

Submissions Received After the Close of the Examination

TR010031

A1 Birtley to Coal House Improvement Project

Last updated: 21/10/2020

Date Examination Closed: 21 July 2021

Date of Recommendation Report: 21 October 2020

Date of Decision: 19 January 2021 (Deadline 21 January 2021)

Submissions made after the Examination closed			
Number	Date submission received by PINS	Name (description of corres)	Date submission forwarded to SoS
01	22 July 2020	Final signed SoCG for Network Rail from Highways England	21 Oct 2020
02	3 December 2020	Correspondence for the SoS regarding Protective Provisions agreements	4 Dec 2020
Submissions made in response to SoS consultation			
Number	Date submission received by PINS	Name (description of corres)	Date submission forwarded to SoS
03	13 November 2020	Update on Gateshead's Local Plan from Gateshead Council	17 November 2020

From: [Wilkes, Nicola](#)
To: [Alford, Dean](#)
Cc: [Roberts, Elis](#); [A1 Birtley to Coal House](#); [A1BirtleytoCoalhouse](#); [Gregory, Michele](#)
Subject: RE: A1 Birtley to Coal House Deadline 11 Submission
Date: 22 July 2020 17:16:46
Attachments: [Network Rail Statement of Common Ground \(3\).pdf](#)

Dean

Please find attached the final version of the signed SOCG for Network Rail. The one in the OneDrive folder is unsigned.

Regards

Nicola

From: Wilkes, Nicola

Sent: 21 July 2020 20:40

To: Alford, Dean <DEAN.ALFORD@planninginspectorate.gov.uk>

Cc: 'Roberts, Elis' <Elis.Roberts@planninginspectorate.gov.uk>; 'A1 Birtley to Coal House' <SM-A1BirtleytoCoalHouse@planninginspectorate.gov.uk>; A1BirtleytoCoalhouse <A1BirtleytoCoalhouse@highwaysengland.co.uk>; Brierley, Ann <Ann.Brierley@highwaysengland.co.uk>; Morgan, Terri <Terri.Morgan@highwaysengland.co.uk>; Richardson, Jake <Jake.Richardson@highwaysengland.co.uk>; Banfield, Isaac <Isaac.Banfield@highwaysengland.co.uk>; Procter, Darlene <Darlene.Procter@highwaysengland.co.uk>; Gregory, Michele <MICHELE.GREGORY@planninginspectorate.gov.uk>

Subject: A1 Birtley to Coal House Deadline 11 Submission

Dean

I can confirm that the remaining documents have now been loaded on to OneDrive.

- 3.1 Draft DCO (Validated)
- 7.5F NGN Statement of Common Ground
- 7.5G Network Rail Statement of Common Ground
- 7.5H Northumbrian Water Ltd Statement of Common Ground
- 7.6 Statement of Commonality of Statements of Common Ground
- EXAC001 Covering Letter
- EXAC002 Applicant's Response to Deadline 11 submissions
- EXAC003 Draft DCO Validation Report

Kind Regards

Nicola

Nicola Wilkes, Project Manager

Regional Investment Programme (RIP) North

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A1 Birtley to Coal House

Scheme Number TR010031

7.5G Statement of Common Ground with Network Rail Infrastructure Limited

Rule 8(1)(e)
Planning Act 2008

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 202[x]**

STATEMENT OF COMMON GROUND WITH NETWORK RAIL

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

Version	Date	Status of Version
Rev 3	21 July 2020	Deadline 11

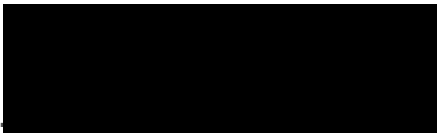
STATEMENT OF COMMON GROUND

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

Signed..... 

**Nicola Wilkes
Project Manager
on behalf of Highways England**

Date: 21 July 2020

Signed.. 

**Name –
on behalf of Network Rail Infrastructure
Limited**

Date: 21 July 2020

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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) **[APP-023]**.
- 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)	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.

Date	Form of correspondence	Key topics discussed and key outcomes
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.

Date	Form of correspondence	Key topics discussed and key outcomes
		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

Date	Form of correspondence	Key topics discussed and key outcomes
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.

Date	Form of correspondence	Key topics discussed and key outcomes
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 paragraph 32(4). The Applicant has submitted a draft DCO at deadline 11 with paragraph 32(4) shown in square brackets. For the parties' latest submissions in respect of paragraph 32(4), please see the Network Rail's deadline 11 submission and the Applicant's submission on 21 July 2020.

