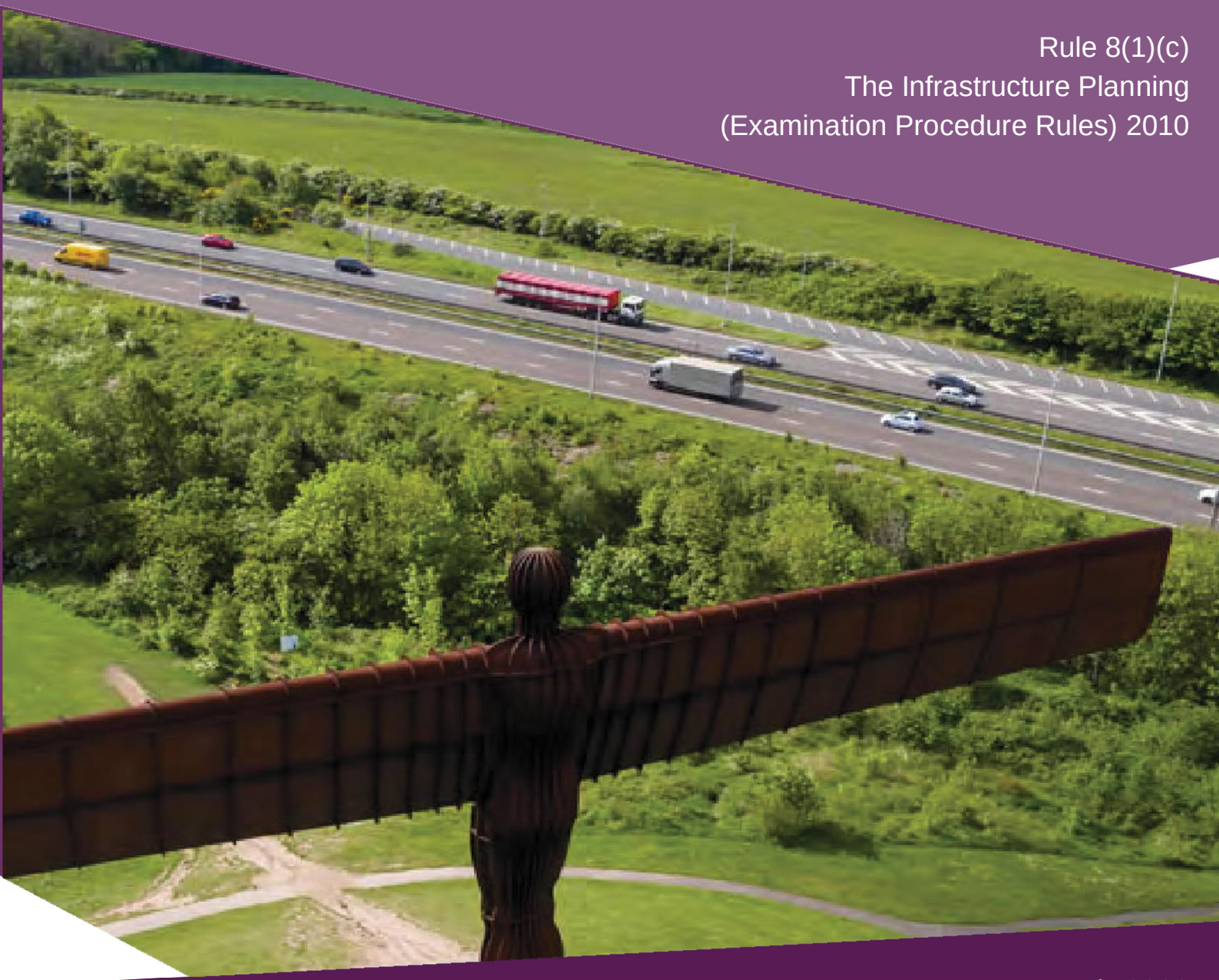
A1 Birtley to Coal House

Scheme Number: TR010031

Applicant's Response to Deadline 11 Submissions

Planning Act 2008

Rule 8(1)(c)
The Infrastructure Planning
(Examination Procedure Rules) 2010



July 2020

Infrastructure Planning

Planning Act 2008

The Infrastructure Planning (Examination Procedure Rules) 2010

The A1 Birtley to Coal House Development Consent Order 20[xx]

