate website (<https://infrastructure.planninginspectorate.gov.uk/>).
- 1.1.3 The SoCG has been produced to confirm to the Examining Authority where agreement has been reached between the parties to it, and where agreement has not (yet) been reached. SoCGs are an established means in the planning process of allowing all parties to identify and so focus on specific issues that may need to be addressed during the examination.

1.2 Parties to this Statement of Common Ground

- 1.2.1 This SoCG has been prepared by (1) **Highways England** as the Applicant and (2) **Network Rail Infrastructure Limited**.
- 1.2.2 Highways England became the Government-owned Strategic Highways Company on 1 April 2015. It is the highway authority in England for the strategic road network and has the necessary powers and duties to operate, manage, maintain and enhance the network. Regulatory powers remain with the Secretary of State. The legislation establishing Highways England made provision for all legal rights and obligations of the Highways Agency, including in respect of the Application, to be conferred upon or assumed by Highways England.
- 1.2.3 Network Rail owns and operates Great Britain's railway network and has statutory and regulatory obligations in respect of it. Network Rail is a statutory undertaker in respect of its railway undertaking.

1.3 Terminology

- 1.3.1 In the tables in the Issues chapter of this SoCG, "Not Agreed" indicates a final position, and "Under discussion" where these points will be the subject of on-going discussion wherever possible to resolve, or refine, the extent of disagreement between the parties. "Agreed" indicates where the issue has been resolved.
- 1.3.2 It can be taken that any matters not specifically referred to in the Issues chapter of this SoCG are not of material interest or relevance to Network Rail Infrastructure Limited, and therefore have not been the subject of any discussions between the parties. As such, those matters can be read as agreed, only to the extent that they are either not of material interest or relevance to Network Rail Infrastructure Limited.

2 Record of Engagement

2.1.1 A summary of the meetings and correspondence that has taken place between Highways England and Network Rail Infrastructure Limited in relation to the Application is outlined in table 2.1.

Table 2-1 - Record of Engagement

Date	Form of correspondence	Key topics discussed and key outcomes
16 July 2019	Email	Network Rail confirmed that the protective provisions sent to them were in a similar format to Network Rail's standard provisions and they are generally satisfied. Network Rail stated that they were consulting with their legal team to confirm (it should be noted that Network Rail has submitted representations in respect of the protective provisions).
12 September 2019	Meeting (HE, CJP, Network Rail)	High level possession proposals for the surveys were discussed, and Network Rail provided comments in relation to the facilitation of those surveys.
10 October 2019	Meeting (HE, CJP, Network Rail)	The following topics were discussed: <ol style="list-style-type: none"> 1. The track possession programme ahead of surveys in February 2020. 2. The Allerdene bridge design, and HE confirmed that design selection was still in progress. 3. The use of full blockades (during Easter/Christmas) for some of the proposed works, in particular for the demolition of the existing bridge. CJP agreed to provide draft proposals for Network Rail to consider. 4. Land acquisition process.
7 November 2019	Meeting (HE, CJP, Network Rail)	The following topics were discussed: <ol style="list-style-type: none"> 1. Bridge agreement. 2. BAPA for surveys being undertaken. 3. Confirmation that DCO has been submitted, and that discussions as to protective provisions would be conducted by HE and Network Rail's respective legal teams. 4. Possession proposals for the surveys. 5. The use of full blockades (during Easter/Christmas).
12 December 2019	Meeting (HE, CJP, Network Rail)	The following topics were discussed: <ol style="list-style-type: none"> 1. Works relating to the overhead line equipment, including the submission by CJP of the AIP for review by Network Rail.

		<ul style="list-style-type: none"> 2. Conclusion of the initial period for representations and agreement that the protective provisions needed to be progressed. 3. Incident reporting for surveys.
23 January 2020	Meeting (HE, CJP, Network Rail)	<p>The following topics were discussed:</p> <ul style="list-style-type: none"> 4. Works relating to the overhead line equipment, including the submission by CJP of further information for review by Network Rail. 5. Possession proposals and confirmation that the blockade for Christmas 2021 had been booked. 6. Discussion as to track bed condition and trough routes/cables. 7. Network Rail confirmed the appointment of its legal team for the discussion of protective provisions. 8. The bridge agreement and BAPA. 9. Incident reporting for surveys.

2.1.2 It is agreed that this is an accurate record of the key meetings and consultation undertaken between (1) **The Applicant** and (2) **Network Rail Infrastructure Limited** in relation to the issues addressed in this SoCG.