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 as soon as the property documents are complete.

3.4 DB Cargo

The parties have agreed the position in respect of the DB Cargo interest and revised drafting has been included in the draft DCO submitted at Deadline 11.

3.5 Clearances

The parties continue to make progress on negotiating both statutory and contractual protections for Network Rail's interests. Network Rail has obtained all the business and technical clearances for the required land and rights as per the DCO land plans.

3.6 Level Crossings

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

Our reference ELSEM/BERRRA/43283-2971

3 December 2020

FAO Susan Anderson
Head of Transport Infrastructure Planning Unit
Department for Transport
Zone 1/14-18
Great Minster House
33 Horseferry Road
London SW1P 4DR

By Email: transportinfrastructure@dft.gov.uk
a1birtleytocoalhouse@planninginspectorate.gov.uk

Dear Madam

A1 Birtley to Coal House Improvement Scheme Development Consent Order Application Network Rail Infrastructure Limited

1. We refer to the Highways England's (**HE**) application for the A1 Birtley to Coal House Improvement Scheme Development Consent Order (**Order**). The Examination of the application for the Order closed on 21 July 2020 and the Examining Authority (**ExA**) was due to provide its report to you on 21 October.
2. The draft Order contains, at Part 3 of Schedule 11, protective provisions for Network Rail's benefit (**Protective Provisions**). Network Rail has sought to agree the Protective Provisions with HE so that an agreed version could be provided to the ExA. Good progress was made but agreement was not reached on the form of indemnity in favour of Network Rail at paragraph 32. The key issue between Network Rail and HE is whether or not the indemnity should exclude HE's liability for consequential and indirect losses.
3. The final deadline for HE and Network Rail to make submissions to the ExA was Deadline 11. However, on 21 July HE made a further submission that was accepted by the ExA and which is attached (**Document 1**). Network Rail did not have an opportunity to respond to that submission; a submission that was, in Network Rail's opinion, inaccurate and confusing. The purpose of this letter is to set out Network Rail's position and to explain the implications for its funding settlement and the wider public purse. It is conscious that the Department for Transport is both its and HE's sponsoring department. You should also be aware that the issue raised in this letter has arisen on a number of other schemes where another Secretary of State is the decision maker; primarily the Secretary of State for Business, Energy and Industrial Strategy.

The indemnity paragraph

4. We set out paragraph 32 of the Protective Provisions in full. We have underlined the text that HE wishes to have included but which is resisted by Network Rail.

10-42457322-143283-2971

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32.—(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—*

(a) by reason of the construction or maintenance of a specified work or a protective work or the failure of it; or

(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.

(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.

(3) The sums payable by the undertaker under sub-paragraph (1) may include a sum equivalent to the relevant costs.

(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].

(5) 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, 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.

(6) 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).

(7) 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.

Highway England's position

5. Document 1 sets out Network Rail's position in the left hand column and HE's position in the right hand column. We set out Network Rail's response using the numbering in Document 1 as follows.
6. At line 8. HE state that "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 loss. The position is that Network Rail has not disclosed its liability and hence it is seeking to be indemnified against losses 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".
7. At line 9. HE state: "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".
8. At line 10 HE state: "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".

Network Rail's response

9. HE did not have much time to respond to Network Rail's Deadline 11 submission and, as a consequence, HE's response, set out in Document 1, is confusing and rather misunderstands Network Rail's position. It also misinterprets the common law rules. We seek in the following paragraphs to set out the key issues, legal principles, and Network Rail's position clearly and simply.

Issue 1 – Network Rail has not provided HE with details of the loss it might claim

10. The purpose of an indemnity is to provide the party benefiting from it with protection for losses which it may suffer as a result of the promoter's scheme. It is often not possible for the protected party to quantify the losses before they are incurred, depending on an almost infinitely wide range of factors (such as the nature, extent, timing and severity of the incident giving rise to the losses). As a matter of law and policy, it cannot be right that Network Rail is prevented from recovering losses it incurs simply because it has not been able to quantify what those losses might be. However, indirect and consequential losses are only recoverable if the parties are aware of the special circumstances that would give rise to them so that there can be no suggestion that HE's liability would be unlimited; the liability for indirect losses would (by application of common law) be limited to losses flowing from only those circumstances of which it was aware.
11. Indirect losses which might arise would include claims by a train operator resulting from works to a station car park. Those works would not interfere with the running of trains and, therefore, would not constitute relevant costs.