Applicant's Response to Deadline 9 Submissions

Rule Number:	Rule 8(1)(c)
Planning Inspectorate Scheme Reference	TR010031
Application Document Reference	Applicant's Response to Deadline 11 Submissions
Author:	A1 Birtley to Coal House Project Team, Highways England

Version	Date	Status of Version
Rev 0	21 July 2020	For Issue

CONTENTS

1 Applicant's Response to Deadline 11 Submissions 1
Table 1 – Network Rail.....2

1 Applicant's Response to Deadline 11 Submissions

Table 1 – Network Rail

Ref:	Comment:	Applicant's Response:
1	This document provides an update to the Examining Authority about the Protective Provisions for the benefit of Network Rail Infrastructure Limited (Network Rail).	Noted
2	The Protective Provisions requested by Network Rail to be included at Part 3 of Schedule 11 to the Order are at Appendix 1 of this document (Network Rail Protective Provisions).	The protective provisions requested by the Applicant are appended to the draft Order submitted on 21 July 2020 with the relevant provision in paragraph 32(4) shown in square brackets. This indicates that the provision is not agreed. The Applicant considers that the wording is essential.
3	The Network Rail Protective Provisions are agreed with the Applicant, save in relation to the indemnity at paragraph 32 of the Network Rail Protective Provisions.	Confirmed, subject to the point above.
4	On the basis that all other matters have been resolved between the parties, we make no further submissions regarding those matters save to explain that as a result of recent discussions with the Applicant, there are two amendments that have been agreed to the Protective Provisions included in the draft Order submitted by the Applicant at Deadline 9 [REP9-003] namely to paragraph 19 (the definition of "specified works") and paragraph 21(1) (the list of powers of the Order requiring Network Rail consent). We have underlined the agreed additional text in the attached Network Rail Protective Provisions.	The Applicant confirms that the amendments outlined by NR are agreed.
5	We set out Network Rail's position in relation to paragraph 32, which relates to the indemnity from the Applicant in favour of Network Rail, in the following paragraphs.	The Applicant disagrees with NR in respect of paragraph 32 and sets out its position in response below.
The indemnity for the benefit of Network Rail at paragraph 32 of the Network Rail Protective Provisions **The proposed exclusion of the Applicant's liability for indirect losses**		
6	Network Rail requests that paragraph 32(4) of the Protective Provisions, drafted by the Applicant and submitted to the Examining Authority at Deadline 9 [REP9-003], be deleted from the Order when made. The Applicant's paragraph 32(4) states: *(4) 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.	The Applicant requires that the provision of paragraph 32(4) as shown in the draft Order submitted on 21 July 2020 be included, contrary to the submissions of Network Rail.
7	Network Rail has previously made submissions in relation to the indemnity that the Applicant seeks and explained why Network Rail does not agree to the amendment to the standard form of indemnity for its benefit included in statutory orders. We do not repeat those submissions but refer the Examining Authority to the following documents: REP4-67 (paragraph 5(iii)) and REP9-029 (paragraphs	Network Rail's previous submissions in respect of the inclusion of paragraph 32(4) have not provided sufficient detail on Network Rail's position and appear to focus on the fact that the ExA should not be persuaded to deviate from Network Rail's standard indemnity provisions which have been included in historic orders. Similarly, Network Rail's