3 ISSUES

3.1 Issues related to the Environmental Statement (ES)

ES Chapter	Paragraph Reference	Sub-section	Network Rail Infrastructure Limited Comment	Highways England Response	Status
Chapter 12: Population and Human Health	12.4.24	Method of assessment - Rail Travellers	TBC	TBC	TBC
	12.6.5	Study Area - Rail Travellers	TBC	TBC	TBC
	12.7.18	Baseline conditions - Rail Travellers	TBC	TBC	TBC
	12.8.11	Potential impacts - Rail Travellers - Construction	TBC	TBC	TBC
	12.8.12	Potential impacts - Rail Travellers - Operation	TBC	TBC	TBC
	12.9.13	Design measures, mitigation measures and enhancement measures - Rail Travellers - Construction	TBC	TBC	TBC
	12.9.14	Design measures, mitigation measures and enhancement measures - Rail	TBC	TBC	TBC

		Travellers - Operation			
	12.10.17-18	Significance of effects - Rail Travellers - Construction	TBC	TBC	TBC
	12.10.19	Significance of effects - Rail Travellers - Operation	TBC	TBC	TBC

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3.2 Issues related to Network Rail Infrastructure Limited's written representation dated 4 February 2020

Written representation section	Paragraph Reference	Sub-section	Network Rail Infrastructure Limited Comment	Highways England Response	Status
Summary	1	-	<p>Network Rail does not object in principle to the Proposed Development subject to the outcome of Network Rail's internal clearance process and the requirements of any regulatory consents.</p>	<p>It is noted that Network Rail Infrastructure Limited (NRIL) does not object to the principle of the proposed DCO. As such, it is understood that matters are effectively resolved subject to appropriate protection of NRIL. In this response where any point is not addressed specifically it should be considered to be not accepted.</p> <p>The Applicant notes that NRIL's clearance process refers to its <u>internal</u> process of governance for the voluntary extinguishment of rights and disposals and not the compulsory acquisition of land. This does not have any bearing on the DCO process and is a mechanism governing its own ability to approve land disposals. Under licence Condition 17 of its Network Licence, NRIL may dispose of land in certain circumstances in any case, but all of those instances relate to voluntary disposals.</p> <p>Paragraphs 4.6 to 4.8 of the General consent to disposals by Network Rail state:</p> <p><i>4.6 There may be occasions when Network Rail is required to sell its land through, for example, the execution of a compulsory purchase order (CPO) or in circumstances of leasehold enfranchisement (under the Leasehold</i></p>	UNDER DISCUSSION

				<p><i>Reform Act 1967 and Leasehold Reform, Housing and Urban Development Act 1993).</i></p> <p><i>4.7 A CPO would require Network Rail to dispose of land which would normally be referred to us for specific consent. Under Condition 17.1(a) of Network Rail's network licence, Network Rail can dispose of land without notifying us when the land is required by or under any enactment.</i></p> <p><i>4.8 There may also be occasions when Network Rail proceeds with a land disposal that, while not made under an enactment, would have been under an enactment had the acquiring party taken the steps to do so.</i></p> <p>For these purposes, the DCO granted pursuant to the application would be a CPO.</p>	
Summary	3	-	<p>Network Rail welcomes the exclusion of compulsory acquisition of its land and rights over its land and other DCO powers in respect of its land without its consent, as provided by Paragraph 21 of the Protective Provisions submitted by the Applicant.</p>	<p>Paragraph 21 of Schedule 11 of the draft DCO sets out the powers conferred on the undertaker under the DCO in respect of which consent must be sought from NRIL prior to the exercise of those powers. It also provides that such consent must not be unreasonably withheld by NRIL but may be given subject to reasonable conditions. In case of dispute, the matter is susceptible to resolution by arbitration under the draft DCO.</p> <p>The Applicant's responses to NRIL's proposed changes to the Protective Provisions are set out at Appendix 1 to this SoCG. Where a protective provision has not been amended in Appendix 2 to NRIL's written representation, it is considered to be agreed and is not listed in Appendix 1 to this SoCG.</p>	UNDER DISCUSSION

Summary	4	-	<p>Given the potential risk of major accidents during the installation and operation phases of the Proposed Development, Network Rail considers it to be of utmost importance that full protections are first put in place and that the Proposed Development should proceed by way of agreement rather than compulsory acquisition.</p>	<p>No works are proposed that would affect the safe and efficient operation of the railway. Indeed, by the replacement of Allerdene Bridge with a modern structure and removal of the need for NRIL's overhead line electrification equipment to be mounted on the structure (as at present), the safe and efficient operation of the railway will be improved as a result of the Scheme. This is a benefit of the Scheme.</p> <p>In terms of the operation phase of the Scheme, a risk identified by the Applicant is that of vehicles leaving the highway where it passes over the new bridge and entering the railway. In order to address this risk, Volume 2 Section 2 Part 8 TD 19/06 of the Design Manual for Roads and Bridges (DMRB) and the Road Restraint Risk Assessment Process (RRRAP) have been followed in the design of the proposed bridge. The provision of H4a parapet (the highest level of containment) is prescribed for parapets over railways in paragraph 4.6 of the relevant section of the DMRB, and will be provided as part of the Scheme. The RRRAP has been applied to the Scheme and demonstrates that the level of risk following mitigation with the proposed Vehicle Restraint System would be acceptable. Beyond this mitigated risk, the Applicant does not know what risks would arise during the operation phase of the Scheme, given the improvement offered through replacement of the bridge.</p>	UNDER DISCUSSION
Summary	5	-	<p>Further, the Secretary of State cannot allow the DCO to be granted without protection for Network Rail from compulsory acquisition as the test in section 127 of the Planning Act 2008 cannot be satisfied. The granting of compulsory acquisition powers to the Applicant</p>	<p>Part 3 of Schedule 11 of the draft DCO contains the Protective Provisions for the protection of railway interests. As stated above, paragraph 21 sets out the powers conferred on the undertaker under the DCO in respect of which consent must be sought</p>	UNDER DISCUSSION

