

Written Representations by Network Rail Infrastructure Limited in relation to Fenwick Solar Farm 202[*] (DCO)

Planning Inspectorate Reference Number: EN010152

Registration Identification Number: TBC

Applicant: Fenwick Solar Project Limited

Application: Fenwick Solar Farm Order 202[]

Introduction

We write further to Network Rail Infrastructure Limited's (**Network Rail/NR**) Section 56 Representation (submitted on 23 January 2025) which confirmed that Network Rail requires its standard protective provisions to be included in the draft Development Consent Order (**Order**). As currently drafted, the Draft Order (document reference number APP-014) does not contain the form of protective provisions considered by NR to sufficiently protect its assets and to ensure the safe and efficient operation of the railway (**Protective Provisions**).

The protective provisions that are included in the Draft Order at Schedule 14, Part 4 allow for compulsory acquisition powers to be exercised on land owned by Network Rail without any requirement to obtain NR's prior consent. There is a longstanding principle that any exercise of compulsory acquisition powers pursuant to a DCO in respect of railway property must be subject to NR's prior consent and a restriction to this effect must be included in the Protective Provisions. Network Rail's position is that an absence of such protection in the Protective Provisions will cause a serious detriment to Network Rail's ability to:

- a) carry out its statutory undertaking;
- b) comply with its Network Licence; and
- c) safely operate the railway network.

Should NR and Fenwick Solar Project Limited (together the **Parties**) not be able to reach an agreement as to the inclusion of the Protective Provisions as part of the Order (should the Inspectorate be minded to grant the same), NR must maintain its objection to the DCO.

We set out the reasons for Network Rail's position and a request for the inclusion of the necessary Protective Provisions on the Order in this submission.

Protective Provisions

The Application includes provisions which would, if granted, authorise the Applicant to carry out works on and in close proximity to operational railway land belonging to Network Rail, to use such land temporarily and to acquire permanent rights over such land. Network Rail must accordingly ensure that the Application is granted subject to the Protective Provisions which provide appropriate protection for the safe and efficient operation of the railway. The Application will also impact at least two level crossings (Askern Level Crossing and Moss Level Crossing), and should adequate protection not be put in place, there may be a detrimental impact on the safe operation of these crossings.

The protective provisions that are afforded to NR at Schedule 14, Part 4 of the current draft Order crucially do not contain a restriction on the Applicant's use of compulsory acquisition powers without

NR's prior consent (with such consent not being unreasonably withheld). The Applicant requires the deletion of the parts of NR's required form of Schedule 14, Part 4, sub paragraph 4 (as set out below), whereas NR requires the inclusion of these provisions:

- 4) *(1) The undertaker must not exercise the powers conferred by—*
- (a) article 3 (development consent granted by this Order);*
 - (b) article 5 (power to maintain the authorised development);*
 - (c) article 17 (discharge of water);*
 - (d) article 19 (authority to survey and investigate the land);*
 - (e) article 20 (compulsory acquisition of land);*
 - (f) article 22 (compulsory acquisition of rights);*
 - (g) article 25 (acquisition of subsoil);*
 - (h) article 26 (power to override easements and other rights);*
 - (i) article 29 (temporary use of land for constructing the authorised development);*
 - (j) article 30 (temporary use of land for maintaining the authorised development);*
 - (k) article 31 (statutory undertakers);*
 - (l) article 23 (private rights);*
 - (m) article 38 (felling or lopping of trees and removal of hedgerows);*
 - (n) the powers conferred by section 11(3) (power of entry) of the 1965 Act;*
 - (o) the powers conferred by section 203 (power to override easements and rights) of the Housing and Planning Act 2016;*
 - (p) the powers conferred by section 172 (right to enter and survey land) of the Housing and Planning Act 2016;*
 - (q) any powers under in respect of the temporary possession of land under the Neighbourhood Planning Act 2017;*
- in respect of any railway property unless the exercise of such powers is with the consent of Network Rail.*
- (2) The undertaker must not in the exercise of the powers conferred by this Order prevent pedestrian or vehicular access to any railway property, unless preventing such access is with the consent of Network Rail.*
- (3) The undertaker must not exercise the powers conferred by sections 271 or 272 of the 1990 Act, article 31 (statutory undertakers), article 26 (power to override easements and other rights or private rights of way) or article 23 (private rights), in relation to any right of access of Network Rail to railway property, but such right of access may be diverted with the consent of Network Rail.*
- (4) The undertaker must not under the powers of this Order acquire or use or acquire new rights over, or seek to impose any restrictive covenants over, any railway property, or extinguish any*