	30-39). In addition to those previous submissions Network Rail further submits as follows.	previous submissions have highlighted that Network Rail should not be required to disclose the terms of commercial agreements with train operating companies (even at a high level) so as to furnish Highways England with sufficient comfort on the potential risk and extent of liability which might be reasonably foreseeable within "indirect and consequential loss or loss of profit". Nothing has changed to justify further the position of Network Rail or to explain its particular exposure to risk which ought to be protected against.
8	The effect of the Applicant's proposed paragraph 32(4) is to exclude "indirect or consequential loss or loss of profit" from the scope of the indemnity. There is an express exception from that exclusion. That is where Network Rail is liable for costs to a train operator under an agreement with such operator and where the agreement and the extent of Network Rail's liability has previously been disclosed in writing to Highways England. As described below, neither the exclusion nor the exception make sense in the context of a proper understanding of English common law and the meaning of the relevant terms used in the drafting of paragraph 32(4).	Network Rail's submission is that the Applicant's amendment to its standard indemnity is not reflective of the actual position at common law, which is that contractual loss is limited to those losses which flow directly from the breach (i.e. are a consequence of any breach of contract subject to foreseeability and remoteness of loss) and those losses which are within the reasonable contemplation of the parties. Network Rail's standard indemnity provision requires any consequential and indirect loss i.e. such losses which are not foreseeable or within the reasonable contemplation of the parties furnished with sufficient information to quantify such losses. The position is that Network Rail has not disclosed its liability and hence it is seeking to be indemnified against losses which only it can manage. The Applicant's submission is that Network Rail's standard indemnity is far more onerous than the position at common law and the inclusion of paragraph 32(4) restores the position to that which the courts of England and Wales have long held as the correct approach.
9	Under common law, there are two types of recoverable losses in a damages claim. First, direct losses which are the natural results of the breach in the usual course of things. Second, indirect loss and consequential loss (which mean the same thing). They are losses which are not the natural result of the breach, but arise from special circumstances of the case. For indirect losses to be recoverable under common law, they must foreseeable. In other words, the paying party (Highways England, in this case) must be in a position to know of the special circumstances at the time of the contract - or here, when the Order was made.	Network Rail's understanding of the position at common law is not correct and omits a critical part of the well established legal test in respect of consequential losses, which is that they must be within the contemplation of the parties (i.e. with the requisite information available to the paying party to assess its loss) and similarly must not be too remote. It is unhelpful that their submissions omit this critical element – and thereby runs the risk of misleading the ExA and the Secretary of State. The Applicant's position is that despite numerous attempts to elicit details of the loss which Network Rail might seek to claim from Highways England, no such information has been provided. On this basis such loss cannot legitimately be claimed to be within the reasonable contemplation of Highways England, because it simply cannot know them, and should not be capable of being claimed.
10	By proposing the exclusion, it appears that Highways England is seeking to protect itself from losses of which it is unaware. In its Written Summary of Oral Submissions at Hearings [REP9-014], Highways England says: "The Applicant should only be liable for losses of which it has knowledge and can control".	The Applicant's position remains that it should only be responsible for losses of which it has knowledge and can control. Network Rail's position is that Highways England should also be liable for losses that are not disclosed to it until it has assumed liability for them and which are controlled by Network Rail, even if Highways England has mitigated them.
11	This is misleading and an incorrect statement of common law principles. As noted above, common law requires that for losses to be recoverable they must be	Network Rail's position throughout the negotiation of protective provisions is that the indirect and consequential losses are intended to compensate