			<p>would result in serious detriment to Network Rail's undertaking; would raise significant health and safety concerns for the general public; and Network Rail does not have any other land available to it which could be used to avoid such detriment.</p>	<p>from NRIL prior to the exercise of those powers. The powers subject to NRIL's consent include the compulsory acquisition of land and the compulsory acquisition of rights. Paragraph 21 also provides that such consent must not be unreasonably withheld by NRIL but may be given subject to reasonable conditions.</p> <p>The tests in section 127 of the 2008 Act can be satisfied. The compulsory acquisition of land and the compulsory acquisition of rights would not result in serious detriment to the carrying on of the undertaking, rather a benefit. No works are proposed that would affect the safe and efficient operation of the railway. The replacement of Allerdene Bridge with a modern structure and removal of the need for NRIL's overhead line electrification equipment to be mounted on the structure (as at present), means that the safe and efficient operation of the railway will be improved as a result of the Scheme.</p>	
Network Rail's duties and the Clearance approval process	2	2	<p>Network Rail considers that there is no compelling case in the public interest for the compulsory acquisition of land and rights over its land as the Applicant and Network Rail should instead negotiate matters by private agreement to grant the Applicant the necessary rights.</p>	<p>The Government's Guidance on compulsory acquisition provides for compulsory powers to be sought in parallel with the promotion of an agreement. It is entirely appropriate for such powers to be granted as a result in the absence of an agreement with NRIL, subject to suitable protection.</p>	UNDER DISCUSSION
Network Rail's duties and the Clearance approval process	2	8	<p>Subject to the design of the Proposed Development submitted by the Applicant being acceptable to Network Rail's asset protection team and its engineers, Network Rail hopes to obtain Clearance before the closure of the Examination.</p>	<p>Sufficient information is available to NRIL to obtain Clearance.</p>	UNDER DISCUSSION

DCO Powers sought by the Applicant and the impact on Network Rail property	3	4	<p>As we state below, the Plots identified in the Book of Reference may include land that is not required for the construction of the Works. Network Rail is investigating the Proposed Development and the land that will be required to undertake the Works and will confirm its findings to the ExA and the Applicant as soon as possible and at an appropriate Examination deadline.</p>	<p>The land included in the draft DCO and the plots identified in the Book of Reference [APP-018] represent the minimum land-take required to construct, operate, maintain and mitigate the Scheme.</p> <p><i>[HE suggests that the analysis of plot uses carried out by NRIL in its email to DLA Piper of 18 February 2020 is used here to confirm that NR understands and does not object to the inclusion of the relevant parcels]</i></p>	UNDER DISCUSSION
Land interests required			<p>Network Rail considers that it will be necessary to provide for:</p> <ul style="list-style-type: none"> a) A new access route for Network Rail prior to interference with its existing access from Lamesley Road b) Surrender of the existing access from Lamesley Road c) Licence to occupy land required for the works, subject to arrangements for the safe and efficient operation of the Railway d) Grant of a new easement for the proposed Allerdene Bridge e) Surrender of easement by Highways England in respect of the existing Allerdene Bridge f) Transfer of land required for abutments of the new bridge g) Surrender of any affected leasehold title of DB Cargo h) Easement for any gas pipelines 	<p>The Applicant considers that this is broadly acceptable save that (by reference to the bullet points opposite):</p> <ul style="list-style-type: none"> a) This is acceptable b) This is acceptable c) This is correct, and the Applicant acknowledges the need for protective provisions in favour of Network Rail d) This is acceptable save that should the existing Allerdene Bridge be in the form of a freehold, the same should apply to the new Bridge e) See item d) above – this would be a transfer if the existing bridge is owned by the Applicant as to a freehold f) The abutments and also the sites of any piers/supports would need to be transferred with concomittant rights of support g) This is acceptable h) The Applicant does not believe that any gas pipeline works envisaged by the 	UNDER DISCUSSION