existing rights of Network Rail in respect of any third party property, except with the consent of Network Rail.

(5) The undertaker must not under the powers of this Order do anything which would result in railway property being incapable of being used or maintained or which would affect the safe running of trains on the railway.

(6) Where Network Rail is asked to give its consent pursuant to this paragraph, such consent must not be unreasonably withheld but may be given subject to reasonable conditions but it shall never be unreasonable to withhold consent for reasons of operational or railway safety (such matters to be in Network Rail's absolute discretion).

(7) The undertaker must enter into an asset protection agreement prior to the carrying out of any specified work.

Paragraph 4(1) and (4)

The Applicant proposes to compulsorily acquire permanent rights over the plots set out at Appendix 1.

The Applicant also proposes to extinguish existing rights or restrictive covenants for the benefit of Network Rail (in so far as they are inconsistent with the new rights proposed to be acquired by the Applicant) in delivering the DCO scheme over the plots set out at Appendix 2.

If NR's consent is not required to be obtained prior to such acquisition and temporary use of this land, it would give rise to a significant, unacceptable risk that the Applicant could compulsorily acquire a right over or temporarily use (as applicable to the respective plots) railway land which would not be subject to the approvals, conditions, limitations and restrictions necessarily required by NR (including any conditions deemed to be required by NR's engineers through its business and technical clearance process) to facilitate and ensure the safe and efficient operation of the railway. Such processes and protocols are implemented by Network Rail to regulate third party interference with the railway and any such interference must be subject to the requisite approvals in order for Network Rail to be in compliance with its Network Licence (as described in further detail below). It is inconceivable that the Applicant should have the powers to circumvent such protocols by way of exercising powers of compulsory acquisition.

NR operates under a Network Licence granted by the Office of Rail and Road (ORR). Under its Network Licence, NR is obliged to ensure compliance with a wide number of standards imposed by the Rail Safety and Standards Board that pertain to maintaining the safe and efficient running of trains on the railway. In order to regulate its ability to comply with such standards, NR must retain stringent restrictions, controls and procedures over any interferences with the railway by third parties, including by reason of persons exercising rights on or over railway land. NR imposes such restrictions through a requirement to obtain its prior consent before rights are compulsorily acquired or railway land is temporarily used and by requiring third parties to enter into an asset protection agreement.

Accordingly, where a right is compulsorily acquired and may be exercised over railway land which is not subject to NR's prior consent, such a right is created outside of NR's control and would not be subject to the necessary restrictions and conditions that NR would regard as sufficient so as to enable it to comply with its Network Licence. For example, NR may require that rights granted to the Applicant are subject to reservations allowing NR to interrupt the exercise of such right in certain circumstances (such as enabling NR to deal with emergencies on the railway or carry out necessary works or the exercise of such rights or such temporary possession may not be safe to be exercised at certain times). Where

NR's prior consent is not required before exercising these powers over railway land, there is a risk that any such rights or such temporary possession would not be subject to the required restrictions and as a result NR's control over its ability to appropriately manage the safety of the railway would be compromised. The consequences of NR not being able to effectively manage the safety of the railway could be catastrophic, especially in instances where Level Crossings are impacted. Moreover, this could lead to a failure by NR to comply with its Network Licence which is not position which can be accepted by NR, nor would it be acceptable to the ORR as NR's regulator.