	foreseeable. If they are not foreseeable – i.e. they are too remote – then they are not direct or indirect losses and so are not recoverable under law. There is no need to expressly exclude liability for loss which is unforeseeable; the law does that.	it for loss of profits associated with any suspension of services as a result of works which it would be liable for pursuant to commercial agreements with train operating companies. There is an express need within the protective provisions to exclude losses which are in the Applicant's view, too remote, on the basis that no information on the risk and extent of such losses has been disclosed. In any event, it is misleading for Network Rail to imply that the provision is otiose on the basis the common law already achieves the outcome of the proposed drafting, as it would no doubt seek to enforce its terms in the event of any suspension of service resultant from the scheme.
12	So, the effect of paragraph 32(4) as proposed by Highways England is to exclude its liability for losses it might cause to Network Rail which: (a) well established common law says ought to be recoverable as damages in a breach of contract claim; and (b) by definition, Highways England is in a position to know about. Network Rail contends that it is neither reasonable nor proper that a loss it suffers as a result of the actions of Highways England which would be recoverable under common law should be excluded from being recoverable under the Protective Provisions.	The Applicant disagrees with Network Rail's assertion that these losses are recoverable as damages in a breach of contract claim as they are not reasonably foreseeable. These are not losses in a contractual claim and the Applicant is not sighted of such losses.
13	Network Rail notes that the proposed paragraph 32(4) is inconsistent with the position in Network Rail's standard asset protection agreements (a copy of which is available on Network Rail's website) where indirect and consequential losses are not excluded from the paying party's loss under an indemnity. Those agreements are regulated by the Office of Rail and Road (ORR), Network Rail's regulator, and are subject to statutory consultation. Network Rail submits that there is no good reason why the level of protection afforded Network Rail under an asset protection agreement ought to be different from that afforded by the Protective Provisions. The ORR in approving the use of the asset protection agreement takes into account a balance between the interests of Network Rail and parties carrying out developments on or near the railway. Network Rail submits that it would be sensible for the Examining Authority and, ultimately, the Secretary of State, to reach the same conclusion as the ORR in respect of the same issue, and delete paragraph 32(4) from the Protective Provisions.	The Applicant would not expect the provision to be included within Network Rail's standard Asset Protection Agreement, as is asserted, on the basis it is not favourable to Network Rail's position. This does not mean that Network Rail's position is appropriate, or that it is not a position taken as a result of its monopoly of the railway network, or indeed the Secretary of State has found on at least two occasions to include the drafting. The view of the Secretary of State is important as it will indicate to Network Rail, which is owned by the Secretary of State, the view that should be taken of such indemnities. Examples of the Secretary of State's approach to this type of indemnity can be found in the National Grid (Hinkley Point C Connection Project) Order 2016 and the M42 Junction 6 Improvement Order 2020. Most recently, the Secretary of state's "minded to" decision on the Hornsea Project Three Offshore Windfarm Order found that the Secretary of State agreed that the Applicant's preferred protective provisions (which included amendments to Network Rail's standard indemnity) as disputed by Network Rail would be sufficient to ensure that the exercise of compulsory acquisition powers in respect of the plot in question would not result in serious detriment to Network Rail's undertaking. The Applicant notes the trend in Secretary of State decision making is to include provisions that exclude indirect and consequential losses incurred by Statutory Undertakers who benefit from the infrastructure improvements of the authorised works.
14	If, notwithstanding Network Rail's submissions above, the Examining Authority or Secretary of State is minded to accept the exclusion of indirect and consequential loss as proposed by the Applicant, then Network Rail further submits that such exclusion is limited so that it addresses only the mischief which Highways England appears to be concerned about, namely the lack of foreseeability. In	Network Rail has proposed that the indirect or consequential loss covered by the indemnity is restricted to that in the contemplation of the parties. However, the proposed drafting does nothing except complicate and confuse the drafting, which simply invites the parties to arbitrate or provides Network rail with yet another argument. The Applicant does not