				DCO would affect the land of Network Rail	
Possible impact of construction traffic on level crossings	3	7	Network Rail is assessing the level crossings in the vicinity of the Proposed Development to check whether there will be an impact on their operation during the construction phase of the Works. If any affected level crossing is privately owned, the landowner's consent would need to be obtained before the Works could proceed.	There are no level crossings within the Order limits, and the nearest level crossings are North of Newcastle and South of Darlington. There is no effect upon these level crossings as a result of the Scheme.	UNDER DISCUSSION
Conclusions	4	4	Given the potential risk of major accidents during the installation and operation phases of the Proposed Development, Network Rail considers it to be of utmost importance that full protections are first put in place and that the Proposed Development should proceed by way of agreement rather than compulsory acquisition.	<p>The Protective Provisions for the protection of railway interests are set out at Part 3 of Schedule 11 of the draft DCO. These include the provision at paragraph 21, which sets out the powers conferred on the undertaker under the DCO in respect of which consent must be sought from NRIL prior to the exercise of those powers. The powers subject to NRIL's consent include the compulsory acquisition of land and the compulsory acquisition of rights.</p> <p>Paragraph 21 also provides that NRIL's consent may be given subject to reasonable conditions.</p>	UNDER DISCUSSION

APPENDICES

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Appendix 1 – Protective Provisions

At appendix 2 of its written representation, NRIL proposed amendments to the protective provisions set out at Part 3 to Schedule 11 of the draft DCO. NRIL’s proposed amendments, and the Applicant’s responses to those amendments, are set out below. The references to paragraph numbers are to the paragraphs contained within Schedule 11 of the draft DCO. Where a protective provision has not been amended in Appendix 2 to NRIL’s written representation, it is considered to be agreed and is not listed in this Appendix.

Paragraph	Network Rail Infrastructure Limited Comment	Highways England Response	Status
19	<p>In this Part of this Schedule—</p> <p>“construction” includes execution, placing, alteration and reconstruction and “construct” and “constructed” have corresponding meanings;</p> <p>“the engineer” means an engineer appointed by Network Rail for the purposes of this Order;</p> <p>“network licence” means the network licence, as the same is amended from time to time, granted to Network Rail Infrastructure Limited by the Secretary of State in exercise of powers under section 8 (licences) of the Railways Act 1993(a) ;</p> <p>“Network Rail” means Network Rail Infrastructure Limited (company number 02904587, whose registered office is at 1 Eversholt Street, London NW1 2DN) and any associated company of Network Rail Infrastructure Limited which holds property for railway purposes and for the purpose of this definition “associated company” means any company which is (within the meaning of section 1159 (meaning of</p>	<p>The amendment to the definition of “network licence”, replacing the reference to the ‘undertaker’ with the ‘Secretary of State’, is accepted.</p> <p>The amendments to the definition of “Network Rail” are not accepted. The replacement of the quotation marks is immaterial and the reference to ‘(b)’ relates to a footnote in the DCO and should be retained. It should be noted that the reference to ‘(a) 1993 c.46 (b) 2006 c.46 75’ also relates to a footnote in the DCO.</p>	UNDER DISCUSSION

	<p>““subsidiary”” etc.) of the Companies Act 2006) the holding company of Network Rail Infrastructure Limited, a subsidiary of Network Rail (a) 1993 c.46 (b) 2006 c.46 75 Infrastructure Limited or another subsidiary of the holding company of Network Rail Infrastructure Limited;</p> <p>“plans” includes sections, designs, design data, software, drawings, specifications, soil reports, calculations, descriptions (including descriptions of methods of construction), staging proposals, programmes and details of the extent, timing and duration of any proposed occupation of railway property;</p> <p>“protective works” means any works specified by the engineer under paragraph 22;</p> <p>“railway operational procedures” means procedures specified under any access agreement (as defined in the Railways Act 1993) or station lease;</p> <p>“railway property” means any railway belonging to Network Rail and—</p> <p>(a) any station, land, works, apparatus and equipment belonging to Network Rail or connected with any such railway; and</p> <p>(b) any easement or other property interest held or used by Network Rail for or connected with the purposes of such railway or works, apparatus or equipment; and</p> <p>“specified work” means so much of any of the authorised development as is, or is to be, situated upon, across, under, over or within 15 metres of, or may in any way adversely affect, railway property.</p>		
20	<p>(1) Where under this Part of this Schedule Network Rail is required to give its consent, or approval in respect of any matter, that consent or approval is subject to the condition that Network Rail complies with any relevant railway</p>	<p>Paragraph 20(1): Paragraph 35 refers to agreements and, as such, the references to ‘agreement’ in paragraph 20(1) should be retained. The inclusion of ‘agreement’ in this paragraph has precedent in the A160/A180 (Port of</p>	<p>UNDER DISCUSSION</p>