Issue 2 – Network Rail has control over the losses

12. The HE submission makes the somewhat bizarre claim that HE should be responsible only for losses that it can control and argues that Network Rail wants HE to be responsible for losses that only it (Network Rail) can control.

13. The simple response is that HE will only be liable under the indemnity if Network Rail has suffered loss and if that loss is caused by HE's works. Added to that is the obligation on Network Rail to mitigate its losses.

Issue 3 – the position at Common Law

14. HE suggest that the parties disagree on the common law position; that is not the case. Network Rail accept that losses are only recoverable which are foreseeable and within the reasonable contemplation of the parties; this means that any suggestion that HE would have an open-ended liability for losses is incorrect.
15. The law is clear. Direct losses are those losses which arise in the usual course of things. Indirect and consequential losses (which are the same thing) are losses which do not arise "in the usual course of things" but arise from special circumstances of which the parties are aware.
16. Accordingly, for indirect and consequential losses, Network Rail has a higher hurdle to overcome if it wishes to recover them as they are only recoverable by Network Rail if HE was aware of the special circumstances which gave rise to the loss.

Network Rail's request of the DfT

17. The key issue for Network Rail is this: if the indemnity excludes consequential and indirect losses, even if HE are aware of the special circumstances which resulted in the losses, Network Rail could not recover the losses from HE under the indemnity. We have provided the example of claims by train operators resulting from works affecting a station car park. Such losses are arguably indirect losses but, to the extent that they result from HE's works, HE should be responsible for them.
18. Network Rail notes that they and HE are both part of the DfT family. If Network Rail does suffer irrecoverable losses as a result of HE schemes, Network Rail is not funded to meet those costs.
19. You should also be aware, and HE have pointed this out in their submissions, that on a number of recently made Development Consent Orders, the Secretary of State (primarily the BEIS Secretary on energy schemes) has included in the Network Rail protective provisions the text excluding the promoter's liability for indirect and consequential losses. Those orders have set unhelpful precedents which other promoters are seeking to rely on to reduce the scope of the indemnity provided to Network Rail. Network Rail is anxious to avoid a further unhelpful precedent being set which promoters of other schemes will rely on to water down the indemnity in Network Rail's favour.
20. We also note that the exclusion of consequential and indirect losses would set a precedent between Network Rail and HE. Network Rail notes that HM Treasury Guidance, *Managing Public Money*, advises, at paragraph 2.3.4, that Treasury consent should be obtained to transactions which "set precedents". While the decision on a DCO application may not, strictly speaking, constitute a "transaction", it is submitted that the principle is nevertheless relevant. Should the Secretary of State be minded to include the text that provides for the exclusion of liability for consequential and indirect losses, Network Rail suggests that the Treasury should be consulted on the implications for Network Rail's future funding settlements.
21. Network Rail asks that HE's proposed paragraph 32(4), that provides for the exclusion of indirect and consequential losses, is not included in the A1 Birtley to Coal House Development Consent Order.
22. Should you have any questions about this letter please do let us know and we will ask our client to respond directly as appropriate.

Yours faithfully

Addleshaw Goddard LLP

Addleshaw Goddard LLP

Direct line 020 7160 3246
Email marnix.elsenaar@addleshawgoddard.com

copy to: Steve Marshall-Camm, Department for Transport, steve.marshall-camm@dft.gov.uk

Document 1
Highways England's Deadline 11 Submission

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



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

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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: <i>(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.</i>	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 be 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

	<p>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:</p> <p><i>"In no circumstances is the undertaker liable to Network Rail under subparagraph (1) for any indirect or consequential loss that was not in the reasonable contemplation of the parties at the time of making the Order"</i></p> <p>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.</p>	<p>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.</p>
15	<p>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.</p>	<p>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).</p>
<p>The Applicant's drawing of a comparison with the indemnities in other DCOs</p>		
16	<p>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.</p>	<p>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.</p>
17	<p>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</p>	<p>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.</p>

	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

From: [Chris Carr](#)
To: [A1 Birtley to Coal House](#)
Cc: [Eleanor Cockbain](#); [Andrew Softley](#)
Subject: A1 Birtley to Coal House
Date: 13 November 2020 09:20:50

FAO Dean Alford (Case Officer)

Further to your consultation letter dated 10th November I am contacting you to provide an update on Gateshead's Local Plan.