	those circumstances we propose that the words following "consequential loss" in paragraph 32(4) are deleted and replaced with "that was not in the reasonable contemplation of the parties at the time of making the Order". In that case, paragraph 32(4) would be drafted as follows: *"In no circumstances is the undertaker liable to Network Rail under sub-paragraph (1) for any indirect or consequential loss that was not in the reasonable contemplation of the parties* at the time of making the Order" However, the Examining Authority and Secretary of State should note that such amendment would leave Network Rail open to an element of risk for which it is not funded.	consider the losses which Network Rail is seeking to include in its suite of protections to be reasonably foreseeable at all, and in any event too remote. Hence, all of them should be removed expressly from the indemnity. Network Rail has long argued that such losses are reasonably foreseeable, and it can argue that if something is in its own reasonable contemplation it is in the mind of the parties. Therefore, the inclusion of this tailpiece simply postpones the ultimate decision on whether this provision is acceptable to an arbitrator or the Court, as opposed to the correct decision making authority, the Secretary of State. We would invite the ExA to include the proposed drafting at 32(4) without the additional provision requested by Network Rail.
15	Finally, Network Rail notes that costs (losses and expenses) payable by Network Rail to train operators would constitute recoverable direct losses, notwithstanding the inference to the contrary in the drafting of paragraph 32(4) proposed by Highways England. Paragraph 32(6) of the Network Rail Protective Provisions defines such costs as a "relevant costs". It is clear that if Highways England caused damage or disruption to the railway, Network Rail will be liable to train operators. It is a widely understood and accepted principle that Network Rail is liable to train operators where the railway is not available for use, and so it would be an entirely obvious – or natural– consequence of breach of the Protective Provisions by Highways England, and therefore constitute a direct loss.	In relation to Network Rail's submission, the Applicant notes that this is in direct contrast to Network Rail's previously held position on what constitutes indirect and consequential loss and further supports the position that this element of the indemnity serves no purpose other than to catch any elements of claim which Network Rail has not sufficiently argued into its definition of relevant costs. The Applicant considers this again to demonstrate the unforeseeability of loss attributable to Network Rail's standard indemnity which further supports our inclusion of paragraph 32(4).
The Applicant's drawing of a comparison with the indemnities in other DCOs		
16	The Applicant, in its Written Summary of Hearings at Deadline 9 (REF9-014), refers to examples where the indemnity in favour of statutory undertakers by the undertaker in protective provisions excludes liability on the part of the undertaker for indirect losses. In our written submissions at Deadline 9 [REP9-02] Network Rail explained that there are very few confirmed orders where the indemnity in favour of Network Rail excludes indirect losses. Further, to be in any way comparable with the Applicant's proposed scheme, another scheme authorised by a Development Consent Order should be comparable in terms of the works proposed and demonstrable risk to Network Rail.	The Applicant does not agree that for the drafting approach to a provision to have general applicability to apply across orders, the nature of the works to which the provision relates must be analogous, as suggested by Network Rail. In any event, Network Rail's submission indirectly references the National Grid (Hinkley Point C Connection) Order 2016 and the electricity cable which oversailed the railway and has so far throughout submissions failed to demonstrate (or even attempt to argue) why Network Rail is more comfortable will indemnifying an oversailed electricity cable than a bridge-mounted carriageway. The Applicant's view is that the two are the same in principle terms, except that the objectives of this proposal include to improve the safety of Network Rail's undertaking by replacing an aged structure and by removing Network Rail's OHLE infrastructure from Highways England's bridge. This is plainly a benefit to Network Rail and based upon the precedent in the M42 Junction 6 Improvement Order should lead to the exclusion from liability of indirect and consequential losses.
17	As a result, we do not consider it helpful to list all the DCOs in which Network Rail's preferred indemnity has been included by the relevant Secretary of State. However, by way of recent examples, we refer the Examining Authority to The Northampton Gateway Rail Freight Interchange Order 2019 (which involves works by the applicant to the West Coast Mainline) and to The Norfolk Vanguard Offshore Windfarm Order 2020 (which involves the construction by the applicant of a cable corridor under operational railway); both include Network Rail's	We agree with Network Rail that it is not helpful (or necessary) to list the DCOs in which this provision has not been included. It has never been Highways England's submission that this is anything but a deviation from their standard wording. However, it is a deviation which has precedent in recent orders, which demonstrates a trend in Secretary of State decision making and which should not be deleted simply because other applicants have failed to seek it.

	preferred form of indemnity and indirect losses are not excluded.	
18	An example of a DCO where the Applicant is also the undertaker, and in which Network Rail's standard indemnity has been confirmed by the Secretary of State, is The A14 Cambridge to Huntingdon Improvement Scheme Consent Order 2016 (as corrected by the 2017 Order). That Order contains Network Rail's preferred indemnity and does not exclude liability on the part of Highways England for indirect losses or require disclosure by Network Rail of ORR regulated documents. That scheme is very similar to this scheme in terms of the interfaces with the railway with the Huntingdon scheme including the removal of a viaduct over the East Coast Mainline.	The Applicant notes that the A14 Cambridge to Huntingdon Improvement Scheme Consent Order 2016 predates the National Grid (Hinkley Point C Connection) Order 2016 and the M42 Junction 6 Improvement Order 2020. Therefore, it is not a valid precedent with which to argue for the inclusion of this paragraph 32(4). On this basis, it is clear why that order did not include an amended version of Network Rail's standard indemnity. We do not consider this to be an appropriate comparison.
Conclusion		
19	Network Rail requests that the Network Rail Protective Provisions are included in the Order.	The Application disagrees and requests that paragraph 32(4) in the draft DCO submitted to the ExA is included.
20	Should the Examining Authority have any further questions regarding these submissions Network Rail will be happy to answer them.	N/A