	<p>operational procedures and any obligations under its network licence or under statute and, if applicable, shall be subject to first obtaining the consent and/or surrender of any leaseholder of the railway property.</p> <p>(2) In so far as any specified work or the acquisition or use of railway property or rights over railway property is or may be subject to railway operational procedures, Network Rail must—</p> <p>(a) co-operate with the undertaker with a view to avoiding undue delay and securing conformity as between any plans approved by the engineer and requirements emanating from those procedures; and</p> <p>(b) use its reasonable endeavours to avoid any conflict arising between the application of those procedures and the proper implementation of the authorised development under this Order.</p>	<p>Immingham Improvement) Development Consent Order 2015 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.</p> <p>Paragraph 20(1): The insertion of the provision relating to the consent and/or surrender of any leaseholders of the railway property is not accepted. The original wording proposed by the Applicant has precedent in the protective provisions for the protection of railway interests contained within the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015, the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016 and the National Grid (Hinkley Point C Connection Project) Order 2016. NRIL has not provided any justification for the departure from this precedent. Any other party should seek its own protection, and in case of recalcitrance on the part of any other such party, the power of compulsion must be retained.</p> <p>Paragraph 20(2)(a): The proposed amendment is accepted.</p>	
21	<p>(1) The undertaker must not exercise the powers conferred by articles 21 (discharge of water), 22 (authority to survey and investigate land), 23 (compulsory acquisition of land), 26 (compulsory acquisition of rights), 27 (private rights over land), 30 (acquisition of subsoil or air-space only), 31 (rights under or over streets), 32 (temporary use of land for carrying out the authorised development), 33 (temporary use of land for maintaining the authorised development), 34 (statutory undertakers), 37 (felling or lopping of trees), 38 (trees subject to tree preservation orders) or the powers conferred by section 11(3) (powers of entry) of the 1965 Act or by section 203 (power to override easements and rights) of the Housing and Planning Act 2016(a) in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.</p> <p>(2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such</p>	<p>Paragraph 21(1): The points (reference to Article 21 and 38) are not accepted as NRIL has not explained why they are necessary to it in the context of the Scheme.</p> <p>Paragraph 21(4): The proposed insertions are otiose and are not accepted. The requirement for the Applicant to seek the consent of NRIL prior to exercising the powers conferred in respect of the imposition of restrictive covenants and the acquisition or extinguishment of existing rights is addressed by the references to articles 26 and 27 of the DCO in paragraph 21(1). It is also noted that the amendments requested by NRIL were not included in the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 or the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.</p> <p>Paragraph 21(5): The deletion of 'agreement' is accepted. The reference to (a) 2016 c.22 76 22 relates to a footnote</p>	UNDER DISCUSSION

	<p>access is with the consent of Network Rail.</p> <p>(3) The undertaker must not exercise the powers conferred by sections 271 (extinguishment of rights of statutory undertakers: preliminary notices) or 272 (extinguishment of rights of telecommunications code system operators: preliminary notices) of the 1990 Act, or article 34 (statutory undertakers), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.</p> <p>(4) The undertaker must not under the powers of this Order acquire or use, or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.</p> <p>(5) Where Network Rail is asked to give its consent under this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions.</p> <p>(6) The undertaker shall not place railway property in a position where it cannot be used, or maintained, or is placed at risk of not being capable of use, to run trains safely.</p>	<p>in the DCO and should be retained.</p> <p>Paragraph 21(6): The insertion of a new paragraph 21(6) is not accepted. At paragraph 3.18 of the written representation, NRIL state that,</p> <p><i>“A further protection provision is required at paragraph 21(6) to ensure that railway property can always be used or maintained. In this case the access route that is currently used and relied upon by Network Rail cannot be surrendered by Network Rail until the new access route has been constructed (pursuant to Work No. 11), is made available for use by Network Rail and the access rights formally documented.”</i></p> <p>The insertion of paragraph 21(6) is otiose, as the reasons given by NRIL for its inclusion are already addressed by the existing drafting. The consent requirements imposed on the undertaker under paragraph 21 serve to protect NRIL from any risk of railway property not being able to be used or maintained, and the principle responsibility for assessing this is with NRIL, not with the Applicant. In particular, paragraph 21(2) provides that the undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of NRIL. This protects NRIL from any risk of being unable to access any railway property. It is noted that the provision requested by NRIL was not included in the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 or the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016.</p>	
22	<p>(1) The undertaker must, before commencing construction of any specified work, supply to Network Rail proper and sufficient plans of that work for the reasonable approval of the engineer and the specified work must not be commenced except in accordance with such plans as have been approved in writing by the engineer or settled by arbitration under article</p>	<p>Paragraph 22(3): The replacement of ‘with all reasonable dispatch’ by ‘without unnecessary delay’ is not accepted. The original wording proposed by the Applicant has precedent in the protective provisions for the protection of railway interests contained within the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015, the M4 Motorway (Junctions 3 to 12) (Smart</p>	UNDER DISCUSSION