Network Rail is of course willing to engage with the Applicant to agree the terms of the rights sought and is required by its proposed Protective provisions at paragraph 4(6) above to act reasonably in doing so. It cannot however relinquish this degree of control over rights being exercised on the railway where the consequences of doing so could be so significantly adverse. Network Rail is in discussions with the Applicant to agree the grant of the necessary rights through private agreement, but these negotiations are still in the early stages and so the relevant agreements are not yet in place.

A restriction on the compulsory acquisition of rights over railway land is a widely accepted and longstanding principle which has been accepted by the Examining Authority and Secretary of State on numerous DCOs including but not limited to: the A47/A11 Thickthorn Junction DCO, Thurrock Flexible Generation Plant DCO, Yorkshire and Humber CCS Cross Country Pipeline DCO, Sunnica Energy Farm DCO, Longfield Solar Farm DCO and South Humber Bank Energy Centre DCO. The purpose of this restriction is not to impede the implementation of the Applicant's scheme, but to secure the necessary protection to NR as a statutory undertaker in order that it can properly regulate the rights to be exercised over its railway network and which is appropriate function and purpose of protective provisions.

Paragraph 4(2)

Network Rail is required to maintain strict safety protocols under its Network Licence that is granted by the ORR. As previously mentioned, NR is required to ensure compliance with a number of safety standards. For Network Rail to ensure compliance with such standards, Network Rail employees and contractors must have the ability to access to railway property and this access cannot be impeded without NR's consent as it could result in a breach of NR's Network Licence. Network Rail requires the inclusion of paragraph 4(2) in the Protective Provisions for this reason.

Paragraph 4(3)-(6)

Network Rail not only has a duty to ensure the safe and efficient running of the railway for employees, third parties, members of the public and all others who come into contact with the railway; it also has an overarching duty to preserve the integrity of the railway. Compulsory acquisition of land is for this reason not appropriate where said acquisition concerns operational railway land and must therefore be subject to Network Rail's prior written consent. Should rights be acquired over railway land without such consent being obtained then the right is created outside the control of Network Rail and may not be subject to the necessary restrictions and conditions that Network Rail would regard as sufficient so as to enable it to comply with the Network Licence and its wider statutory undertaker responsibilities.

Similarly, where proposed compulsory acquisition is of rights over railway land where Network Rail has the benefit of easements and other rights, such acquisition would not be subject to Network Rail's usual process of obtaining both business and technical clearance (a process by which network rail engineers assess the detriment to the railway). If such rights are acquired outside of this process implications are that Network Rail could be in a position where the railway is unsafe (with catastrophic consequences), and Network Rail are compromised in both its position as statutory undertaker and ability to ensure the safe and efficient running of trains on the railway.

Network Rail are willing to engage with the Applicant to agree the terms and extent of the rights being sought. In doing so (and discussed above), Network Rail are under a duty to act reasonably in their role

as statutory undertaker. However, Network Rail cannot be placed in a position where they are to relinquish the degree of control over the railway being sought by the Applicant as the consequences of doing so are significantly adverse.

Paragraph 4(7)

An Asset Protection Agreement (APA) is required to be entered into in order to support the review of the design of a specified work and to facilitate access on to railway land. An APA is a contracting agreement between Network Rail and an outside party to allow interaction and to establish roles, responsibilities and liabilities of a project over, under or adjacent to the railway. The APA enables NR's Asset Protection Team to regulate managing access, site safety management, engineering services, and possession arrangements as necessary. The Protective Provisions must include a requirement for the Applicant to enter into an APA in order for NR to fulfil its statutory duty to protect the railway in accordance with the terms of its Network Licence. It is therefore submitted that Network Rail would be acting reasonably in requiring that any such required APA be entered in to before any specified work is carried out.

For the reasons set out above, NR must maintain its objection to the application for the DCO and must insist on the inclusion of the form of provision 4 set out in this submission and the DCO should not be granted in its current form.