Gateshead Council adopted parts 1 and 2 of the Local Plan (Core Strategy and Urban Core Plan) in March 2015.

The Council submitted Part 3 of the Local Plan, Making Spaces for Growing Places (MSGP), which consists of development management policies and land allocations and designations, to the Secretary of State on 12th April 2019. Public hearing sessions relating to the MSGP Submission Plan took place between 1st October and 10th October 2019.

Following consultation on Main Modifications from 27 July 2020 to 18 September 2020, the Council received the Final Inspectors Report and Schedule of Main Modifications on the 3rd November 2020 – the report can be found at <https://www.gateshead.gov.uk/article/10990/MSGP-examination> in the latest examination news section. The report concludes that MSGP provides an appropriate basis for the planning of the borough, provided that a number of main modifications are made to it. The Council is in the process of making these modifications, and it is intended that the Plan will be adopted in January 2021.

MSGP includes policies which will be of relevance to the A1 Birtley to Coal House scheme, notably policy MSGP18 Safeguarded land for transport improvements, which includes MSGP18.5 A1 Birtley to Coalhouse. A summary of previous comments on EIA scoping referred to:

- **Flood Risk and Drainage, Water Quality** - Regard should be given to Draft Plan Making Spaces for Growing Places (MSGP) Policies 30, 31 and 32. The effect of the scheme on water quality should be considered during the construction and operation, including impact of surface water runoff, and opportunities to improve the quality of the existing surface water runoff and appropriate mitigation measures should be put in place.
- **Flood Risk** - Regard should be given to Draft Plan Making Spaces for Growing Places (MSGP) Policies 30, 31 and 32. The effect of surface water and fluvial flood risk to and from the scheme should be considered during the construction and operation. Appropriate mitigation measures should ensure that the scheme does not increase flood elsewhere within the River Team catchment. The flood risk assessment should also consider the Strategic Flood Risk Assessment (October 2017) (which includes the identification of flood zone 3b within the junction 67 area) and latest Lead Local Flood Authority data (including historic flooding records, flood management assets including culverts and details of ordinary watercourses). The assessment should cover the sequential test and exception test, should the scheme be located within flood zone 2 and 3. The risk of groundwater flood risk to the scheme and the effect of the scheme on groundwater flows may require a hydrogeological assessment. The scheme should include

appropriate surface water management arrangements, including the use of SuDS.

Subject to limited modification Policies MSGP30-32 are considered to be effective.

- **Green Belt** – The Scoping Report acknowledges that most of the land which includes and surrounds the site footprint is designated part of the Tyne and Wear Green Belt. The existing and proposed roads cross diagonally the strategic Green Belt gap between the Tyneside conurbation to the north (represented here by the outer edge of Gateshead) and the Washington/Chester-le-Street/Birtley conurbation to the south (represented here by the northern and eastern edges of Birtley). Policy CS19 of the adopted Gateshead and Newcastle upon Tyne Core Strategy follows earlier development plans in specifically identifying prevention of the merging of Gateshead with Birtley or Washington as a principal purpose of the Tyne and Wear Green Belt in accordance with national policy. The effective functioning of this gap as Green Belt is thus highly vulnerable to significant adverse impact from any reduction in its openness. Whilst the effect of the proposed scheme will be limited, the Scoping Report should explicitly recognise the importance of minimising diminution in the openness of the Green Belt, including temporary diminution during construction, and of returning any land which is surplus to highway requirements to other, open uses by the completion of the scheme.

MSGP includes minor revisions to the Green Belt boundary but not in the location of this scheme.

- **Public Open Space** - The extent of the proposed scheme includes an area of open space at Longacre Wood. It is not yet clear whether this land will be developed as part of the Improvement Scheme. However, the EIA Scoping Report appears to have appropriate regard to the potential impact of the development on open space, as addressed within the Landscape and Visual and People and Communities sections of the report.

Policy MSGP40 as proposed to be modified is considered effective in terms of protecting valuable open space.

Please note that as a result of deleted and additional policies the policy references/numbers will change in the final version of the Plan.

I hope the above is helpful but please advise if any additional information is required.

Regards

Chris

Chris Carr

Spatial Planning & Housing Strategy Team Leader | Policy, Climate Change and Strategic Transport | Economy, Innovation & Growth | Gateshead Council

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