<p>46 (arbitration).</p> <p>(2) The approval of the engineer under sub-paragraph (1) must not be unreasonably withheld, and if by the end of the period of 28 days beginning with the date on which such plans have been supplied to Network Rail the engineer has not intimated disapproval of those plans and the grounds of disapproval the undertaker may serve upon the engineer written notice requiring the engineer to intimate approval or disapproval within a further period of 28 days beginning with the date upon which the engineer receives written notice from the undertaker. If by the expiry of the further 28 days the engineer has not intimated approval or disapproval, the engineer is deemed to have approved the plans as submitted.</p> <p>(3) If by the end of the period of 28 days beginning with the date on which written notice was served upon the engineer under sub-paragraph (2), Network Rail gives notice to the undertaker that Network Rail desires itself to construct any part of a specified work which in the opinion of the engineer will or may affect the stability of railway property or the safe operation of traffic on the railways of Network Rail then, if the undertaker desires such part of the specified work to be constructed, Network Rail must construct it without unnecessary delay on behalf of and to the reasonable satisfaction of the undertaker in accordance with the plans approved or deemed to be approved or settled under this paragraph, and under the supervision (where appropriate and if given) of the undertaker.</p> <p>(4) When signifying approval of the plans the engineer may specify any protective works (whether temporary or permanent) which in the engineer's opinion should be carried out before the commencement of the construction of a specified work to ensure the safety or stability of railway property or the continuation of safe and efficient operation of the railways of Network Rail or the services of operators using the same (including any relocation de-commissioning and removal of works, apparatus and equipment necessitated by a specified work and the comfort and safety of passengers who may be affected by the specified</p>	<p>Motorway) Development Consent Order 2016 and the National Grid (Hinkley Point C Connection Project) Order 2016. NRIL has not provided any justification for the departure from this precedent.</p> <p>Paragraph 22(4): For the reasons stated above, this change is not accepted.</p>	
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	<p>works), and such protective works as may be reasonably necessary for those purposes must be constructed by Network Rail or by the undertaker, if Network Rail so desires, and such protective works must be carried out at the expense of the undertaker in either case without unnecessary delay and the undertaker must not commence the construction of the specified works until the engineer has notified the undertaker that the protective works have been completed to the engineer's reasonable satisfaction.</p>		
23	<p>(1) Any specified work and any protective works to be constructed by virtue of paragraph 22(4) must, when commenced, be constructed—</p> <p>(a) without unnecessary delay in accordance with the plans approved or deemed to have been approved or settled under paragraph 22;</p> <p>(b) under the supervision (where appropriate and if given) and to the reasonable satisfaction of the engineer;</p> <p>(c) in such manner as to cause as little damage as is possible to railway property; and</p> <p>(d) so far as is reasonably practicable, so as not to interfere with or obstruct the free, uninterrupted and safe use of any railway of Network Rail or the traffic on it and the use by passengers of railway property.</p> <p>(2) If any damage to railway property or any such interference or obstruction is caused by the carrying out of, or in consequence of the construction of a specified work or a protective work, the undertaker must, regardless of any such approval, make good such damage and must pay to Network Rail all reasonable expenses to which Network Rail may be put and compensation for any loss which it may sustain by reason of any such damage, interference or obstruction.</p>	<p>Paragraph 23(3): The deletion of '77' relates to the DCO page number, which should be retained.</p>	<p>UNDER DISCUSSION</p>

	<p>(3) Nothing in this Part of this Schedule imposes any liability on the undertaker with respect to any damage, costs, expenses or loss attributable to the negligence of Network Rail or its servants, contractors or agents, or any liability on Network Rail with respect of any damage, costs, expenses or loss attributable to the negligence of the undertaker or the undertaker's employees, contractors or agents.-</p>		
27	<p>The undertaker must repay to Network Rail all reasonable fees, costs, charges and expenses reasonably incurred by Network Rail—</p> <p>(a) in constructing any part of a specified work on behalf of the undertaker as provided by paragraph 22(3) or in constructing any protective works under the provisions of paragraph 22(4) including, in respect of any permanent protective works, a capitalised sum representing the cost of maintaining and renewing those works;</p> <p>(b) in respect of the approval by the engineer of plans submitted by the undertaker and the supervision by the engineer of the construction of a specified work or a protective work;</p> <p>(c) in respect of the employment or procurement of the services of any inspectors, signallers, watchkeepers and other persons whom it is reasonably necessary to appoint for inspecting, signalling, watching and lighting railway property and for preventing, so far as may be reasonably practicable, interference, obstruction, danger or accident arising from the construction or failure of a specified work or a protective work;</p> <p>(d) in respect of any special traffic working resulting from any speed restrictions which may in the opinion of the engineer, require to be imposed by reason or in consequence of the construction or failure of a specified work or a protective work or from the substitution or diversion of services which may be reasonably necessary for the same reason; and</p>	<p>Paragraph 27(d): The deletion of '78' relates to the DCO page number, which should be retained.</p>	<p>UNDER DISCUSSION</p>

