

A1 Birtley to Coal House

Scheme Number TR010031

7.5 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

June 2020

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	7.5F
Author:	A1 Birtley to Coal House Project Team, Highways England

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Rev 2	June 2020	Final

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]**

CONTENTS

1	INTRODUCTION.....	1
1.1	Purpose of this document.....	1
1.2	Parties to this Statement of Common Ground.....	1
1.3	Terminology	1
2	RECORD OF ENGAGEMENT	2
3	OUTSTANDING ISSUES.....	4
3.1	Land Acquisition	4
3.2	Protective Provisions	6
3.3	Property Documents.....	8
3.4	DB Cargo	8
3.5	Clearances.....	8
3.6	Level Crossings.....	8

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, operates and maintains the railway infrastructure of Great Britain and must comply with regulatory consents or approvals required under the Railways Act 1993 and the Network Licence, by either the Office of Rail and Road or the Secretary of State for Transport. 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.
- 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.

Table 2-1 - Record of Technical Engagement

Date	Form of correspondence	Key topics discussed and key outcomes
16 July 2019	Email	Network Rail confirmed that they had undertaken an initial review of the draft Protective Provisions and that they would instruct their Legal Team to review the Protective Provisions and confirm their comments.
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)	<p>The following topics were discussed:</p> <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)	<p>The following topics were discussed:</p> <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)	<p>The following topics were discussed:</p> <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. 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> <ol 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.
26 March 2020	Meeting (HE, CJP, Network Rail Asset Protection)	<p>The following topics were discussed:</p> <ol style="list-style-type: none"> 1. COVID-19 and safe working 2. Possessions required by CJP for survey work 3. Capacity of the rail network and extension of possessions in light of COVID-19 4. Confirmation of proposals for Christmas 2021 possession 5. DCO update and hearing postponement 6. Update on meeting of 11th March 2020 and discussion on grouting 7. Design approvals process 8. Bridge deck height

Table 2-2 - Record of Property Engagement

10 Dec 2018	Email	Email sent from NR Property (Roger Brighthouse) to the Applicant's appointed Agent, the Valuation Office Agency (VOA) (Ricky Gardner), advising the VOA of the appropriate property contact for Network Rail and requesting full details of the land and rights, both temporary and permanent, which Highways England will require for the road improvement scheme together with any scheme drawings/general arrangement drawings
3 January 2019	Email	VOA sent the "Network Rail Land Acquisition Plan", drawing number HE551462 and dated 23 November 2018 to Network Rail Property.
9 April 2019	Email	Network Rail Property sent an e-mail to VOA outlining all required Network Rail agreements and approvals based upon the Network Rail Land Acquisition Plan.
30 May 2019	Part clearance approval	Network Rail obtained part clearance approval for the acquisition of land and rights detailed within the 'Network Rail Land Acquisition Plan', produced by the Applicant. This did not include grouting and so additional clearance is required.
11 March 2020	Meeting	The Applicant's legal team met with Network Rail's legal team to discuss method of land acquisition and outline the justification for the acquisition of each plot required for the scheme. Draft template documentation was circulated before the meeting and the form and content of these documents was discussed.
1 April 2020	Action Points	Network Rail's legal team issued an Action Point Plan listing the actions points that each party or their respective lawyers were to carry out regarding the private property documents that it is currently envisaged will be required.
15 April 2020	Email	Email from VOA looking to progress matters referring to NR Property email of 9 April 2019.

3 **OUTSTANDING ISSUES**

3.1 **Land Acquisition**

- 3.1.1 It is the objective of the parties that the necessary interests in the Order land that are owned by Network Rail will be secured by private treaty. It is agreed that notwithstanding any agreement reached the parcels owned by Network Rail should remain within the powers of compulsory acquisition but subject to the proposed protective provisions and to any contractual arrangements agreed pursuant to those provisions.

- 3.1.2 The parties have agreed that the following land interests will be required by the Applicant:
- i. Acquisition of freehold land for the bridge abutments;
 - ii. Acquisition of an easement for the placing of the bridge span in the airspace above the operational railway;
 - iii. Rights of temporary access to demolish the existing bridge and to construct the new bridge; and
 - iv. Bridge Agreement / Asset Protection Agreement for the construction of the new bridge and demolition of the existing bridge.
- 3.1.3 In addition the following rights and interests will be addressed by the parties:
- i. The grant of a permanent access to Network Rail for maintenance and the surrender, if applicable, of any existing rights;
 - ii. Temporary access during the works period;
 - iii. Permanent access for maintenance to the bridge structure;
 - iv. Surrender of the existing bridge rights;
 - v. Transfer back to Network Rail of land not required for the Scheme and forming the existing bridge abutments and the provision of Network Rail's permanent line side fencing, which is required to ensure railway safety; and
 - vi. Deed of Surrender and Variation of DB Cargo's leasehold interest in land that is not being acquired by the Applicant; and
 - vii. The grant of subsoil rights relating to grouting works.