S.127 of the Planning Act 2008

In addition to the points set out above, without the inclusion of paragraph 4 of Network Rail's standard Protective Provisions, NR must also maintain its objection to the DCO on the basis that the proposed compulsory acquisition of rights over railway property does not satisfy the test in section 127 of the Planning Act 2008 in that:

- (a) the right cannot be acquired without serious detriment to the carrying on of the undertaking; and
- (b) such detriment cannot be made good by Network Rail by use of other railway property.

The reason for which is that:

- 1) all of the plots (over which rights are proposed to be compulsorily acquired and temporary possession is proposed to be taken) comprise an operational railway line, or is in respect of railway or equipment or is in respect of a restriction on title against disposition by reason of the same;
- 2) unless NR has the ability to require its prior consent and/or require the Applicant to enter into an asset protection agreement prior to the acquisition of such rights/temporary possession in order to ensure any such rights can be carried out in harmony with the operational railway (as is provided for in provision 4), the compulsory acquisition of such rights/temporary use would be adverse to the operational railway and would cause a serious detriment to the carrying on of NR's undertaking as it could interfere with the operational railway line and the safe running of trains out with Network Rail's control; and
- 3) as this is an operational railway line such detriment cannot be made good as the line cannot be relocated to other land in the possession of NR (and not least to say requiring NR to relocate its operational railway to facilitate such rights would be entirely disproportionate both in cost and nature).

Accordingly, in order for such proposed compulsory acquisition and temporary possession of the plots referred to at Appendix 1 and 2 below to satisfy the test in section 127 Planning Act 2008, paragraph 4 of Network Rail's standard Protective Provisions (and particularly paragraph 4(1) requiring NR's consent to be sought before powers authorising the compulsory acquisition of such rights are exercised) must

be included in the draft Order. Network Rail's position is that in the absence of paragraph 4, the test in section 127 is not satisfied.

Network Rail is investigating the extent of rights and restrictions for the benefit of Network Rail which are proposed to be extinguished in delivering the proposed development. On this basis, Network Rail reserves its position in regards to whether or not the test in section 138 of the Planning Act 2008 is satisfied. Network Rail hopes to confirm its position on these matters within the next 28 days.

Appendix 1

Permanent Acquisition

Plot of Land	Description
5/03	Permanent acquisition of new rights over 5059 square metres of public highway (Moss Road), verge, drain (Copley Spring) and level crossing over railway (East Coast Main Line), Moss, Doncaster, and overhead cables.
9/09	(in respect of sub-soil) - Permanent acquisition of new rights over 21352 square metres of public highway (Thorpe Bank), verge, and bridge structures over drains (Thorpe Marsh Engine Drain, Thorpe Marsh Drain), Barnby Dun, Doncaster, and overhead cables.
10/01	Permanent acquisition of new rights over 3594 square metres of trees, shrubbery, drain and culvert, west of Thorpe Lane, Barnby Dun, Doncaster.
10/02	Permanent acquisition of new rights over 3279 square metres of railway line (CJS Carcroft Junction to Stainforth Junction Line), Barnby Dun, Doncaster.
10/04	Permanent acquisition of new rights over 9080 square metres of disused railway line, hardstanding, grassland, trees and shrubbery, west of Thorpe Lane, Barnby Dun, Doncaster.
11/07	Permanent acquisition of new rights over 6661 square metres of public highway (Station Road), footway and level crossing over railway (in respect of a level crossing).

Appendix 2

Extinguishment of Existing Rights

Plot of Land	Description
plot 8/14	in respect of a restrictive covenant on title SYK26546;
plot 9/02	in respect of a restrictive covenant on title SYK490734;
plot 9/04	in respect of a restrictive covenant on title SYK490734;
plot 9/07	in respect of a restrictive covenant on title SYK110502;
plot 9/10	in respect of rights;
plot 10/03	in respect of a restrictive covenant on title SYK364907; and
plot 10/09	in respect of a restrictive covenant on title SYK432770
plot 9/10	in respect of rights;
plot 10/03	in respect of a restrictive covenant on title SYK364907; and