	<p>(e) in respect of any additional temporary lighting of railway property in the vicinity of the specified works, being lighting made reasonably necessary by reason or in consequence of the construction or failure of a specified work or a protective work.</p>		
28	<p>(1) In this paragraph—“EMI” means, subject to sub-paragraph (2), electromagnetic interference with Network Rail apparatus generated by the operation of the authorised development where such interference is of a level which adversely affects the safe operation of Network Rail’s apparatus; “Network Rail’s apparatus” means any lines, circuits, wires, apparatus or equipment (whether or not modified or installed as part of the authorised development) which are owned or used by Network Rail for the purpose of transmitting or receiving electrical energy or of radio, telegraphic, telephonic, electric, electronic or other like means of signalling or other communications.</p> <p>(2) This paragraph applies to EMI only to the extent that such EMI is not attributable to any change to Network Rail’s apparatus carried out after approval of plans under paragraph 22(1) for the relevant part of the authorised development giving rise to EMI (unless the undertaker has been given notice in writing before the approval of those plans of the intention to make such change).</p> <p>(3) Subject to sub-paragraph (5), the undertaker must in the design and construction of the authorised development take all measures necessary to prevent EMI and must establish with Network Rail (both parties acting reasonably) appropriate arrangements to verify their effectiveness.</p> <p>(4) In order to facilitate the undertaker’s compliance with sub-paragraph (3)—</p> <p>(a) the undertaker must consult with Network Rail as early as reasonably practicable to identify all Network Rail’s apparatus which may be at risk of EMI, and must continue to consult with Network Rail (both before and after formal submission of plans under paragraph 22(1) in order to identify all potential causes</p>	<p>Paragraph 28(7)(b): It should be noted that the reference to ‘79’ relates to the DCO page number.</p> <p>Paragraph 28(9): The insertion of ‘the indemnity in’ is accepted in the interests of clarity.</p>	<p>UNDER DISCUSSION</p>

of EMI and the measures required to eliminate them;

(b) Network Rail must make available to the undertaker all information in the possession of Network Rail reasonably requested by the undertaker in respect of Network Rail's apparatus identified under sub-paragraph (a); and

(c) Network Rail must allow the undertaker reasonable facilities for the inspection of Network Rail's apparatus identified under sub-paragraph (a).

(5) In any case where it is established that EMI can only reasonably be prevented by modifications to Network Rail's apparatus, Network Rail must not withhold its consent unreasonably to modifications of Network Rail's apparatus, but the means of prevention and the method of their execution may be selected at the reasonable discretion of Network Rail, and in relation to such modifications paragraph 22(1) has effect subject to this sub-paragraph.

(6) If at any time prior to the completion of the authorised development and regardless of any measures adopted under sub-paragraph (3), the testing or commissioning of the authorised development causes EMI then the undertaker must immediately upon receipt of notification by Network Rail of such EMI either in writing or communicated orally (such oral communication to be confirmed in writing as soon as reasonably practicable after it has been issued) cease to use (or procure the cessation of use of) the undertaker's apparatus causing such EMI until all measures necessary have been taken to remedy such EMI by way of modification to the source of such EMI or (in the circumstances, and subject to the consent, specified in sub-paragraph (5)) to Network Rail's apparatus.

(7) In the event of EMI having occurred—

(a) the undertaker must afford reasonable facilities to Network Rail for access to the undertaker's apparatus in the

investigation of such EMI;

(b) Network Rail must afford reasonable facilities to the undertaker for access to Network Rail's apparatus in the investigation of such EMI; and 79

(c) Network Rail must make available to the undertaker any additional material information in its possession reasonably requested by the undertaker in respect of Network Rail's apparatus or such EMI.

(8) Where Network Rail approves modifications to Network Rail's apparatus under subparagraphs (5) or (6)—

(a) Network Rail must allow the undertaker reasonable facilities for the inspection of the relevant part of Network Rail's apparatus; and

(b) any modifications to Network Rail's apparatus approved under those sub-paragraphs must be carried out and completed by the undertaker in accordance with paragraph 23.

(9) To the extent that it would not otherwise do so, the indemnity in paragraph 32(1) applies to the costs and expenses reasonably incurred or losses suffered by Network Rail through the implementation of the provisions of this paragraph (including costs incurred in connection with the consideration of proposals, approval of plans, supervision and inspection of works and facilitating access to Network Rail's apparatus) or in consequence of any EMI to which sub-paragraph (6) applies.

(10) For the purpose of paragraph 27(a) any modifications to Network Rail's apparatus under this paragraph are deemed to be protective works referred to in that paragraph.