3.2 Protective Provisions

3.2.1 The Protective Provisions have been agreed between the parties except for the following 3 points. The discussions to date regarding these points are summarized in the following table:

Para	Disputed Protective Provision	HE Response	NR Response (as set out in its Deadline 4 submission)	HE Response
20(1)	Where under this Part of this Schedule Network Rail is required to give its consent, agreement or approval in respect of any matter, that consent, agreement or approval is subject to the condition that Network Rail complies with any relevant railway operational procedures and any obligations under its network licence or under statute <u>and, if applicable, shall be subject to Network Rail or the undertaker (as relevant) first obtaining the consent and/or surrender of the leaseholder DB Cargo (UK) Limited</u>	In respect of paragraph 20(1) Network Rail has asserted that DB Cargo will need to consent to any proposals affecting its property interest, but has provided no evidence as to why this treatment of a private third party is necessary or appropriate. DB Cargo has not objected to the application, its land is required and it is open to it to seek compensation should it be adversely affected both under the Railways Act regime <u>via</u> Network Rail and under the Compulsory Purchase Compensation Code.	Network Rail requests the additional underlined wording at paragraph 20(1) to acknowledge the fact that Network Rail cannot be held accountable for any delay to its consent that may be caused by the Applicant or Network Rail first seeking consent from the freight operating company leaseholder, DB Cargo (UK) Limited.	The Applicant does not believe that the additional wording is appropriate in protective provisions and is a private matter between Network Rail and its leaseholder. Furthermore, Network Rail have stated that they do not agree to the use of compulsory acquisition powers in respect of its leaseholder's land but have not demonstrated that this land falls within the legal definition of operational land and therefore why it should benefit from the protected status of the statutory undertaking.
21(1)	The undertaker must not exercise the powers conferred by articles <u>21 (discharge of water)</u>	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.	Network Rail requests that article 21 is included in the list of Order powers that would require Network Rail's consent so that any work by the Applicant to drains, watercourses or culverts would have to be agreed with Network Rail in so far as such work would affect the railway. Network Rail's consent cannot be unreasonably withheld but may be given subject to reasonable conditions (paragraph	21(1) Article 21 – The Applicant confirms that there will be no increased discharge from the scheme to the culvert. As a result the requested provision is otiose.

			<p>21(5) of the Network Rail Protective Provisions).</p> <p>Reference to this article has been included in the equivalent list of powers in relation to many other Orders and Network Rail does not consider its inclusion to be controversial as the Applicant will be liaising with Network Rail in relation to all other Order powers in any event.</p>	
<p>32(4)</p>	<p>In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss or loss of profits, except that the sums payable by the undertaker under that sub-paragraph include a sum equivalent to the relevant costs in circumstances where— (a) Network Rail is liable to make payment of the relevant costs pursuant to the terms of an agreement between Network Rail and a train operator; and (b) the existence of that agreement and the extent of Network Rail's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the undertaker, but not otherwise.</p>	<p>Paragraph 32(4): The deletion of paragraph 32(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</p>	<p>Network Rail requests the deletion of this wording, being sought by the Applicant at sub-paragraph (4), which excludes liability, on the part of the Applicant, for any indirect or consequential loss of profits by Network Rail. Network Rail is anxious to ensure that the indemnity included in the Network Rail Protective Provisions is included in the Order and that the scope of the indemnity is not diluted. As the operator of the national rail network it is essential that the undertaker of any works that affect the railway provides Network Rail with a full indemnity; that should include consequential loss which, in any event, would need to be properly justified and meet the relevant common law tests.</p> <p>Network Rail should also not be obliged (as requested by the Applicant at its sub-paragraph (4)(b)) to provide advance details of agreements with train operators to the Applicant; this creates an</p>	<p>32(4) - This is not accepted. The oversailing of a railway by a road is neither different in terms of its installation (it will be undertaken during possessions, just like the installation of overhead lines) and when in situ will be inert. As such, the impacts upon the operation of Network Rail’s undertaking and need for it to recover consequential loss are essentially identical. This is because, if an interference were to occur, the loss suffered by Network Rail has not been demonstrated in any way to be different to the losses which would result from interference by an overhead power line.</p> <p>As regards disclosure, Highways England should only be liable for losses of which it has knowledge and can control. Therefore, it is appropriate that where Network Rail can foresee</p>

		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.	unnecessary administrative burden on Network Rail and any failure to provide the relevant details would invalidate the indemnity. Further, such agreements are commercially sensitive; the Office of Rail and Road only provides redacted copies of such train operator contracts for that reason.	consequential loss and disclose the potential liability to which it may be exposed. This is a concession in relation to the first part of paragraph (4), representing a compromise. If Network Rail is not able to subscribe to sub-paragraph (b) of paragraph 4, the exclusion of consequential liability should be absolute.
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3.3 Property Documents

Discussions are ongoing between the Applicant and Network Rail regarding the property documents and real estate matters addressed at section 3.1.2 – 3.14 above. The parties will update the Examining Authority regarding progress in relation to the property documents at the next appropriate deadline.

3.4 DB Cargo

The parties are still considering the position in respect of the protection of Network Rail's interest on the DB Cargo land and will update the Examining Authority regarding progress at the next appropriate deadline.

3.5 Clearances

The parties continue to make progress on negotiating both statutory and contractual protections for Network Rail's interest and these measures will be dependent on full clearances being obtained from Network Rail in accordance with its statutory licence.

3.6 Level Crossings

It is agreed that there are no railway level crossings that will be affected by the Scheme.