(11) In relation to any dispute arising under this paragraph the reference in article 46 (arbitration) to a single arbitrator to be

	<p>agreed between the parties is to be read as a reference to an arbitrator being a member of the Institution of Engineering and Technology to be agreed.</p>		
32	<p>(1) The undertaker must pay to Network Rail all reasonable costs, charges, damages and expenses not otherwise provided for in this Part of this Schedule which may be occasioned to or reasonably incurred by Network Rail—</p> <p>(a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it; or</p> <p>(b) by reason of any act or omission of the undertaker or of any person in the undertaker's employ or of the undertaker's contractors or others whilst engaged upon a specified work or a protective work, and the undertaker must indemnify and keep indemnified Network Rail from and against all claims and demands arising out of or in connection with a specified work or a protective work or any such failure, act or omission; and the fact that any act or thing may have been done by Network Rail on behalf of the undertaker or in accordance with plans approved by the engineer or in accordance with any requirement of the engineer or under the engineer's supervision will not (if it was done without negligence on the part of Network Rail or of any person in its employ or of its contractors or agents) excuse the undertaker from any liability under the provisions of this subparagraph.</p> <p>(2) Network Rail must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise of such a claim or demand is to be made without the prior written consent of the undertaker.</p> <p>(3) The sums payable by the undertaker under subparagraph (1) may include a sum equivalent to the relevant costs.</p> <p>(4) Subject to the terms of any agreement between Network Rail and a train operator regarding the timing or method of payment of the relevant costs in respect of that train operator,</p>	<p>Paragraph 32(1)(b): The deletion of '80' relates to the DCO page number, which should be retained.</p> <p>Paragraph 32(4): The deletion of paragraph 23(4) is not accepted. While, at paragraph 3.14 of the written representation, NRIL state that their amendments represent the "standard indemnity which has been included in many statutory orders", it is noted that the deleted text was included in the National Grid (Hinkley Point C Connection Project) Order 2016. The examining authority's recommendation report stated that the protective provisions contained within the recommended order "<i>would give adequate safeguards</i>" (paragraph 9.2.137). The Secretary of State's decision letter points to the examining authority's finding that NRIL's proposed indemnity wording was "<i>unduly onerous</i>", and states that the Secretary of State was satisfied with the examining authority's finding on this issue, thereby confirming the point. This precedent is particularly relevant since it involved a finding by the Secretary of State (who is the shareholder of both NRIL and the Applicant) that the wording was not required, notwithstanding that it had been included in previous DCOs. As such, it should be excluded from the draft DCO. It is also noted that this provision was subsequently included in the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016, consistently with this finding.</p>	<p>UNDER DISCUSSION</p>

	<p>Network Rail must promptly pay to each train operator the amount of any sums which Network Rail receives under sub-paragraph (3) which relates to the relevant costs of that train operator.</p> <p>(5)The obligation under sub-paragraph (3) to pay Network Rail the relevant costs is, in the event of default, enforceable directly by any train operator concerned to the extent that such sums would be payable to that operator under sub-paragraph (5).</p> <p>(6) In this paragraph— “the relevant costs” means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by each train operator as a consequence of any restriction of the use of Network Rail’s railway network as a result of the construction, maintenance or failure of a specified work or a protective work or any such act or omission as mentioned in subparagraph (1); and “train operator” means any person who is authorised to act as the operator of a train by a licence under section 8 (licences) of the Railways Act 1993.</p>		
33	<p>Network Rail must, on receipt of a request from the undertaker, at a frequency to be agreed between the undertaker and Network Rail, provide the undertaker free of charge with written estimates of the costs, charges, expenses, and other liabilities for which the undertaker is or will become liable under this Part of this Schedule (including the amount of the relevant costs mentioned in paragraph 32) and with such information as may reasonably enable the undertaker to assess the reasonableness of any such estimate or claim made or to be made under this Part of this Schedule (including any claim relating to those relevant costs).</p>	<p>The deletion of ‘future cost forecasts’ is not accepted. The original wording proposed by the Applicant has precedent in the protective provisions for the protection of railway interests contained within the A160/A180 (Port of Immingham Improvement) Development Consent Order 2015 and the M4 Motorway (Junctions 3 to 12) (Smart Motorway) Development Consent Order 2016. It is noted that NRIL’s objections to both of these schemes was withdrawn before the time the examinations concluded, meaning NRIL had agreed to the inclusion of ‘future cost forecasts’ in the protective provision. Further, NRIL has not provided any justification for the departure from this precedent.</p>	UNDER DISCUSSION
36	<p>Nothing in this Order, or in any enactment incorporated with or applied by this Order, prejudices or affects the operation of Part 1 (the provision of railway services) of the Railways Act 1993.</p>	<p>The deletion of ‘81’ relates to the DCO page number, which should be retained.</p>	UNDER DISCUSSION

38	The undertaker must no later than 28 days from the date that the documents referred to in article 44(1) (certification of plans, etc.) are submitted to and certified by the Secretary of State in accordance with article 44, provide a set of those documents to Network Rail in format to be agreed between the undertaker and Network Rail's engineers.	The amendment to the article reference is accepted. The amendment to the format of the documents to be submitted to NRIL is accepted.	UNDER DISCUSSION
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Without Prejudice